

## Status, Benefits, and Recognition: Current Controversies in the Marriage Debate

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## I. INTRODUCTION

During the summer of 2003, the debate over same-sex “marriage” captured the attention of the American public to an extent heretofore unseen. In 1996, the Hawaii Supreme Court appeared to be on the verge of redefining marriage in Hawaii,<sup>1</sup> yet few people outside of Hawaii paid close attention. In 1999, the Vermont Supreme Court demanded that the Legislature extend marriage-like recognition to same-sex couples,<sup>2</sup> and for the most part, only those in Vermont took notice. Two years later the Dutch Parliament “opened up” marriage to include same-sex couples,<sup>3</sup> though the first officially sanctioned same-sex “marriage” in recorded history came and went with little fanfare in the United States. It wasn’t until the summer of ‘03 that a major triad of marriage-related developments struck close to home, converging to push same-sex “marriage” to the forefront of American political and social life. The media firestorm kicked off on June 26, 2003, when the United States Supreme Court struck down a Texas law banning homosexual sodomy.<sup>4</sup> While Justice Kennedy’s majority opinion and Justice O’Connor’s concurrence both went out of their way to disclaim any direct impact on marriage litigation,<sup>5</sup> the potential implications were only thinly veiled. As Justice Scalia bluntly criticized in his dissenting opinion, “Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.”<sup>6</sup> Numerous commentators quickly joined the chorus, alternatively deriding and celebrating the majority opinion as having paved the way for same-sex “marriage” in the United States.<sup>7</sup>

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1. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Baehr v. Miike, No. 91-1394 (Haw. Cir. Ct. Dec. 3, 1996).

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

3. Stb. 2001, No. 9 (“Act on the Opening Up of Marriage”) (Bill 22672) (Dec. 21, 2000).

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

5. *Id.* at 2484 (“The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”); *Id.* at 2488 (O’Connor, J., concurring) (“Unlike the moral disapproval of same-sex relations— the asserted state interest in this case— other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.”).

6. *Id.* at 2498.

7. *See, e.g.*, Ellen Goodman, *Next Step for Homosexuals Will Be Down the Aisle*, BALTIMORE SUN, June 30, 2003, at 9A; Michael Kinsley, *Abolish Marriage; Let’s Really Get the Government Out of Our Bedrooms*, WASHINGTON POST, July 3, 2003, at A23; Gegax, Rosenberg, et al., *The War Over Gay Marriage*, NEWSWEEK, July 7, 2003, at 38; Rick Santorum, *Gay Unions: A Matter of Rights or a Threat to Traditional Marriage? Americans Must Preserve Institution of Marriage*, USA TODAY, July 10, 2003, at A13; David G. Savage, *High Court Ruling May Lead to*

The *Lawrence* decision landed upon a media market ripe for discussion of marriage issues. Just two weeks earlier, the Ontario Court of Appeals had found the Canadian marriage law in constitutional violation and had ordered the Toronto clerk's office to immediately begin issuing marriage licenses to applicant same-sex couples.<sup>8</sup> Even closer to home, a decision in the case of seven same-sex couples seeking marriage licenses in Massachusetts, then pending before the Massachusetts Supreme Judicial Court, was expected at any time.<sup>9</sup> This trilogy of events, actual and anticipated, sparked an unprecedented degree of media attention devoted to the marriage debate.<sup>10</sup>

More than a year before the election, same-sex "marriage" and civil unions had already become a topic of conversation surrounding the 2004 presidential campaign.<sup>11</sup> The presidential campaign of former Vermont Governor Howard Dean quickly made same-sex unions a prime political question, with all of the Democratic Party primary candidates endorsing some form of legal recognition for same-sex unions,<sup>12</sup> even as polling data shows a majority of the general public opposed to both same-sex

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*Gay Marriage Rights; Both Sides Agree it Follows Logically*, DAILY PRESS (Va.), June 28, 2003, at A1.

8. Halpern v. Toronto [2003] C.A. 2159.

9. Goodridge v. Dep't. of Pub. Health, 14 Mass. L. Rep. 591 (Mass. Super. Ct. 2002), vacated by Goodridge v. Dept. of Publ. Health, 798 N.E.2d 941 (Mass. 2003).

10. Cheryl Wetzstein, *Gay 'marriages' ahead: Debate Stirs in the States*, WASHINGTON TIMES, July 13, 2003, at A1 ("For years, the issue of same-sex 'marriage' in America has surfaced only occasionally, a topic of arcane conversation, and promptly slips away. No longer. High court decisions in Canada and the United States and a pending lawsuit in Massachusetts will finally force 'gay marriage' to the top of the nation's legal and cultural agenda."). A rough statistical analysis of the primarily print media sources contained in the Westlaw database finds more news articles dealing with same-sex "marriage" this summer than in any month in the previous seven years. A search of the Westlaw news database for the month of June 2003 revealed 1353 articles mentioning the phrase "same-sex marriage." In July and August, there were 1243 and 1688 articles, respectively. The previous monthly high of 832 articles was reached in September 1996, as Congress adopted the Defense of Marriage Act and a Hawaii court considered evidence in *Baehr v. Miike*. Most months have seen between one and two hundred articles containing the phrase "same-sex marriage." The *Baker v. State* decision that gave rise to Vermont civil unions produced 255 articles in December 1999, and the effective date of the Dutch same-sex "marriage" legislation in April 2001 produced just 126 articles in the Westlaw database.

11. See, e.g., Maggie Gallagher, *Concerns Boil Down to Three Big Issues*, MYRTLE BEACH SUN-NEWS, Aug. 21, 2003, at 9 (suggesting that terrorism, the energy crisis, and gay marriage will be the three big topics of the 2004 election season); Will Lester, *Most in Poll Favor Gay-Marriage Ban - Many Say They'll Oppose '04 Candidates Who Defend Same-Sex Unions*, NEWARK STAR-LEDGER, Aug. 19, 2003, at 4; Dick Morris, *W's Weapon Against Dean*, NEW YORK POST, Nov. 5, 2003 ("In a Bush-Dean race, the contest would likely hinge on three semantic differences. The way the electorate defines the gay marriage, tax-cut and Iraq issues will spell victory or defeat for the candidates.").

12. Mary Leonard, *GOP Sees '04 Issue in Gay Marriage*, BOSTON GLOBE, Nov. 7, 2003, at A1 ("None of the leading Democratic candidates support gay marriage, but all are wooing gay and lesbian activists and young voters with promises to fight a constitutional amendment, endorse civil unions, and expand domestic benefits to same-sex couples.").

“marriage” and civil unions.<sup>13</sup> A proposed marriage amendment to the United States Constitution gained fifty co-sponsors during the month of July alone, tripling its previous support.<sup>14</sup> Polling data from throughout the summer and fall of 2003 suggests that many Americans are still in the process of forming, reforming, and solidifying opinions on same-sex “marriage” and “civil unions.”<sup>15</sup>

As a nation, we have come face to face with the difficult questions surrounding the definition of that social institution called marriage. As many Americans now consider these issues for the first time, it strikes me that a concise overview of the debate as it stands today, with some reference to the history which has brought us to this point, may be helpful to many.<sup>16</sup> That concise overview is essentially what I have undertaken to provide in this article, recognizing already that I will likely fail on both counts. First, this overview will be longer than I would have liked it to be, sacrificing brevity. Secondly, it will be shorter than it needs to be, sacrificing breadth and detail. I trust the compromise will prove somewhat satisfactory to the reader.

## II. CURRENT CONTROVERSIES IN THE MARRIAGE DEBATE

To date, the marriage debate has largely been a counterpoint of judicial action and legislative reaction. Since same-sex couples first began to seek marriage licenses in the early 1970's, courts have been repeatedly called upon to interpret state marriage laws and evaluate their constitutionality. In response to real or anticipated threats from the courts, state legislatures have often adopted measures intended to mitigate the likelihood of a judicial redefinition of marriage.<sup>17</sup> In the 1990's, this counterpoint saw marriage litigation in Hawaii, quickly followed by the adoption of the first state marriage recognition (state DOMA) bill in 1994<sup>18</sup> and the federal Defense of Marriage Act (DOMA)

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13. Alan Cooperman, *Sodomy Ruling Fuels Battle Over Gay Marriage*, WASHINGTON POST, July 31, 2003, at A1 (“In an unexpected shift in the electoral landscape, polls show that public support of gay rights in general, and of ‘civil unions’ for same-sex couples in particular, has fallen about 10 percentage points since the court’s June 26 ruling.”).

14. H.R.J. Res. 56, 108th Cong. (2003). As of June 25, the measure had attracted 25 cosponsors. In the weeks following the *Lawrence v. Texas* decision, that number jumped to 75 cosponsors. As of November 1, 2003, the total stands at 96.

15. See, e.g., Associated Press, *Polls Hint at Backlash After Gay-Rights Ruling*, CHICAGO TRIBUNE, July 30, 2003, at 10.

16. Except as otherwise noted, the discussion contained in this article attempts to incorporate developments occurring through February 2004.

17. See David O. Coolidge & William C. Duncan, *Definition or Discrimination: State Marriage Recognition Statutes in the “Same-Sex Marriage” Debate*, 32 CREIGHTON L. REV. 3, 5 (1998).

18. 1994 Haw. Sess. Laws 217.

in 1996.<sup>19</sup> Today, 38 states have adopted marriage recognition statutes defining marriage as a male-female union and declining to recognize same-sex unions as marriages.<sup>20</sup> In Alaska, a trial court opinion striking down the state marriage statute prompted almost immediate legislative response, resulting in the ratification of a marriage amendment to the state constitution just eight months later.<sup>21</sup> In Vermont, the court gave the legislature instructions to guide its creation of civil unions.<sup>22</sup> Recently, the Massachusetts legislature weighed its response to the Supreme Judicial Court's recent decision in *Goodridge v. Department of Public Health*.<sup>23</sup>

While encompassing a wide variety of factual situations and political realities, today's marriage debate encompasses three subcategories of disputes, each with distinct legal and social ramifications: (1) same-sex marriage controversies, (2) disputes over marital benefits, and (3) questions of interstate marriage recognition. While the definition of marriage remains at the heart of the marriage debate both politically and philosophically, recent litigation has emphasized marital benefits and recognition, opening up three major fronts in the marriage debate.

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19. Pub. L. 104-199, 100 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. §1738C (1997)).

20. ALA. CODE § 30-1-19 (2002); ALA. CONST. art. I, § 25; ARIZ. REV. STAT. ANN. § 25-101 (West 2000); ARK. CODE ANN. § 9-11-107 (Michie 2002); ARK. CODE ANN. § 9-11-109 (Michie 2002); ARK. CODE ANN. § 9-11-208 (Michie 2002); CAL. FAM. CODE § 308.5 (West 2002); COLO. REV. STAT. § 14-2-104 (2002); DEL. CODE ANN. tit. 13, § 101 (2001); FLA STAT. ANN. § 741.212 (West 2000); GA. CODE ANN. 19-3-3.1 (2002); HAW. REV. STAT. § 572-3 (1999); HAW. CONST. art. 1, § 23; IDAHO CODE § 32-209 (Michie 2002); 750 ILL. COMP. STAT. ANN. 5/212 (West 2000); IND. CODE § 31-11- 1-1 (2002); IOWA. CODE. § 595.2 (2002); KAN. STAT. ANN. § 23-101 (1999); KY. REV. STAT. ANN. §§ 402.040, 404.045 (Michie 2002); LA. CIV. CODE ANN. art. 89 (West 2000), *amended by* 1999 La. Acts 890 §1; ME. REV. STAT. ANN. tit. 19-A, § 701 (West 2002); MICH. COMP. LAWS ANN. § 551.1 (West 2000); MICH. COMP. LAWS ANN. § 551.271 (West 2000); MINN. STAT. ANN. § 517.01 (West 2004); MISS. CODE ANN. § 93-1-1 (2003); MO. REV. STAT. § 451.022 (West 2002); MONT. CODE ANN. § 40-1-401 (2002); NEB. CONST. art. I, § 29; Nev. Question 2 (approved Nov. 5, 2002); N.C. GEN. STAT. § 51-1.2 (2000); N.D. CENT. CODE § 14-03-01 (1960); 2004 Ohio Laws 61; OKLA. ST. ANN. tit. 43 § 3.1 (West 2000); 23 PA. CONS. STAT. ANN. § 1704 (West 2000); S.C. CODE ANN. § 20-1-15 (Law. Co-op 2000); S.D. CODIFIED LAWS § 25-1-1 (Michie 2000); TENN. CODE ANN. § 36-3-113 (2002); UTAH CODE ANN. § 30-1-42 (2000); VT. STAT. ANN. tit. 15, § 1201 (2002); VA. CODE ANN. § 20-45.2 (Michie 2000); WASH. REV. CODE ANN. § 26.04.020 (West 2000); W.VA. CODE § 48-2-603 (2002).

21. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); ALASKA. CONST. art. I, § 25.

22. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

23. *Goodridge v. Dept. of Publ. Health*, 798 N.E.2d 941 (Mass. 2003).

### A. Same-Sex Marriage Controversies

#### 1. Overview

In the United States, all 50 states and the District of Columbia recognize marriage as the union of one man and one woman. Forty-two states have explicitly enshrined this definition of marriage in their statutory system.<sup>24</sup> In the remaining eight states and the District of Columbia, the definition of marriage is implicit from gender-specific references such as “husband” and “wife,” or prohibitions on certain incestuous relationships that presume a male-female definition of marriage,<sup>25</sup> and courts considering the marriage laws of these states have uniformly found the existing marriage statute to contemplate only opposite-sex couples.<sup>26</sup>

24. ALA. CODE § 30-1-19; ALA. CONST. art. I, § 25; ARIZ. REV. STAT. ANN. § 25-101; ARK. CODE ANN. § 9-11-107; ARK. CODE ANN. § 9-11-109; ARK. CODE ANN. § 9-11-208; CAL. FAM. CODE § 308.5; COLO. REV. STAT. § 14-2-104; DEL. CODE ANN. tit. 13, § 101; FLA. STAT. ANN. § 741.212; GA. CODE ANN. 19-3-3.1; HAW. REV. STAT. § 572-3; HAW. CONST. art. I, § 23; IDAHO CODE § 32-209; 750 ILL. COMP. STAT. ANN. § 5/212; IND. CODE § 31-11-1-1; IOWA CODE 595.2; KAN. STAT. ANN. § 23-101; KY. REV. STAT. ANN. §§ 402.040, 404.045; LA. CIV. C. art. 89; MD. CODE ANN., FAM. LAW § 2-201 (2004); ME. REV. STAT. ANN. tit. 19-A, § 701; MICH. COMP. LAWS ANN. § 551.1; MICH. COMP. LAWS ANN. § 551.271; MINN. STAT. ANN. § 517.01; MISS. CODE ANN. § 93-1-1; MO. REV. STAT. § 451.022; MONT. CODE ANN. § 40-1-401; NEB. CONST. art. I, § 29; NEV. CONST. art. 1, § 21 (2003); N.C. GEN. STAT. § 51-1.2; N.D. CENT. CODE § 14-03-01; N.H. REV. STAT. ANN. §§ 457:1, 457:2, 457:43 (2003); 2004 Ohio Laws 61; OKLA. ST. ANN. tit. 43 § 3.1; PA. CONS. STAT. ANN. § 1704; S.C. CODE ANN. § 20-1-15; S.D. CODIFIED LAWS § 25-1-1; TENN. CODE ANN. § 36-3-113; TEX. FAM. CODE ANN. §§ 2.001(B), 6.204 (2003); UTAH CODE ANN. § 30-1-4; VT. STAT. tit. 15, § 1201(4); VA. CODE § 20-45.2; WASH. REV. CODE ANN. § 26.04.020; W.VA. CODE § 48-2-603; WYO. STAT. ANN. § 20-1-101(2003).

25. *See, e.g.*, D.C. CODE ANN. § 46-401 (2003) (declaring incestuous marriages void ab initio as between men and their female relatives and between women and their male relatives); CONN. GEN. STAT. ANN. § 46b-21 (incest provision); CONN. GEN. STAT. ANN. §§ 46a-81r (West 2003) (declaring that nothing in the prohibition against discrimination on the basis of sexual orientation should be construed “to authorize . . . the right of marriage between persons of the same sex”); MASS. GEN. LAWS ch. 207, §§ 1-2 (1998) (gender-specific prohibition on incestuous marriages); N.J. REV. STAT. § 37:1-1 (2003) (gender specific prohibition on incestuous marriages); N.J. REV. STAT. § 37:1-3 (2003) (reference to “male party” and “female party” in context of marriage license application); N.M. STAT. ANN. § 40-2-1 (Michie 2003) (referring to marital obligations in terms of “husband” and “wife”); N.Y. DOM. REL. LAW § 170 (McKinney 2004) (statutory reference to “husband” and “wife” in context of divorce); OR. REV. STAT. § 106.010 (2003) (marriage entered into by “males” and “females” age 17 or older); OR. REV. STAT. § 106.150 (2003) (married spouses take each other to be “husband and wife.”); R.I. GEN. LAWS §§ 15-1-1, 15-1-2 (2003) (gender specific prohibitions against incestuous marriages); WIS. STAT. § 765.001 (2003) (“marriage is a legal relationship between 2 equal persons, a husband and a wife”).

26. *See, e.g.*, *Baker v. Nelson*, 191 N.W.2d 185, 185-86 (Minn. 1971) (decided prior to the adoption of Minnesota’s statutory definition of marriage and concluding that the drafters of the marriage law used “marriage” according to its common meaning as “the state of union between persons of the opposite sex”); *Dean v. District of Columbia*, 653 A.2d 307, 310 (D.C. 1995) (“The language and legislative history of the marriage statute demonstrate that neither Congress nor the Council of the District of Columbia has ever intended to define ‘marriage’ to include same-sex unions.”); *Baker v. State*, 744 A.2d 864, 868 (Vt. 1999); *Goodridge v. Dept. of Publ. Health*, 14

In 1979, Professor Rhonda Rivera wrote in a *Hastings Law Journal* article that “[a] number of homosexual couples have tried to effectuate a legal marriage but to date no court has recognized such a union.”<sup>27</sup> The same remained true for nearly 25 years, until a ruling of the Massachusetts Supreme Judicial Court on November 18, 2003 rewrote the common law definition of marriage in the Commonwealth of Massachusetts.<sup>28</sup>

Since 1971, there have been direct constitutional challenges to the marriage laws of nine states and the District of Columbia that have resulted in published opinions.<sup>29</sup> Of these ten reported American cases to litigate the constitutionality of male-female marriage laws, six simply affirmed the marriage laws of the state,<sup>30</sup> two (Hawaii and Alaska) were preempted by constitutional amendments defining marriage,<sup>31</sup> and one court (Vermont) stopped short of redefining marriage, but ruled that same-sex couples were entitled to marital benefits.<sup>32</sup> As of this writing, the end result in Massachusetts is still very much in question.<sup>33</sup> A number

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Mass. L. Rptr. 591, (Mass. Super., May 7, 2002), *vacated by*, *Goodridge v. Dept. of Publ. Health*, 798 N.E.2d 941 (Mass. 2003); *see also* *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. 2002) (finding that Connecticut law does not recognize marriages between persons of the same sex); *Adoption of Tammy*, 619 N.E.2d 315, 316 (Mass. 1993) (“the laws of the Commonwealth do not permit [a same-sex couple] to enter into a legally cognizable marriage”); *Rutgers Council of AAUP Chapters v. Rutgers Univ.*, 689 A.2d 828, 835 (N.J. Super. Ct. App. Div. 1997) (concluding that despite the absence of specific statutory reference, New Jersey law “strongly and firmly implied” a male-female definition of marriage, such that a contrary legislative intent “cannot be fathomed.”); *In re Bonfield*, 780 N.E.2d 241, 250 (Ohio 2002) (Cook, J., concurring and dissenting) (“[T]he General Assembly does not permit same-sex marriages. . .”).

27. Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in The United States*, 30 *HASTINGS L.J.* 799, 874 (1979).

28. *Goodridge v. Dept. of Publ. Health*, 798 N.E.2d 941 (Mass. 2003).

29. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for lack of substantial federal question*, 409 U.S. 810 (1972); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Adams v. Howerton*, 486 F. Supp. 1119 (D.C. Cal. 1980); *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Storrs v. Holcomb*, 645 N.Y.S.2d 286 (N.Y. Sup. Ct. 1996), *appeal dismissed*, 666 N.Y.S.2d 835 (1997); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

30. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for lack of substantial federal question*, 409 U.S. 810 (1972); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Adams v. Howerton*, 486 F. Supp. 1119 (D.C. Cal. 1980); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Storrs v. Holcomb* (645 N.Y.S.2d 286 (N.Y. Sup. Ct. 1996), *appeal dismissed*, 666 N.Y.S.2d 835 (1997).

31. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Baehr v. Miike*, No. 91-1394 (Haw. Cir. Ct. Dec. 3, 1996); *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999); HAW. CONST. art. I, § 23 (giving legislature authority to define marriage as union of man and woman); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); ALASKA CONST. art. I, § 25 (defining marriage as union of man and woman).

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

33. A constitutional amendment to define marriage as the union of one man and one woman was debated in Constitutional Convention in the early part of this year. 2003 Mass. H. 3190. *See infra*, section II.A.4.



of additional cases have either been decided on procedural grounds, or have been resolved at the trial level and have not produced a published opinion.<sup>34</sup> Four cases have been filed since 2001, three of which are still pending as of this writing.<sup>35</sup>

Twelve of these 13<sup>36</sup> marriage cases were filed in state courts,<sup>37</sup> and nine of the 13 cases have been litigated on the basis of state constitutional provisions, with *Baker v. Nelson*,<sup>38</sup> *Adams v. Howerton*,<sup>39</sup> *Dean v. District of Columbia*,<sup>40</sup> and *Standhardt v. Superior Court of Ariz.*<sup>41</sup> the four exceptions filing federal claims.<sup>42</sup>

In *Baker v. Nelson*, the first of the published marriage cases, the United States Supreme Court ultimately ruled that the Minnesota marriage law did not raise any federal constitutional issues, dismissing the appeal.<sup>43</sup> The Jurisdictional Statement filed in the case alleged that

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34. See, e.g., *Burkett v. Zablocki*, 54 F.R.D. 626, 626 (E.D. Wis. 1972) (granting clerk's motion to dismiss as plaintiffs failed to respond to the motion); *Irwin v. Lupardus*, 1980 Ohio App. LEXIS 12106 (Ohio Ct. App. June 26, 1980) (rejecting constitutional claims for recognition of a same-sex common law marriage).

35. *Standhardt v. Superior Court of Ariz.*, No. 1 CA-SA 03-0150, 2003 WL 22299701 (Ariz. Ct. App. Oct. 8, 2003); *Lewis v. Harris*, No. 15-03 (N.J. Mercer Co. Super. Ct. Nov. 5, 2003); *Morrison v. Sadler*, No. 49A02-0305-CV-447 (Ind. Ct. App. May 28, 2003). Recent news reports indicate several additional cases filed in February and early March 2004, including lawsuits in California, Florida, New York, Oregon, Washington, and West Virginia. Dean E. Muphy, *California Court to Get Case on Gay Marriages*; NEW YORK TIMES, Feb. 23, 2004, at A19; Stephen Nohlgren, *State Ban on Gay Marriage Being Tested*, ST. PETERSBURG TIMES, Feb. 19, 2004, at 1A; Mark Larabee, *Lawsuits Target Gay Marriage*, THE OREGONIAN, Mar. 5, 2004, at A01; Jonathan Martin, *Same-Sex Couples to Sue Over State Marriage Laws*, SEATTLE TIMES, Mar. 8, 2004, at A1; *Gay Marriage Spreads to West Virginia*, 365Gay.com, Mar. 6, 2004, available at <http://www.365gay.com/newscon04/03/030604wvaMarr.htm>; *Lambda Sues New York for Same-Sex Marriage Rights*, ADVOCATE, Mar. 6, 2004, available at [http://www.advocate.com/new\\_news.asp?ID=11576&sd=03/06/04-03/08/04](http://www.advocate.com/new_news.asp?ID=11576&sd=03/06/04-03/08/04).

36. Including the ten published opinions and the three pending cases.

37. *Adams v. Howerton*, the only exception, was an immigration case in which the plaintiffs argued, in part, that the equal protection and due process guarantees of the United States Constitution required the recognition of same-sex "marriages" under Colorado law. 486 F. Supp. 1119, 1124-25 (D.C. Cal. 1980).

38. 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for lack of substantial federal question*, 409 U.S. 810 (1972) (asserting rights of due process, privacy and equal protection under the Ninth and Fourteenth Amendments to the United States Constitution); see also Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027) (copy on file with author).

39. 486 F. Supp. 1119, 1124 (D.C. Cal. 1980) (asserting federal guarantees of equal protection and due process).

40. 653 A.2d 307, 331, 362 (D.C. 1995) (asserting a fundamental right to marry person of one's choice under Due Process Clause of Fifth Amendment as well as guarantee of equal protection under Fifth Amendment Due Process Clause).

41. No. 1 CA-SA 03-0150, 77 P.3d 451, 454 (Ariz. Ct. App. Oct. 8, 2003) (asserting fundamental right to marry and guarantee of equal protection under both state and federal constitutions).

42. *Goodridge v. Dep't. of Pub. Health* also contained a federal claim based upon the free speech clause of the First Amendment to the United States Constitution, but the claim did not figure prominently in the litigation. 798 N.E.2d 941 (Mass. 2003).

43. 409 U.S. 810 (1972).

the state's failure to grant a marriage license to persons of the same sex violated constitutional guarantees of equal protection, due process and privacy.<sup>44</sup> Though no written opinion was issued, the dismissal for lack of a substantial federal question constitutes a substantive ruling on the merits.<sup>45</sup> Lower federal courts are bound to follow the ruling unless or until the Supreme Court overrules it.<sup>46</sup> This ruling obviously dampened the prospects of future equal protection, due process, and privacy claims made under the United States Constitution, and may (at least partially) account for the fact that the majority of subsequent cases have relied upon state constitutional claims.

Over the past three decades the concept of same-sex "marriage" has become increasingly accepted in the legal academy, such that ideas virtually unheard of prior to 1970 are now part of the academic orthodoxy in many circles.<sup>47</sup> Over time, this ideology has spread throughout the legal profession, as prominent attorneys and bar associations have shown increasing willingness to support the effort to gain legal recognition for same-sex marriage.<sup>48</sup>

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44. Appellants in the case presented three constitutional questions: (1) "Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their liberty to marry and of their property without due process of law under the Fourteenth Amendment"; (2) "Whether appellee's refusal, pursuant to Minnesota marriage statutes, to sanctify appellants' marriage because both are of the male sex violates their rights under the equal protection clause of the Fourteenth Amendment"; and (3) "Whether appellee's refusal to sanctify appellants' marriage deprives appellants of their right to privacy under the Ninth and Fourteenth Amendments." Jurisdictional Statement at 3, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027).

45. See *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975).

46. See *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (D.C. Cal. 1980).

47. Prior to 1980, only a handful of articles even discussed the topic of same-sex "marriage." See, e.g., Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *HASTINGS L.J.* 799, 874-78 (1979); Comment, *Fundamental Interests and the Question of Same-Sex Marriage*, 15 *TULSA L.J.* 141 (1979); Comment, *Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution*, 128 *U. PA. L. REV.* 193 (1979); Note, *The Legality of Homosexual Marriage*, 82 *YALE L.J.* 573 (1973). Even prior to 1990, a Westlaw search reveals only 21 published law review articles that contain the phrase "same-sex marriage." During the next five years, from 1990-1994, 198 articles contained some reference or discussion of "same-sex marriage," and between 1995-1999, the number of new articles jumped to 849. A more detailed review by the Marriage Law Project of approximately 150 published law review articles written on the topic of same-sex "marriage" between 1990 and 1999 shows further that roughly seventy-five percent of these articles favor the legal recognition of same-sex "marriage." See "Bibliography of Law Review Articles Relating to the Issue of Same-Sex 'Marriage,'" Marriage Law Project, available at: <http://marriagelaw.cua.edu/Bibliogr.htm>.

48. William C. Duncan, "A Lawyer Class": *Views on Marriage and "Sexual Orientation" In The Legal Profession*, 15 *B.Y.U. J.PUB.L.* 137 (2001). In the Massachusetts marriage litigation, each of the amicus briefs filed in support of the plaintiffs was filed by a major Boston law firm, and several briefs were filed on behalf of bar associations, including the Boston Bar Association and the Massachusetts Bar Association. See, e.g., Brief of Amicus Curiae Massachusetts Bar Association, *Goodridge v. Dep't. of Pub. Health*, Docket # SJC-08860; Brief of Amici Curiae Boston Bar Association, *Goodridge v. Dept. of Pub. Health*, Docket # SJC-08860.

## 2. *Marriage litigation in the 1970's*

The first generation of same-sex marriage cases began when the Hennepin County Clerk refused to issue a marriage license to Richard Baker and James McConnell on May 22, 1970.<sup>49</sup> Shortly thereafter, Baker and McConnell filed the lawsuit that would ultimately make its way to the United States Supreme Court as *Baker v. Nelson*, discussed above.<sup>50</sup> Each of the other three constitutional challenges to state marriage laws filed in the 1970's ended in a similar result, with one case decided at the state supreme court level, one at the state intermediate court of appeals, and one in federal district court.<sup>51</sup>

## 3. *Marriage litigation in the 1990's*

During the 1990's the outcome of marriage litigation became less predictable. Of the five cases filed during the 1990's, each ultimately upheld the constitutionality of state marriage laws, though with three significant caveats and only in the face of legislative and popular intervention.

In *Baehr v. Lewin*, the eldest in this second generation of marriage cases, the Hawaii Supreme Court shocked even the plaintiffs with its 1993 ruling that the marriage law constituted sex discrimination, requiring application of a strict scrutiny analysis under the Hawaii Constitution.<sup>52</sup> On remand, the trial court entered a number of factual findings that reflect the heavy burden of proof required under the strict scrutiny standard imposed by the Hawaii Supreme Court:

Defendant presented insufficient evidence and failed to establish or prove the legal significance of the institution of traditional marriage and the need to protect traditional marriage as a fundamental structure in society.

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49. Jurisdictional Statement at 3-4, *Baker v. Nelson*, 409 U.S. 810 (1972) (No. 71-1027).

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

51. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Adams v. Howerton*, 486 F. Supp. 1119 (D.C. Cal. 1980); *see also* William C. Duncan, *Same-Sex Marriage Litigation: An Historical Overview*, 18 *BYU J. PUB. L.* 623 (2004).

52. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *see also*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 *N.Y.U. L. REV.* 197, 209 n.40 (1994)

The sex discrimination argument had been such a uniform loser before *Baehr* that when that case was litigated, neither the plaintiff nor the amici even bothered to make the argument. . . . Nor was the sex discrimination issue raised by the court at oral argument. The majority opinion therefore was a surprise to all the parties. Telephone Interview with Daniel R. Foley, attorney for plaintiffs in *Baehr v. Lewin* (Apr. 19, 1994).

*Id.*

\* \* \*

A father and a mother can, and do, provide his or her child with unique paternal and maternal contributions which are important, though not essential, to the development of a happy, healthy and well-adjusted child.

\* \* \*

In Hawaii, and elsewhere, same-sex couples can, and do, have successful, loving and committed relationships.

\* \* \*

In Hawaii, and elsewhere, people marry for a variety of reasons including, but not limited to the following: (1) having or raising children; (2) stability and commitment; (3) emotional closeness; (4) intimacy and monogamy; (5) the establishment of a framework for a long-term relationship; (6) personal significance; (7) recognition by society; and (8) certain legal and economic protections, benefits and obligations.<sup>53</sup>

Finally, in its conclusions of law, the court wrote:

Defendant presented meager evidence with regard to the importance of the institution of traditional marriage, the benefits which that relationship provides to the community and, most importantly, the adverse effects, if any, which same-sex marriage would have on the institution of traditional marriage and how those adverse effects would impact on the community and society. The evidentiary record in this case is inadequate to thoughtfully examine and decide these significant issues.<sup>54</sup>

From all appearances, by December of 1996 Hawaii was well on its way to becoming the first jurisdiction in the world to officially recognize a marriage between two persons of the same sex.<sup>55</sup> Before the Hawaii

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53. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at \*17-18 (Haw. Cir. Ct. Dec. 3, 1996).

54. *Id.* at \*20.

55. *See, e.g.*, Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

It finally happened. On Tuesday, December 3, 1996, a Honolulu judge struck down a Hawaiian law permitting only opposite-sex couples to marry, and Hawaii became the first state to recognize same-sex marriages. . . . We can confidently predict that Hawaii will recognize same-sex marriages, for while the trial court stayed its mandate pending appeal, it is very unlikely that the decision will be overturned.

*Id.*; Daniel B. Foley, *The State of Gay Marriage: Will Hawaii Lead the Way?*, 20 FAM. ADVOC. 39 (Summer 1997) ("The Hawaii Supreme Court was briefed on the lower court decision in June 1997, and the final decision, expected by year's end, is likely to affirm the December 3, 1996, ruling in favor of same-sex marriage.") (Mr. Foley was counsel to the three same-sex couples who were plaintiffs in the *Baehr* litigation).

Supreme Court would again rule in the marriage litigation, however, the oft-criticized reasoning of the court's 1993 plurality opinion<sup>56</sup> was rejected by the Legislature and by the people of the state of Hawaii. While the case was making its second trip on appeal through the Hawaii court system, the legislature presented Hawaiian voters with the opportunity to vote on a constitutional amendment which provided, "The Legislature shall have authority to reserve marriage to opposite-sex couples."<sup>57</sup> On November 3, 1998, Hawaiian voters ratified the amendment by a 69 percent to 29 percent margin,<sup>58</sup> effectively terminating the litigation eight years after it had begun.<sup>59</sup>

While the Hawaii litigation was in progress, courts in New York and the District of Columbia rejected constitutional challenges to the marriage laws of those jurisdictions,<sup>60</sup> and an Alaskan couple filed suit in Anchorage.<sup>61</sup>

Moving much more quickly than *Baehr*, the Alaskan marriage litigation also prompted a state constitutional amendment after trial judge Peter Michalski granted the plaintiffs' motion for summary judgment on February 27, 1998, applied a strict scrutiny standard, and ordered an additional hearing to determine whether the state could demonstrate a compelling state interest which supported the marriage law.<sup>62</sup> In reaching

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56. See, e.g., BERNARD SCHWARTZ, A BOOK OF LEGAL LISTS: THE BEST AND WORST IN AMERICAN LAW 182-84 (1997) (describing the 1993 *Baehr* opinion as one of the ten worst state supreme court decisions in American history and "an affront to both law and language that well deserves its place on the list of worst decisions."); David O. Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning, and Fate*, 22 U. HAW. L. REV. 19, 26 n.22 (2000).

In my opinion, the plurality opinion contradicts itself. In the first half of the opinion, during its 'due process' analysis, the plurality operates from the historic view of marriage, and finds the existing male-female marriage statute constitutional. In the second half, engaged in its 'equal protection' analysis, the plurality switches the unit of analysis from that of an individual entering a social institution, to that of 'couples' entering a formal partnership status created by the State.

*Id.* (internal citations omitted).

57. See H.R. 117, S.D. 1, C.D. 1, Conf. Comm. Rep. No. 1 (1997). On April 29, 1997, the proposed Marriage Amendment was approved in the Senate with 25 Ayes and 0 Nays, and in the House with 44 Ayes, 6 Nays, and 1 Excused. See 1997 HAW. SENATE J. 766; 1997 HAW. HOUSE J. 922, cited in David O. Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning, and Fate*, 22 U. HAW. L. REV. 19, 19 n.3 (2000).

58. Constitutional Amendment: Legislative Power to Reserve Marriage to Opposite Sex Couples, Nov. 3, 1998, available at <http://www.state.hi.us/elections/reslt98/general/98swgen.html> (p.004, middle column) (285,384 votes in favor (69.2%), 117,827 votes opposed (28.6%), 8,422 blank votes (2.0%), and 887 overvotes (0.2%)).

59. *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999). See also David O. Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Constitutionality*, 22 U. HAW. L. REV. 19 (2000).

60. *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995); *Storrs v. Holcomb*, 645 N.Y.S.2d 286 (N.Y. Sup. Ct. 1996), appeal dismissed, 666 N.Y.S.2d 835 (1997).

61. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

62. *Id.* at \*6.

his decision, Judge Michalski declared that marriage is “the recognition of one’s choice of a life partner,” and held that article I, section 22 of the Alaska Constitution guarantees this freedom of choice.<sup>63</sup>

In an effort to head off the threatened judicial redefinition of marriage, the Alaska legislature quickly drafted a marriage amendment to the Alaska Constitution, approving it in May, defending it against a legal challenge decided in September, and sending it to the voters for ratification in November 1998, just eight months after Judge Michalski’s trial opinion.<sup>64</sup> Meanwhile, in June 1998, the Alaska Supreme Court refused to consider the state’s appeal in the *Brause* case,<sup>65</sup> allowing the litigation to go forward until Alaskan voters effectively foreclosed the litigation on November 3, 1998, approving the Alaska marriage amendment by a 68 to 32 percent margin.<sup>66</sup>

Of the five marriage cases of the 1990’s, *Baker v. State* came nearest a judicial redefinition of marriage. In its December 1999 ruling, the Vermont Supreme Court stopped just shy of striking down the Vermont marriage laws, holding that the Vermont constitution required the extension of “equal benefits” to same-sex couples, ordering the legislature to create a system by which to provide marital benefits for same-sex couples, and noting that future litigation may find that the

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63. *Id.* at \*1. Judge Michalski also suggested that the marriage law violated equal protection guarantees, but rested his decision on the privacy analysis. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998). See also Kevin G. Clarkson et al., *The Alaska Marriage Amendment: The People’s Choice on the Last Frontier*, 16 ALASKA L. REV. 213, 218-224 (1999).

64. See Clarkson, *supra* note 63, at 214 n.2.

See S.J. Res. 42, 20th Leg., 2d Legis. Sess. (Alaska 1998). The final version of the Amendment approved by the Legislature proposed to add a new section to article I of the Alaska Constitution that reads as follows: “Section 25. Marriage. To be valid or recognized in this State, a marriage may exist only between one man and one woman. No provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex.” The proposed amendment passed the House by a vote of 28-12, see House J. 3785, 20th Leg., 2d Legis. Sess. (Alaska 1998), and the Senate passed the amendment 14-6, Senate J. 4157, 20th Leg., 2d Legis. Sess. (Alaska 1998). Between approval and ratification, the Alaska Supreme Court struck the second sentence from the Marriage Amendment. See *Bess v. Ulmer*, Nos. S-8811, S-8812, S-8821, Preliminary Opinion and Order, at 8 (Alaska Sept. 22, 1998), *aff’d*, *Bess v. Ulmer*, Nos. S-8811, S-8812, S-8821, 1999 WL 619092 (Alaska Aug. 17, 1999). On November 3, 1998, the one-sentence version of the Marriage Amendment was ratified by the people by a vote of 68% to 32%. See Cheryl Wetzstein, *Gays Can’t ‘Marry’ 2 States Say*, WASHINGTON TIMES, Nov. 5, 1998, at A16.

*Id.*

65. *High Court Declines Same-Sex Case*, ANCHORAGE DAILY NEWS, June 6, 1998, at D1.

66. Measure No. 2, “Constitutional Amendment Limiting Marriage,” Nov. 3, 1998, available at <http://www.gov.state.ak.us/lsgov/elections/elect98/general/results.htm> (152,965 votes in favor (68.11%) and 71,631 opposed (31.89%)); see also *Bess v. Ulmer*, 985 P.2d 979 (Alaska 1999) (affirming validity of marriage amendment); *Brause v. Dep’t. of Health and Soc. Servs.*, 21 P.3d 357 (Alaska 2001) (rejecting unmarried couple’s claim for marital benefits).

marriage itself unconstitutionally discriminates against same-sex couples.<sup>67</sup> Perhaps in a compromise crafted in order to reach its unanimous opinion, the *Baker* court carefully avoided any discussion of the definition of marriage, ostensibly turning *Baker* into a case about benefits only.<sup>68</sup>

#### 4. Current marriage litigation

In a November 6, 2003 editorial, Detroit News editor and syndicated columnist Deb Price writes:

As in real estate, the secret to success in any civil rights struggle is three words: location, location, location. And a recent Arizona state court ruling against a marriage-minded gay couple serves as a painful reminder that those of us who are gay need to pick our legal battles—and our battlegrounds—very carefully. That’s especially true now that we are so clearly winning. . . . Lambda [Legal Defense and Education Fund], the American Civil Liberties Union and the Freedom to Marry Coalition have terrific ideas on how to change the legal terrain in your home state.<sup>69</sup>

Over the last five years, these three organizations, accompanied by the Boston-based Gay & Lesbian Advocates & Defenders (GLAD), have played an increasingly prominent role in shaping the litigation effort to achieve legal recognition of same-sex marriage. This role has included the filing of strategic litigation in selected jurisdictions,<sup>70</sup> efforts to dissuade individuals from filing litigation in states that might prove counter-productive to the national effort,<sup>71</sup> and attempts to mitigate the impact of litigation that threatens to impact the cause adversely.<sup>72</sup>

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67. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

68. *Id.*, discussed further *infra*, section II.B.2.

69. Deb Price, *Gays Must Pick Battles Wisely*, SAN JOSE MERCURY NEWS, Nov. 6, 2003 (institutional website omitted) (Lambda Legal is available at <http://www.lambdalegal.org>; the ACLU is available at <http://www.aclu.org>; and the Freedom to Marry Coalition is available at <http://www.freedomtomarry.org>).

70. See, e.g., *Goodridge v. Dept. of Publ. Health*, 798 N.E.2d 941 (Mass. 2003); *Lewis v. Harris*, 2003 WL 23191114 (N.J. Super. L., Nov. 5, 2003), *appeal pending*; *Snetsinger v. Board of Regents*, No. 03-238 (Mont. Sup. Ct.).

71. Judy Nichols, *Committed to Gay Marriage in Arizona, Couple Struggle with Suit to Wed*, ARIZONA REPUBLIC, Sept. 1, 2003, at A1 (reporting a meeting in which representatives from the ALCU, Lambda Legal, and the Arizona Human Rights Foundation met with the plaintiffs in the *Standhardt* case, urging them to drop their lawsuit); Robert L. Pela, *Here Come the Grooms: Local Poster Boys for Gay Marriage Want It All*, PHOENIX NEW TIMES, Aug. 21, 2003 (In response to a question about criticism the plaintiffs received in *Standhardt* for continuing with the marriage litigation, Tod Keltner stated, “We’ve heard things like ‘We’d like to strangle those guys.’ There’s a lot of concern with our court case because of the backlash, the implications, the expending of resources in Arizona.” Don Standhardt continued, “And for that reason, we’re not asking any gay group for anything, and we never plan to. We plan to do this on our own. I guess I’m a bad [homosexual], but I didn’t know any of these agencies even existed. I didn’t know the Arizona

In a joint advisory issued following the Ontario Court of Appeals' decision redefining marriage in that Canadian province, Lambda, GLAD, the National Center for Lesbian Rights, Freedom to Marry, and the ACLU Lesbian and Gay Rights Project advised gay and lesbian couples:

For those who contemplate litigation as a response to discrimination against their marriage, it is critical to remember that any legal case has profound implications beyond the individuals involved. Please contact the organizations below who have the most experience litigating on marriage, civil unions and the rights of GLBT people and who have definite thoughts about what, when and where litigation is and is not advisable for taking our movement forward. Couples should absolutely not race across the border just to set up lawsuits; the wrong cases could set us back for years. We will be strongest if we work together.<sup>73</sup>

Since *Baker*, four additional cases have challenged the constitutionality of state laws that explicitly or implicitly recognize marriage as an exclusively male-female union. In each case, the lawsuits have alleged that state constitutional provisions render the marriage laws unconstitutional, while the Arizona lawsuit also includes claims based upon the United States Constitution.

*a. Massachusetts.* The first and most prominent of the four post-*Baker* cases arose in Massachusetts, setting the stage for the November 2003 decision which made the Massachusetts Supreme Court the first in the nation to recognize same-sex marriage. In April 2001, the Boston-based Gay & Lesbian Advocates & Defenders (GLAD), an organization that also served as co-counsel for the plaintiffs in *Baker*, filed suit challenging the Commonwealth's marriage laws on behalf of seven same-sex couples.<sup>74</sup> As in other cases, the couples satisfied all requirements of eligibility for marriage except for the definitional requirement of a man and a woman. The couples had applied for and

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Human Rights Fund was around, I didn't know about Freedom to Marry was there, or Lambda Legal. And once we did hear of them, and we did call them, they were just so pretentious and negative toward us, I just [wrote them off.]").

72. See Brief of Amici Curiae American Civil Liberties Union, *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App.) (No. A01A1827); Brief of Amicus Curiae Lambda Legal Defense and Education Fund, *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App.) (No. A01A1827); Brief of Amici Curiae Gay and Lesbian Advocates and Defenders, *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App.) (No. A01A1827).

73. Joint Advisory from Gay & Lesbian Advocates & Defenders, Lambda Legal Defense & Education Fund, National Center for Lesbian Rights, ACLU Lesbian & Gay Rights Project, Freedom to Marry (June 2003), available at: [http://www.glad.org/GLAD\\_Cases/Canadian\\_Marriage\\_Joint\\_Advisory.shtml](http://www.glad.org/GLAD_Cases/Canadian_Marriage_Joint_Advisory.shtml). See also Hayley Mick, *U.S. Same-sex Pairs Advised to Think Twice Before Marriage in Canada*, CANADIAN PRESS, July 13, 2003.

74. 744 A.2d 864, 866 (listing Mary Bonauto of Gay & Lesbian Advocates & Defenders as co-counsel for the plaintiffs).



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been denied marriage licenses, giving them standing to challenge the marriage laws.<sup>75</sup>

The complaint contained five principal allegations. First, the complaint alleged that, in the absence of a statutory definition of marriage in the Massachusetts General Laws, the common law definition of marriage should be construed to encompass couples in a same-sex relationship.<sup>76</sup> The complaint then alleged that the marriage laws violated three distinct sections of the Massachusetts Constitution, including guarantees of equality, due process, and the right to pursue happiness.<sup>77</sup> Finally, the complaint also alleged that the definition of marriage violated the right to “intimate association” implicitly guaranteed, though yet undefined, by the Massachusetts Constitution.<sup>78</sup>

Deputy Attorney General Judith Yogman coordinated the state’s response, which took the initial form of an answer filed on May 11, 2001.<sup>79</sup> On August 20, 2001, GLAD filed a motion for summary judgment, to which the state responded in December 2001 with a response and counter motion for summary judgment. Three organizations also filed amicus briefs in support of the state’s motion for summary judgment.<sup>80</sup>

On May 7, 2002, Superior Court Judge Thomas Connolly issued a 26-page opinion granting summary judgment in favor of the state, and denying the plaintiffs’ motion. In the opinion, Judge Connolly focused specifically on the plaintiff’s argument that the Massachusetts Constitution of 1780 guarantees a fundamental right to marry “the person of one’s choice,” virtually ignoring their equal protection claims.<sup>81</sup>

The case was subsequently appealed to the Massachusetts Court of Appeals and the state filed a motion for direct appellate review by the

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75. Complaint ¶¶ 122-148, *Goodridge v. Dep’t. of Pub. Health*, 14 Mass. L. Rptr. 591 (Mass. Super. Ct. 2002) (C.A. No. 01-1647-A).

76. *Id.* ¶ 153; Memorandum in Support of Plaintiffs’ Motion for Summary Judgment at 4, *Goodridge v. Dep’t. of Pub. Health*, C.A. No. 01-1647-A.

77. Complaint ¶ 153.

78. *Id.*; Memorandum in Support of Plaintiffs’ Motion for Summary Judgment at 60, *Goodridge v. Dep’t. of Pub. Health*, 14 Mass. L. Rptr. 591 (Mass. Super. Ct. 2002) (C.A. No. 01-1647-A).

79. Answer, *Goodridge v. Dep’t. of Pub. Health*, 14 Mass. L. Rptr. 591 (Mass. Super. Ct. 2002) (C.A. No. 01-1647-A).

80. Brief of Amicus Curiae Massachusetts Family Institute, *Goodridge v. Dep’t. of Pub. Health*, 14 Mass. L. Rptr. 591 (Mass. Super. Ct. 2002) (C.A. No. 01-1647-A); Brief of Amicus Curiae Marriage Law Project, *Goodridge v. Dep’t. of Pub. Health*, 14 Mass. L. Rptr. 591 (Mass. Super. Ct. 2002) (C.A. No. 01-1647-A); Brief of Amicus Curiae American Center for Law and Justice, *Goodridge v. Dep’t. of Pub. Health*, 14 Mass. L. Rptr. 591 (Mass. Super. Ct. 2002) (C.A. No. 01-1647-A).

81. *Goodridge v. Dep’t. of Pub. Health*, 14 Mass. L. Rptr. 591, 2002 WL 1299135 at \*5-\*11, (Mass. Super. Ct. 2002).

state Supreme Judicial Court (SJC).<sup>82</sup> Briefing at the SJC was completed in December 2002, as numerous amicus parties added their briefs to those filed by GLAD and by the State. Overall, eleven amicus briefs were filed on behalf of the plaintiffs, with an additional sixteen briefs filed in support of the state's position.<sup>83</sup> Oral arguments in the case were held on March 4, 2003.<sup>84</sup> The SJC customarily issues opinions within 130 days of oral argument, a practice that was waived in this case on July 14, 2003.<sup>85</sup>

As the first marriage case filed after the Vermont Supreme Court decision in *Baker v. State*,<sup>86</sup> *Goodridge* was intended to complete what many regard as the unfinished business of *Baker*. Whereas in *Baker*, the court awarded marital benefits to same-sex couples, the plaintiffs in *Goodridge* expressly rejected marital benefits as an adequate remedy, arguing that the status itself is a benefit of marriage, and that denial of marital status results in less than full equality.<sup>87</sup>

On November 18, 2003, the court responded with a 4-3 decision, concluding that the state's definition of marriage was "incompatible with the constitutional principles of respect for individual autonomy and equality under the law."<sup>88</sup> In reaching this conclusion, the court wrote that "[c]ivil marriage is created and regulated through exercise of the police power," describing the public role of marriage as "central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data,"<sup>89</sup>

After concluding that the state had discriminated against same-sex couples "for no rational reason,"<sup>90</sup> the four-justice majority redefined the common law definition of "civil marriage to mean the voluntary union of

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82. Application for Direct Appellate Review, *Goodridge v. Dep't. of Pub. Health*, 14 Mass. L. Rptr. 591 (Mass. Super. Ct. 2002) (Appeals Ct. No. 02-P-1162).

83. Appellants' amicus briefs are available at [http://www.glad.org/marriage/goodridge\\_amicus.shtml](http://www.glad.org/marriage/goodridge_amicus.shtml).

84. Cheryl Wetzstein, *Court to Hear Suit on Gay Unions*, WASHINGTON TIMES, Mar. 3, 2003, at A4.

85. Kathleen Burge, *SJC Puts Off a Decision on Gay Marriage*, BOSTON GLOBE, July 15, 2003, at A1.

86. 744 A.2d 864 (Vt. 1999).

87. Complaint at ¶ 31, *Goodridge v. Dep't. of Pub. Health*, C.A. No. 01-1647-A, (seeking "access to marriage licenses, and the legal and social status of civil marriage, as well as the protections, benefits and obligations of marriage. . .").

88. *Goodridge v. Dept. of Publ. Health*, 798 N.E.2d 941, 949 (Mass. 2003).

89. *Id.* at 954. The court then went on to emphasize the "enormous private and social advantages" which flow to couples who marry. *Id.* at 954-55.

90. *Id.* at 968.

two persons as spouses, to the exclusion of all others.”<sup>91</sup> The court then remanded the case to the superior court for entry of judgment, but raised questions in the legislature, writing, “Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion.”<sup>92</sup>

As the legislature weighed its options in light of the court’s ruling, the Massachusetts Senate requested an advisory opinion from the court on the constitutionality of proposed “civil union” legislation which would make same-sex partners legal “spouses,” attaching all the benefits and responsibilities of marriage under the law.<sup>93</sup> With the 180-day stay running and a constitutional convention scheduled for February 11, 2004, the court moved quickly, with the same 4-3 majority ruling on February 3 that “[t]he [civil union] bill maintains an unconstitutional, inferior, and discriminatory status for same-sex couples.”<sup>94</sup>

Meeting in constitutional convention on February 11 and 12, the legislature failed to garner majority support for any single amendment proposed, though 175 (of 200) legislators voted for some form of amendment.<sup>95</sup> When the convention reconvened on March 11, the legislature gave preliminary approval to a “compromise” amendment simultaneously defining marriage as the union of a man and a woman and creating same-sex “civil unions” as the legal equivalent of marriage. Approval came despite the lack of majority support for the measure, as strategic alliances both kept the amendment alive and prevented a “marriage-only” text from advancing.<sup>96</sup> On March 29, amid much controversy, the legislature rejected a last-ditch effort to bifurcate the marriage and civil union provisions in the amendment, passing the (marriage and civil union) compromise amendment by a final vote of 105-92.<sup>97</sup>

The amendment must be approved again in 2005 before being placed on the ballot for ratification by voters in November 2006. With the court’s 180-day stay having expired on May 17, 2004, marriage licenses

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91. *Id.* at 969.

92. *Id.* at 969-70.

93. In re Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).

94. *Id.* at 572. Alternatively, the majority opinion also suggests that if “the Legislature were to jettison the term ‘marriage’ altogether, it might well be rational and permissible.” *Id.* at 570, n.4.

95. Massachusetts Catholic Conference, *Joint Session 2004 Voting Analysis*, Feb. 13, 2004, available at <http://www.macathconf.org/04jointsession1.htm>.

96. Raphael Lewis, *Accord Said to Lack Firm Majority in Gay-Marriage Fight*, *Lawmakers’ Votes Fluid*, BOSTON GLOBE, Mar. 13, 2004, at A1.

97. Rick Klein, *Vote Ties Civil Unions to Gay-Marriage Ban, Romney to Seek Stay of SJC Order*, BOSTON GLOBE, Mar. 30, 2004, at A1.

appear likely to issue to same-sex couples in Massachusetts,<sup>98</sup> at least during the interim period between May 2004 and November 2006. News reports indicate, however, that Massachusetts Governor Mitt Romney and key legislators are considering various ways to postpone issuance of marriage licenses to same-sex couples until after November 2006.<sup>99</sup>

It is not yet clear at this point whether Massachusetts will ultimately break new ground in the full legal recognition of same-sex marriage fall back upon the model of Alaska and Hawaii, where the people refused to accept a judicial redefinition of marriage. In many respects, the Supreme Judicial Court decisions have proven to be only the start of the marriage debate in Massachusetts and throughout the United States. With a proposed marriage amendment currently pending at the Massachusetts Statehouse,<sup>100</sup> and a Federal Marriage Amendment gaining support in Washington,<sup>101</sup> there is an uneasy tension as those on both sides of the debate await the *Goodridge* decision, and wonder whether legislative counterpoint will again drown out the judicial melody.

*b. New Jersey.* On June 26, 2002, seven same-sex couples filed suit in Hudson County Superior Court alleging that the New Jersey marriage laws violate the New Jersey Constitution. In contrast to many of the marriage cases, the complaint filed by the five lesbian couples and two gay male couples contained only two claims for relief – one under an equal protection analysis, and the other under a right of privacy that ostensibly includes the right to marry. The plaintiff couples are represented by the Lambda Legal Defense and Education Fund, a national advocacy and litigation organization that claims to have spent more than a year preparing for the lawsuit.<sup>102</sup>

Lambda's preparation was evident in the three-pronged approach that simultaneously pressed the concept of same-sex unions in the legal, legislative and public arenas. In the legal arena, where other complaints have adopted something of a shotgun approach, the legal claims presented in Lambda's lawsuit were narrow and focused, avoiding issues that could distract from the main themes being advanced. These twin

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98. A Massachusetts statute prohibits Massachusetts clerks from issuing marriage licenses to couples from other states seeking to circumvent their own state's marriage laws. Mass. Gen. Laws, ch. 207, §11 (2003).

99. Rick Klein, *Romney Warns of "Legal Limbo" Governor Eyes Timing of Vote, Gay Marriages*, BOSTON GLOBE, Feb. 14, 2004, at A1.

100. 2003 Mass. H. 3190 ("The Marriage Affirmation & Protection Amendment").

101. Mike Allen & Alan Cooperman, *Bush Backs Amendment Banning Gay Marriage*, WASHINGTON POST, Feb. 25, 2004, at A1.

102. Complaint, *Lewis v. Harris* (N.J. Hudson Co. Super. Ct., June 26, 2002) (on file with author); Michael Booth, *Gay Marriage Suit May Derail Push for 'Civil Union' Status*, 169 N.J. L.J. 1 (July 1, 2002); Kate Coscarelli, *Same-sex Couples Sue For Right to Marry in N.J.*, THE STAR-LEDGER (Newark, N.J.), June 27, 2002, at 017.

themes of equality and freedom to marry have also formed the basis for legislative deliberations on measures addressing domestic partnerships and civil unions.<sup>103</sup> Finally, in the third prong of its approach, Lambda used the lawsuit and surrounding media coverage to launch a series of “town hall” style meetings in which Lambda attorneys and lobbyists met with interested citizens across the state.<sup>104</sup>

While Lambda and others have worked to develop grassroots receptivity to same-sex unions among New Jersey residents, the litigation has proceeded slowly, giving activists on both sides of the issue opportunity to educate and persuade the general public. At the time of the initial complaint, the state filed no response, and Lambda subsequently amended its complaint on October 9, 2002, releasing the local registrars of vital statistics who had been named in the initial complaint and naming only state officials as defendants.<sup>105</sup> On November 22, 2002, a consent order transferred venue to Mercer County, the customary venue for lawsuits naming the state as defendant.<sup>106</sup>

On February 24, 2003, Deputy Attorney General Patrick DeAlmeida, acting on behalf of the defendants, moved to dismiss the complaint.<sup>107</sup> More than ten weeks later, on May 8, 2003, Lambda filed its brief in opposition to the motion to dismiss,<sup>108</sup> and Judge Linda Feinberg set a hearing for June 27, 2003. At the hearing, Judge Feinberg converted the motion to dismiss into a motion for summary judgment, and requested further briefing.<sup>109</sup>

Shortly after the case was transferred to Mercer County, three separate groups filed coordinated applications to intervene in the litigation.<sup>110</sup> On May 31, 2003, Judge Feinberg denied each of the

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103. 2003 NJ A.3743 (domestic partnerships); 2003 NJ A3762 (civil unions).

104. Johanna Duerr, *Town Meeting on Gay Unions, Couples Rights Held in Cape May*, PRESS OF ATLANTIC CITY, May 7, 2003 (describing series of 10 town meetings held in support of marriage litigation and legislative measures).

105. Brief of Defendants in Support of their Motion to Dismiss at 3, *Lewis v. Harris*, No. 15-03 (N. J. Mercer Co. Super. Ct. Feb. 24, 2003).

106. *Id.*

107. *Id.*

108. Brief of Plaintiffs in Opposition to Defendants' Motion to Dismiss, *Lewis v. Harris*, No. 15-03 (N.J. Mercer Co. Super. Ct.).

109. See Michelle Han, *Gay Couples Fight in Court for Right to Marry; State Argues That Debate Belongs in Legislature*, NEW JERSEY RECORD, June 28, 2003, at A3.

110. The first group consisted of state legislators, represented by lawyers from the American Family Association, a national pro-family organization based in Mississippi. The legislators argued that they had a constitutional duty to establish public policy for the state of New Jersey, and that the litigation threatened their ability to fulfill that responsibility. See Opinion at 3, *Lewis v. Harris*, No. 15-03 (N.J. Mercer Co. Super. Ct. Nov. 5, 2003). A second group of taxpayers, married couples, and local pro-family organizations argued that the litigation would impair their interest in marriage, as it currently exists. *Id.* Finally, a business owner also sought to intervene, arguing that the outcome of

motions to intervene, finding the applicants to have failed to satisfy a four-part test required for intervention of right.<sup>111</sup> Particularly, Judge Feinberg noted, and the attorney for the legislators also conceded, that the Attorney General's office had presented an adequate representation of the case, at least up to the point of the hearing.<sup>112</sup> In denying the motions to intervene, Judge Feinberg granted each of the three groups of applicants *amicus curiae* status.<sup>113</sup>

On November 5, 2003, 16 months after the filing of the initial complaint, Judge Feinberg released a 71-page opinion granting the state's motion for summary judgment. In her opinion, Judge Feinberg rejected the plaintiffs' contention that a right of same-sex "marriage" is guaranteed in the New Jersey Constitution, and concluded that the definition of marriage is a matter best left to the New Jersey Legislature, noting that "courts will not second-guess the Legislature's policy decisions regarding economic, social and philosophical issues."<sup>114</sup> The case is currently pending on appeal.<sup>115</sup>

*c. Indiana.* On July 15, 2002, Marion County Superior Court Judge Cynthia Ayers rejected an equal protection challenge to a state personnel policy that did not include domestic partners under its spousal benefits coverage.<sup>116</sup> In her opinion, Judge Ayers concluded that the definition of marriage was at the heart of the benefits complaint, stating, "It is clear that the plaintiff's attack here is not on the funeral leave policy, but rather on the marriage statute and its preclusion of same-sex marriages."<sup>117</sup> Five weeks later, the Indiana Civil Liberties Union (ICLU), representing the plaintiff in the benefits case, also filed a challenge to the Indiana marriage statute. The ICLU suit was filed on behalf of three same-sex couples in Marion County Superior Court, seeking to compel the clerks of Marion County and neighboring Hendricks County to issue them marriage licenses.<sup>118</sup> Alternatively, the

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the litigation could impact his employee personnel policies, insurance premiums, and conflict with his religious beliefs. *Id.*

111. *Id.* at 3 n.1.

112. Kathy Barrett Carter, *Groups Denied Say in Suit on Gay Unions*, THE STAR-LEDGER (Newark, NJ), Apr. 1, 2003, at 15 (audio recording of hearing on file with author).

113. Opinion at 3 n.1, *Lewis v. Harris*, No. 15-03 (N.J. Mercer Co. Super. Ct. Nov. 5, 2003).

114. *Id.* at 5.

115. Michael Ann Knotts, *Appeal Ahead on Same-Sex Marriage Ban*, 12 N.J. LAW.: WKLY NEWSPAPER 2149 (Nov. 10, 2003); Mary P. Gallagher, et al, *Never Enough*, 174 N.J.L.J. 1111 (Dec. 29, 2003) (noting that notice of appeal was filed on Dec. 22, 2003).

116. Findings of Fact, Conclusions of Law and Entry of Summary Judgment, *Cornell v. Hamilton*, No. 49D04-0002-CP-180 (Ind. Marion Super. Ct. July 15, 2002).

117. *Id.* at Conclusions of Law ¶ 16.

118. Complaint at 11, Request for Relief ¶ 1, *Morrison v. O'Bannon*, No. 49D11-0208-PL-1415 (Ind. Marion Super. Ct. (filed Aug. 22, 2002)).

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couples, each of which has obtained a civil union license in Vermont, argued that the court should recognize them as “spouses” because of their legal status under Vermont law.<sup>119</sup>

The Indiana Attorney General then intervened to defend the marriage statute, and, on January 3, 2003, moved to dismiss the lawsuit for failure to state a claim upon which relief could be granted, pursuant to Rules 12(b)(1) and 12(b)(6) of the Indiana Trial Rules.<sup>120</sup> The memo filed in support of the motion to dismiss argued that the plaintiffs’ allegations regarding the tax code were outside the jurisdiction of the superior court, that the constitutional claims were without merit, and that federal rules of comity and Full Faith and Credit did not require an Indiana court to extend legal recognition to the plaintiffs’ “civil unions” entered into pursuant to Vermont law.<sup>121</sup>

Before responding to the motion to dismiss, Plaintiffs amended their complaint for a second time, dropping their claim for civil union recognition.<sup>122</sup> Following oral argument, Judge S.K. Reid reserved judgment, subsequently dismissing the complaint on May 7, 2003.<sup>123</sup> In her order, Judge Reid found several state interests sufficient to justify the Indiana statute<sup>124</sup> defining marriage as a male-female union. These interests included: (1) “encouraging procreation to occur in a context where both biological parents are present to raise the child,”<sup>125</sup> (2) “promoting the traditional family as the basic living unit of our free society,”<sup>126</sup> identifying a societal significance of the biological family, and (3) the reflexive interest in “protecting the integrity of traditional marriage,”<sup>127</sup> recognizing marriage as an objective and independent social good.

The case has been appealed to the Indiana Court of Appeals, where the case is currently pending.<sup>128</sup>

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119. *Id.* at 11, Request for Relief ¶ 2.

120. Defendants’ Rule 12(B)(1) and 12(B)(6) Motion to Dismiss, *Morrison v. Sadler*, No. 49D11-0208-PL-1415 (Ind. Marion Super. Ct. Jan. 3, 2003).

121. Memorandum in Support of Defendants’ Motion to Dismiss, *Morrison v. Sadler*, No. 49D11-0208-PL-1415 (Ind. Marion Super. Ct. Jan. 3, 2003).

122. Plaintiffs’ Second Amended Complaint, *Morrison v. Sadler*, No. 49D11-0208-PL-1415 (Ind. Marion Super. Ct. (filed Feb. 3, 2003)).

123. *Morrison v. Sadler*, No. 49D13-02110-PL-001946 (Ind. Marion Super. Ct.).

124. IND. CODE § 31-11-1-1 (2003).

125. *Morrison v. Sadler*, No. 49D11-0208-PL-1415, slip op. ¶ 17 (Ind. Marion Super. Ct., May 7, 2003).

126. *Id.* ¶ 23.

127. *Id.* ¶ 27.

128. Unlike previous marriage cases, the *Morrison* litigation has attracted little amicus attention. At the Indiana Court of Appeals, there were no amicus briefs filed in support of the Appellants, and only four briefs in support of the State.

*d. Arizona.* On July 7, 2003, two Arizona men filed a special action in the Arizona Court of Appeals seeking an order to compel the Superior Court to award them a marriage license.<sup>129</sup> After the United States Supreme Court decision in *Lawrence v. Texas*,<sup>130</sup> handed down on June 26, 2003, Mr. Harold Standhardt and Mr. Tod Keltner jointly applied for a marriage license from the Maricopa County Clerk. When the clerk denied the application, the two men circumvented the trial court, taking the unusual step of filing directly in the Court of Appeals.<sup>131</sup> Substantively, their complaint alleges that both the Arizona and United States Constitutions guarantee a right to marry another person of the same sex as a corollary of the constitutional guarantee of privacy articulated in *Lawrence v. Texas*.<sup>132</sup> The complaint also invoked the equal protection guarantee of the federal constitution and the equal privileges and immunities guarantee of the Arizona Constitution.<sup>133</sup>

News reports note that Standhardt and Keltner have resisted pressure from national gay rights groups urging them to withdraw their lawsuit. The pressure is based in strategic concern that litigation in Arizona would not advance a national strategy toward the recognition of same-sex marriage.<sup>134</sup> Consistent with this approach, the American Civil Liberties Union filed an amicus brief urging the Arizona Court of Appeals to refuse to hear the case, but to no avail.<sup>135</sup>

The Attorney General's office<sup>136</sup> argued strongly that there is no fundamental constitutional right to same-sex "marriage" under either the state or federal constitutions, that marriage statutes do not violate

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129. Petition for Special Action, Standhardt v. Superior Court of Ariz., 77 P.3d 451 (Ariz. Ct. App. 2003) (No. 1 CA-SA 03-0150) (July 7, 2003).

130. 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

131. Petition for Special Action, Standhardt v. Superior Court of Ariz., 77 P.3d 451 (Ariz. Ct. App. 2003) (No. 1 CA-SA 03-0150) (Petition for Special Action filed July 7, 2003).

132. *Id.* at 4 ("In *Lawrence v. Texas*, the United States Supreme Court succinctly recognized that gay persons have a fundamental privacy right to marry." (citations omitted)).

133. *Id.* at 6.

134. See, e.g., Judy Nichols, *Committed to Gay Marriage in Arizona, Couple Struggle with Suit to Wed*, ARIZONA REPUBLIC, Sept. 1, 2003, at A1

("[The plaintiffs] are walking the Arizona road virtually alone, without help from local and national organizations who say they support the cause. In fact, the groups tried to get the men to drop the lawsuit because they believe Arizona is the wrong place and this is the wrong time to raise the issue of same-sex marriage.")

135. Brief of Amici Curiae American Civil Liberties Union of Arizona and American Civil Liberties Union, Standhardt v. Superior Court of Ariz., 77 P.3d 451 (Ariz. Ct. App. 2003) (No. 1 CA-SA 03-0150).

136. As in New Jersey, a state legislator unsuccessfully attempted to intervene in the litigation and was granted amicus status. The amicus brief filed by the Alliance Defense Fund on behalf of State Senator Mark Anderson reinforced many of the arguments put forward in the Attorney General's response. Response to Special Action Petition by Intervenor-Respondent Senator Mark Anderson, Standhardt v. Superior Court of Ariz., 77 P.3d 451 (Ariz. Ct. App. 2003) (No. 1 CA-SA 03-0150).



guarantees of equal protection, and that the state has a legitimate interest in linking procreation to childrearing, such that children are being raised by their own biological parents whenever possible.<sup>137</sup>

On October 8, 2003, a three-judge panel of the Arizona Court of Appeals unanimously affirmed the constitutionality of the Arizona marriage law, rejecting both the state and federal constitutional claims made by Standhardt and Keltner.<sup>138</sup> Though having come and (apparently) gone without attracting national media attention, the *Standhardt* opinion is nonetheless significant in at least two respects.<sup>139</sup>

First, and perhaps most significantly, *Standhardt* makes the Arizona Court of Appeals the first court to have considered the Supreme Court's *Lawrence v. Texas* decision in the context of same-sex "marriage." After a summer full of speculation as to how *Lawrence* would impact the marriage debate, the Arizona Court of Appeals was given first opportunity for an official interpretation. Plaintiffs' claim that *Lawrence* implicitly created a fundamental right to marry a partner of the same-sex was based in language from the *Lawrence* decision stating:

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The *Casey* decision again confirmed that *our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.* *Id.*, at 851, 112 S.Ct. 2791. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Ibid. Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.*<sup>140</sup>

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137. State's Response to Petition for Special Action at 37, *Standhardt v. Superior Court of Ariz.*, 77 P.3d 451 (Ariz. Ct. App. 2003) (No. 1 CA-SA 03-0150) (quoting Lynn D. Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 HARV. J.L. & PUB. POL'Y 771 (2001); Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773 (2002)).

138. *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003).

139. Plaintiffs have reportedly filed a cert petition with the Arizona Supreme Court. Judy Nichols, *Appeal Likely Today on Gay-Marriage Ban*, ARIZ. REPUBLIC, Dec. 8, 2003, at B1.

140. *Lawrence v. Texas*, 123 S.Ct. 2472, 2481-82 (emphasis added by Arizona court).

The Arizona court concluded that this language does not set forth a fundamental right to enter into same-sex marriages, giving three reasons for its conclusion.<sup>141</sup> First, the court noted that elsewhere in the *Lawrence* decision, the Supreme Court explicitly held that its decision “[did] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>142</sup> Secondly, the Arizona court concluded that “these purposes” described by the Supreme Court in *Lawrence* referred back to the *Casey* quotation, establishing a right of homosexual persons to make “‘intimate and personal choices’ that reflect ‘one’s own concept of existence, of meaning, of the universe, and of the mystery of human life’ free from government compulsion.”<sup>143</sup> Finally, the Arizona court noted that the *Lawrence* decision did not declare sexual activity between persons of the same sex to be a fundamental right, applying the rational basis test in striking down the Texas statute.<sup>144</sup> In the absence of a clearly established fundamental right to sexual activity, the Arizona court was unable to find a fundamental right to same-sex marriage.<sup>145</sup>

The *Standhardt* decision is also significant in that the court recognized the state’s interest in “encouraging procreation and child-rearing within the stable environment traditionally associated with marriage.”<sup>146</sup> In its opinion, the Court of Appeals adopted the State’s argument that the benefits and responsibilities linked to marriage communicate the state’s concern that men and women undertake a commitment to each other for the good of the children that they produce.<sup>147</sup> While acknowledging that not all married couples have children, the Court nonetheless held the marriage statute a reasonable effort to further the link between marriage, procreation and childrearing.<sup>148</sup>

The court also addressed plaintiffs’ equal protection arguments, briefly noting that the Arizona marriage law “furthers a proper legislative end and was not enacted simply to make same-sex couples unequal to everyone else,”<sup>149</sup> distinguishing the Arizona marriage statute from the Supreme Court’s 1996 decision in *Romer v. Evans*.<sup>150</sup>

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141. *Standhardt*, 77 P.3d at 456-57.

142. *Id.* at 456 (quoting *Lawrence*, 123 S.Ct. at 2484).

143. *Id.* at 457 (quoting *Lawrence*, 123 S.Ct. at 2481-82).

144. *Id.* at 457.

145. *Id.*

146. *Id.* at 461.

147. *Id.* at 462-63.

148. *Id.*

149. *Id.* at 465

150. 517 U.S. 620 (1996).

### 5. *Marriage legislation*

Since 1994, state legislatures across the nation have considered marriage recognition (DOMA) legislation that has now been adopted in 38 states.<sup>151</sup> Over the past three years, however, the legislative debate has begun to shift, as advocates of same-sex marriage have introduced same-sex marriage legislation in several states and proponents of traditional marriage have, at least in part, turned their attention to state and federal constitutional amendments.<sup>152</sup> In the 2001 legislative session, same-sex marriage bills were introduced in three states (Connecticut, New York and Rhode Island),<sup>153</sup> a number which climbed to five states in the 2003 session (Connecticut, New York, Rhode Island, Montana, and Massachusetts).<sup>154</sup>

Though few of these measures have even received a legislative hearing, they still play an important strategic role in the campaign for same-sex marriage. As the sponsors of such legislation often explain, even in defeat the proposed legislation serves a long-term educational purpose, providing a context in which to discuss the topic of same-sex marriage with legislative colleagues and the general public.<sup>155</sup> In addition, such measures may triangulate state DOMA measures, creating a safe haven of passive neutrality for undecided legislators hesitant to take sides on a controversial issue.

Following the Massachusetts marriage decision, legislators in at least 18 states quickly introduced marriage amendments to their state constitutions in an effort to foreclose the possibility of similar litigation in their states.<sup>156</sup>

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151. *See supra* note 21.

152. Though beyond the scope of this article, same-sex marriage legislation has recently been adopted in two European nations: Netherlands and Belgium. Stb. 2001, No. 9 ("Act on the Opening Up of Marriage") (Bill 22672) (Dec. 21, 2000); Associated Press, *Belgium Votes to Recognize Gay Marriages*, CHICAGO TRIBUNE, Jan. 31, 2003, at 6. In November 2002, Statistics Netherlands, the official Dutch statistics agency, reported that "[s]ame-sex couples do not seem to be very interested in marriage," after finding that only 10% of the Netherlands' estimated 50,000 same-sex couples had married during the first 18 months after the new marriage law took effect. Press release, "More Marriages and More Partnerships," Statistics Netherlands, Nov. 27, 2002.

153. 2001 Conn. A.B. 6032; 2001 N.Y. S.B. 1205; 2001 R.I. H.B. 5608.

154. 2003 Conn. H.B. 6389; 2003 Mass. H.B. 3677; 2003 Mont. H.B. 607; 2003 N.Y. A. 7392; 2003 R.I. H.B. 5861; 2003 R.I. S.B. 496.

155. *See, e.g.*, Cheryl Wetzstein, *California Gay-Union Bill Pulled; Family Advocates Apply Pressure*, WASHINGTON TIMES, Jan. 17, 2002, at A10 (quoting California Assemblyman Paul Koretz after withdrawal of his domestic partnership bill: "I'll be here for at least five years. These same-sex families are here to stay. This issue is here to stay. And whether it's this year or next year, the bill will be back.>").

156. *See, e.g.*, 2004 Al. H.B. 8; 2004 Ariz. Sen. Con. Res. 1015; 2003 Ga. Sen. Res. 595; 2004 Id. H.J.Res. 9; 2004 Ill. H.C.A. 24 [couldn't find]; 2004 Ind. Sen. J. Res. 7; 2004 Iowa Sen. J. Res. 2002; 2003 Kan. H.Con.Res. 5033; 2004 Ky. H.B. 95; 2003 Mass. H. 3190; 2004 Md. S.B. 673;

Significant as these state efforts are to the future of the marriage debate, state legislative efforts have been recently overshadowed by U.S. House Joint Resolution 56, proposing a marriage amendment to the United States Constitution.<sup>157</sup> The Federal Marriage Amendment was introduced in Congress on May 21, 2003, and had 115 co-sponsors as of March 1, 2004.<sup>158</sup> An identical proposal introduced in the Senate on November 25, 2003 had nine cosponsors as of March 1.<sup>159</sup> The amendment effort, spearheaded by the Alliance for Marriage,<sup>160</sup> is an effort to (1) constitutionally define marriage as the union of a man and a woman, and (2) prevent the courts from mandating the creation of a quasi-marital status, such as Vermont civil unions. The text of the amendment reads: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."<sup>161</sup>

On September 9, the Administrative Committee of the U.S. Conference of Catholic Bishops lent their support to the federal marriage amendment effort.<sup>162</sup> In an October 2, 2003 press conference, twenty-four primarily conservative organizations joined together in a Coalition to Protect Marriage, pledging to mobilize grassroots support for traditional marriage in the months leading up to the 2004 elections.<sup>163</sup> Various commentators have suggested that the Federal Marriage Amendment is likely to play a prominent role in the 2004 presidential and congressional elections, and may be included as part of the Republican Party platform.<sup>164</sup>

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2004 Mich. S.J.Res. 5; 2004 Minn. H.F. 2798; 2004 Miss. H. Con.Res. 56; 2004 Mo. S.J.Res. 29; 2004 Okla. H.J.Res. 1042; 2004 Utah H.J.Res. 25; 2004 Vt. P. 3; 2004 Wis. A.J.Res. 66.

157. U.S. H.R.J.Res. 56, 108<sup>th</sup> Cong. (2003).

158. *Bill Summary and Status for the 108<sup>th</sup> Congress*, available at <http://thomas.loc.gov> (H.J.Res. 56, 108<sup>th</sup> Cong. (2003)).

159. *Id.* (Sen. J. Res. 26, 108<sup>th</sup> Cong.)

160. See <http://www.allianceformarriage.org>.

161. U.S. H.R.J.Res. 56, 108<sup>th</sup> Cong. (2003).

162. Press Release, *U.S. Catholic Bishops' Administrative Committee Calls for Protection of Marriage*, United States Conference of Catholic Bishops, Sept. 10, 2003, available at <http://www.usccb.org/comm/archives/2003/03-179.htm>.

163. Cheryl Wetzstein, *Groups Pledge to Support Marriage; Say Gay Threat Demands Action*, WASHINGTON TIMES, Oct. 3, 2003, at A1.

164. See, e.g., Mark O'Keefe, *An Uneasy Union: Religious Groups Come Out Against Gay Marriages*, SAN DIEGO UNION-TRIBUNE, Oct. 16, 2003, at A4 (quoting a May 7 memo from pollster Richard Wirthlin which identifies the Federal Marriage Amendment as "an ideal wedge issue" which could work to the advantage of the Republican party in the 2004 elections); Mary Leonard, *Campaign 2004: Gay Marriage Stirs Conservatives Again*, BOSTON GLOBE, Sept. 28, 2003, at A1 (quoting Republican National Committee Chairman Ed Gillespie as saying that a federal marriage amendment may be "addressed in some form or fashion" in the party's 2004 platform).

*B. Marital Benefits Legislation and Cases*

As early as 1973, legal commentators had begun to suggest that some status, alternative to marriage, might be created as a means of extending certain spousal benefits to same-sex couples. Writing in the *Yale Law Journal*, one commentator suggested:

Although private consensual homosexual activity might be legalized in this country without creating many problems as it was in Great Britain, the expansion of marriage to encompass homosexual couples would alter the nature of a fundamental institution as traditionally conceived.

The Supreme Court may in the future decide that such alteration is beyond its competence and therefore that marriage should be confined to its present definition absent a positive move on the part of individual state legislatures to broaden it. If such proves to be the case, particular legal benefits available only to married couples might still be attacked on equal protection grounds under both the Fourteenth and Twenty-seventh Amendments.

If the Court granted homosexuals some of these benefits – without compelling states to grant marriage licenses – it might eventually create a ‘quasi-marital’ status. State legislatures might explicitly grant such a status, and specify the attendant rights.<sup>165</sup>

Twenty-five years later, these words proved prophetic, as first the Oregon Court of Appeals,<sup>166</sup> then the Vermont Supreme Court,<sup>167</sup> ruled that same-sex couples were constitutionally entitled to the rights and benefits of marriage. While clearly tied to the marriage controversy, as with other aspects of the marriage debate, the manner in which that connection is made becomes very significant.

Legislatures have long been in the business of linking benefits and marriage, and are particularly suited to sever that connection where appropriate for a particular benefit. For example, where state law bundles numerous benefits and responsibilities as part of the marriage “package,” a legislative body may evaluate each of those rights and determine which in fact further the state’s interests in marriage, which are common to all parents, and which should be made applicable to all individuals regardless of marital or parental status. To the Vermont Court, however, equipped only with the hammer of “common benefits,” every benefit, protection, or responsibility of marriage suddenly became a nail, leaving

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165. Note, *The Legality of Homosexual Marriage*, 82 *YALE L.J.* 573, 588-89 (1973).

166. *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998) (finding the Oregon Constitution to require state employers to treat domestic partners equally with married couples).

167. *Baker v. State*, 744 A.2d 864 (Vt. 1999) (finding the Vermont Constitution to require that same-sex couples be granted all the legal rights, benefits, and responsibilities of marriage).

the court no room to consider whether certain functions of marriage might still serve a valid purpose under state law, distinguishing marriage from other relationships. Litigation thus becomes a blunt instrument, ill equipped to respond to the exigencies of a given factual setting.

### 1. *Domestic Partnerships*

Unlike the debate over the definition of marriage itself, most of the debate over spousal benefits for same-sex couples has in fact occurred in legislative bodies. Nationally, a handful of states and various local governments have extended some form of recognition to same-sex partnerships.<sup>168</sup> These relationships often mirror various requirements for marriage, but are narrower in scope than marriage.<sup>169</sup> Usually established under the rubric of “domestic partnerships,” most policies are limited to employee benefits for unmarried partners of government employees.<sup>170</sup> A number of jurisdictions have also adopted “domestic partner registries,” permitting same-sex couples to formally register their partnership, though such registries often carry few substantive benefits.<sup>171</sup>

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168. While some private employers also offer domestic partner benefits to their employees, this article focuses on domestic partnership policies in the public sector. In the private sector, recent reports from the Human Rights Campaign indicate that 5667 private employers offer spousal benefits for the domestic partners of their employees, comprising approximately 0.11% of the nation’s 5.3 million employers as documented in the U.S. Census Bureau’s 1997 Economic Census. See “Company Summary: 1997 Economic Census” at 15, Table 1 United States Census Bureau, available at <http://www.census.gov/prod/ec97/e97cs-1.pdf>; “Domestic Partner Benefits,” Human Rights Campaign, available at <http://www.hrc.org/worknet/dp/index.asp>. The numbers are significantly higher among Fortune 500 companies, though still a minority as the Human Rights Campaign counts 202 of the Fortune 500 that offer domestic partner benefits, approximately 40% of the nation’s largest companies. In 1997, the City of San Francisco adopted a benefits plan requiring private employers to offer domestic partner benefits in order to be eligible to compete for city contracts. The cities of Los Angeles and Seattle subsequently adopted similar ordinances. Los Angeles Admin. Code, Div. 10, Chap. 1, Art. 1, § 10.8.2; Seattle Mun. Code § 20.45.020. Five years later, based on data showing that 75% of the 4500 businesses that offered domestic partner benefits in 2002 did so in order to comply with the San Francisco city ordinance. San Francisco Human Rights Commission, *Five Year Report on the San Francisco Equal Benefits Ordinance*, Nov. 14, 2002, at 1.

169. The definition of a domestic partner put forward by the Oregon Court of Appeals contains many typical elements, though wide variation exists between jurisdictions. *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 439 (Or. Ct. App. 1998) (defining “domestic partners” as (1) “homosexual persons,” (2) “not related by blood closer than first cousins,” (3) “who are not legally married,” (4) “who have continuously lived together,” (5) “in an exclusive and loving relationship,” (6) “that they intend to maintain for the rest of their lives,” (7) “who have joint financial accounts,” and (8) “joint financial responsibilities,” (9) “who would be married to each other if Oregon law permitted it,” (10) “who have no other domestic partners,” and (11) “who are 18 years of age or older”). See also William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV. 961 (2001) (surveying 35 domestic partnership ordinances).

170. See William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV. 961 (2001).

171. See *id.*

Three states offer some form of legally recognized status that confers certain legal rights and benefits upon same-sex couples. Hawaii was the first, adopting its “reciprocal beneficiary” statute in 1997 as part of a legislative compromise allowing the marriage amendment to move forward. Under the reciprocal beneficiary law, any two adults who cannot legally marry (including parent/child, roommates, siblings, etc.) may enter into a reciprocal beneficiary relationship and receive sixty statutory rights and benefits available to married couples, including survivorship rights, health insurance, and joint property ownership.<sup>172</sup> The most well known of the three systems exists in Vermont, where the legislature adopted “civil unions” in 2000, extending to registered same-sex couples all the legal benefits and responsibilities of marriage.<sup>173</sup> Lesser known is the fact that Vermont also adopted a “reciprocal beneficiary” statute in 2000.<sup>174</sup> Unlike the civil union statute that provides broad rights for same-sex couples, the reciprocal beneficiary statute provides a smaller set of spousal benefits to close relatives who are precluded from entering into a marriage or civil union due to their relationship by blood or adoption.<sup>175</sup> While more than 6,000 couples (mostly from out-of-state) have now entered into a civil union, as of August 2003 no couple had yet applied to establish a reciprocal beneficiary relationship.<sup>176</sup> Established in 1999, California’s “domestic partnership” is by far the most populous of the various registries with more than 23,000 registered domestic partners as of November 1, 2003.<sup>177</sup> As initially established, domestic partners received hospital visitation rights and health insurance coverage for dependents of state employees.<sup>178</sup> In 2001, the list of benefits was expanded to include eligibility for stepparent adoptions, family and medical leave, standing to bring a wrongful death lawsuit, and inheritance rights, among others.<sup>179</sup> Even more recently, on September 19, 2003, California Governor Gray

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172. HAW. REV. STAT. § 572C-1 (2003); *Hawaii’s Domestic Partner Law A Bust; Relatively Few Sign Up for Country’s Broadest Benefits Package*, WASHINGTON POST, Dec. 25, 1997, at A14 (finding that only 296 couples had signed up for benefits, in contrast to the state’s estimate of 20,000 couples).

173. VT. STAT. ANN. tit. 15, § 1201 (2004). In Vermont, the adoption of civil unions did not come without political controversy, including a “Take Back Vermont” campaign in the fall of 2000 that removed 20 pro-civil union legislators from office in November 2000. *See* Nancy Remsen, *Statehouse Sees Shift in Power*, BURLINGTON FREE PRESS, Nov. 9, 2000.

174. Vt. Stat. Tit. 15, § 1301 (2004).

175. *Id.* at §§ 1301, 1303.

176. E-mail from Richard McCoy (Aug. 25, 2003) (on file with author).

177. Phone call with Special Filings Section of California Secretary of State (Nov. 3, 2003) (reporting that of the 23,442 registered domestic partnerships, an estimated 90% have been issued to California residents).

178. 1999 Cal. Legis. Serv. 588 (West).

179. 2001 Cal. Legis. Serv. 893 (West).

Davis signed into law a bill which will make registered domestic partners the legal equivalent of married spouses under all provisions of state law when the bill takes effect on January 1, 2005.<sup>180</sup>

The Human Rights Campaign (HRC) reports that, as of November 2003, ten state governments extended benefits to domestic partners of state employees.<sup>181</sup> Though a precise tally is difficult to obtain, at the local level, HRC counts approximately 166 cities and counties throughout the United States that offer domestic partner benefits.<sup>182</sup> This number constitutes slightly less than 0.2 percent of the nation's 87,525 units of local government as recorded by the 2002 Census of Governments.<sup>183</sup>

Reports indicate that Berkeley, California became the first American municipality to offer domestic partner benefits to its employees in 1984.<sup>184</sup> Beginning in the mid-1990's, as additional cities and counties began to offer similar benefit ordinances, taxpayer challenges to these ordinances were filed in a number of jurisdictions. With mixed results, the lawsuits have commonly focused on two primary allegations: (1) that the policies were outside the scope of municipal authority granted by state law, and (2) that they infringed upon the exclusively state legislative authority over domestic relations law.<sup>185</sup>

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180. 2003 Cal. A.B. 205. Two lawsuits have been filed in a pre-implementation challenge to the bill. The lawsuits allege the measure unconstitutionally contradicts the initiative statute defining marriage as the union of one man and one woman that was overwhelmingly approved by California voters on March 7, 2000. *Suit Challenges Partners' Rights Bill*, SAN FRANCISCO CHRONICLE, Sept. 23, 2003, at A16.

181. *State Governments that Offer Domestic Partner Health Benefits*, Human Rights Campaign, available at <http://www.hrc.org/worknet/dp/index.asp> (including California, Connecticut, Iowa, Maine, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington).

182. *Local Governments and Quasi-Governmental Agencies That Offer Domestic Partners Health Benefits*, Human Rights Campaign, available at <http://www.hrc.org/worknet/dp/index.asp> (a search for units of local government offering domestic partner benefits turned up 166 results, including 83 cities and towns, 33 counties, as well as various school districts and special district governments).

183. *Government Organization*, at 2, Table 2, 2002 Census of Governments (Dec. 2002), available at <http://www.census.gov/prod/2003pubs/gc021x1.pdf> (finding 87,525 total units of local government, including 3,034 county governments, 19,429 municipal governments, and 16,504 town or township governments, in addition to 13,506 school district governments, and 35,052 special district governments).

184. *See Governments Offering Benefits*, Partners Task Force for Gay and Lesbian Couples, available at <http://www.buddybuddy.com/d-p-gov.html> (last visited Nov. 4, 2003).

185. *See, e.g.*, Lilly v. City of Minneapolis, 527 N.W.2d 107 (Minn. Ct. App. 1995) (Minn. Sup. Ct. denied review) (invalidating ordinance); City of Atlanta v. McKinney, 265 Ga. 161, 454 S.E.2d 517 (1995) (invalidating ordinance); City of Atlanta v. Morgan, 268 Ga. 586, 492 S.E.2d 193 (1997) (affirming ordinance); Schaefer v. City & County of Denver, 973 P.2d 717 (Colo. Ct. App. 1998) (affirming ordinance); Crawford v. City of Chicago, 304 Ill. App.3d 818, 237 Ill. Dec. 668, 710 N.E.2d 91 (Ill. App. Ct. 1999) (affirming ordinance); Connors v. City of Boston, 430 Mass. 31, 714 N.E.2d 335 (Mass. 1999) (invalidating ordinance); Slattery v. City of New York, 179 Misc.2d 740, 686 N.Y.S.2d 683 (N.Y. Sup. Ct.), *aff'd as modified* by 697 N.Y.S.2d 603 (1999) (affirming



Other questions surrounding domestic partner ordinances have arisen regarding the complex interplay between state and federal law. In San Francisco, California, the ordinance requiring city contractors to offer domestic partner benefits to their employees was found to be preempted by the federal Employee Retirement Income Security Act (ERISA) with respect to ERISA-covered health and pension plans.<sup>186</sup> In Portland, Maine, Catholic Charities filed suit in February 2003 making the same arguments against a similar ordinance recently adopted by the City of Portland.<sup>187</sup>

In April 2003, a Vermont legislative committee approved legislation excluding civil union partners from the definition of “spouse” in statutes governing the state’s Medicaid system.<sup>188</sup> Because federal law defines spousal eligibility for Medicaid coverage in terms of marriage between a man and a woman,<sup>189</sup> the legislators expressed concern that Vermont law recognizing civil union partners as “spouses” could jeopardize the state’s federal Medicaid funding. Having received no definitive answer from Washington, the state ultimately elected to rely exclusively on state funding to cover Medicaid premiums for same-sex couples related by civil union, rather than risk reliance on federal dollars which might jeopardize the entire program.<sup>190</sup>

## 2. Benefits Litigation

For several years, litigation has produced an increasingly pronounced rhetorical separation between marital status and marital benefits, as

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ordinance); *Lowe v. Broward County*, 766 So.2d 1199 (Fla. App. 4th Dist. 2000) (Fla. Sup. Ct. denied review) (affirming ordinance); *Arlington County v. White*, 259 Va. 708, 528 S.E.2d 706 (2000) (invalidating ordinance); *Irizarry v. Bd. of Educ.*, 251 F.3d 604 (7th Cir. 2001) (affirming ordinance); *S.D. Myers, Inc. v. City & County of San Francisco*, 253 F.3d 461 (9th Cir. 2001); *Heinsma v. City of Vancouver*, 29 P.3d 709 (Wash. 2001); *Pritchard v. Madison Metro. Sch. Dist.*, 242 Wis. 2d 301, 625 N.W.2d 613 (2001) (affirming ordinance); *Tyma v. Montgomery County*, 801 A.2d 148 (Md. 2002) (affirming ordinance); *Devlin v. City of Philadelphia*, 809 A.2d 980 (Pa. Commw. Ct., 2002) (invalidating ordinance).

186. *Air Transp. Ass’n of Am. v. City & County of San Francisco*, 992 F. Supp. 1149, 1155 (N.D. Cal. 1998).

187. Tess Nacelewicz, *Catholic Charities Sues City on Domestic Partner Issue*, PORTLAND PRESS HERALD, Mar. 1, 2003, at 1A.

188. Associated Press, *Vt. Panel’s New Medicaid Rules Said to Violate Civil Unions Law*, BOSTON GLOBE, Apr. 19, 2003, at B2; David Mace, *Critics Say Rule Change Violates Civil Unions*, TIMES ARGUS, Apr. 17, 2003.

189. 1 U.S.C. §7. (“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.” Pub. L. 104-199, sec 1, 100 Stat. 2419 (Sep. 21, 1996)).

190. Darren M. Allen, *Administration Shifts Civil Union Medicaid Stance*, TIMES ARGUS, July 11, 2003.

various plaintiffs have argued that they are constitutionally entitled to marital benefits, while stopping short of claims for legal recognition of a same-sex “marriage.” Until 1998, these claims were uniformly unsuccessful.<sup>191</sup>

*a. Hawaii and Alaska - wrapping up Baehr and Brause.* Though earlier benefits cases had been litigated, the distinction between marital status and marital benefits may have been first highlighted in Alaska and Hawaii after the adoption of the marriage amendments to their respective state constitutions. In both Alaska and Hawaii, after constitutional amendments effectively precluded their campaign for full legal recognition of same-sex “marriage,” the plaintiffs or their amici alternatively argued that principles of equality demanded same-sex couples be accorded the rights and benefits of marriage, even if marital status itself were to describe only opposite-sex couples.<sup>192</sup> Both courts sidestepped the question, however. The Alaska Supreme Court dismissed the case on procedural grounds, determining that the plaintiffs had failed to present an actual controversy,<sup>193</sup> and the Hawaii Supreme Court only hinted at a response to the arguments made by the ACLU in an amicus brief, stating: “The plaintiffs seek a limited scope of relief in the present lawsuit, i.e., access to applications for marriage licenses and the consequent legally recognized marital status. Inasmuch as HRS § 572-1 is now a valid statute, the relief sought by plaintiffs is unavailable.”<sup>194</sup>

*b. Oregon Court of Appeals - Tanner v. OHSU.* In 1998, the Oregon Court of Appeals became the first American court to find that an

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191. *Bailey v. City of Austin*, 972 S.W.2d 180 (Tex. Ct. App. 1998); *Hinman v. Dep’t. of Personnel Admin.*, 213 Cal. Rptr. 410 (Cal. App. 3d Dist. 1985) (holding state’s denial of spousal dental insurance coverage to unmarried same-sex partners of state employees not unconstitutional); *Phillips v. Wisconsin Personnel Comm’n*, 482 N.W.2d 121 (Wis. Ct. App. 1992) (holding state policy limiting employee dependent health insurance benefits to spouses and dependent children not unconstitutional); *Ross v. Denver Dep’t of Health & Hosps.*, 883 P.2d 516 (Colo. Ct. App. 1994) (rejecting equal protection and due process challenge to denial of health insurance coverage for same-sex partner of employee); *Rutgers Council v. Rutgers*, 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997), *cert. denied*, 707 A.2d 151 (1998) (finding same-sex partner is not a “spouse” for purposes of health insurance law and contract); *Alaska Civil Liberties Union v. Alaska*, No. S-10459 (Alaska [date]).

192. *Brause v. State, Dept. of Health & Social Services*, 21 P.3d 357 (Alaska 2001); *AkCLU v. Alaska*, No. S-10459 (Alaska Oct. 27, 1999) (case filed on behalf of eight same-sex couples seeking a constitutional right to spousal employee benefits); *Baehr v. Miike*, No. 91-1394-05 (Dec. 9, 1999).

193. *Brause v. State, Dept. of Health & Social Services*, 21 P.3d 357, 358 (Alaska 2001).

194. *Baehr v. Miike*, No. 91-1394-05 (Haw. Dec. 9, 1999). David O. Coolidge has noted that this suggestive language raises more questions than it answers with respect to marital benefits. *The Hawai’i Marriage Amendment: Its Origins, Meaning, and Fate*, 22 U. HAW. L. REV. 19, 111 (2000). Particularly, if marriage licenses are a narrow pursuit resulting in marital status, what is the broader claim that the court may be anticipating? *Id.* Does it involve marital benefits as separated from marital status? *Id.* The Court left these questions unclear. *Id.*

unmarried couple had a constitutional right to marital benefits.<sup>195</sup> In *Tanner*, three lesbian employees of the Oregon Health Sciences University applied for medical and dental insurance benefits on behalf of their same-sex partners, affirming that they would have married their partners were they permitted to do so under state law.<sup>196</sup> In the summer of 1996, the trial court found that the denial of benefits violated both an employment discrimination statute<sup>197</sup> and a constitutional provision guaranteeing equal privileges and immunities to all classes of citizens.<sup>198</sup> Moreover, the trial court attempted to define a “domestic partner” who would be entitled to marital benefits. The court’s rather unwieldy definition held that domestic partners would include “homosexual persons not related by blood closer than first cousins who are not legally married, who have continuously lived together in an exclusive and loving relationship that they intend to maintain for the rest of their lives, who have joint financial accounts and joint financial responsibilities, who would be married to each other if Oregon law permitted it, who have no other domestic partners, and who are 18 years of age or older.”<sup>199</sup>

On appeal, the Court of Appeals ultimately found no statutory violation, but declared that same-sex couples constituted a suspect class for purposes of the constitutional analysis under Article I, section 20 of the Oregon Constitution.<sup>200</sup> Having described same-sex couples as a suspect class, the court also applied a disparate impact analysis, declaring it irrelevant that the University had no intent to discriminate against same-sex couples.<sup>201</sup> In the final paragraphs of its opinion, the court described the disparity: “Homosexual couples may not marry. Accordingly, the benefits are not made available on equal terms. They are made available on terms that, for gay and lesbian couples, are a legal impossibility.”<sup>202</sup> When the defendant university showed no interest in appealing the decision, State Representative Ron Sunseri took the

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195. *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998). See also William C. Duncan and David O. Coolidge, *Marriage and Democracy in Oregon: The Meaning and Implications of Tanner v. Oregon Health Sciences University*, 36 WILLAMETTE L. REV. 503, 518-20 (2000).

196. *Tanner* at 438.

197. OR. REV. ST. § 695.030(1)(b) (prohibiting discrimination on the basis of the sex of one “with whom the individual associates,” which the court interpreted as a de facto prohibition of discrimination on the basis of sexual orientation).

198. OR. CONST. art. I, § 20 (“No law shall be passed granting to any citizen or class of citizens privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.”); *Tanner* at 438-39.

199. *Tanner* at 439.

200. *Id.* at 447.

201. *Id.*

202. *Id.* at 448.

unusual step of seeking a writ of mandamus requiring the Court of Appeals to vacate its opinion.<sup>203</sup> The Oregon Supreme Court refused to consider the case.<sup>204</sup>

The *Tanner* ruling was narrow, applicable only to spousal benefits for state university employees.<sup>205</sup> Nonetheless, the analysis was a precursor of that which would appear a year later in the Vermont Supreme Court's decision in *Baker v. State*.<sup>206</sup> While *Tanner* went virtually unnoticed outside of a few legal circles, *Baker* would set the state into political turmoil.

*c. Vermont - Baker v. State.* Although the *Baker* court explicitly rejected the suspect class analysis adopted in *Tanner*,<sup>207</sup> the basic substance of the *Baker* opinion finds commonality with much of the *Tanner* opinion. In *Baker*, the Court observed that "the marriage statutes apply expressly to opposite-sex couples. Thus, the statutes exclude anyone who wishes to marry someone of the same sex."<sup>208</sup> After reciting a list of the governmental benefits that are tied to marriage, the Court stated, "While other statutes could be added to this list, the point is clear. The legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned."<sup>209</sup>

Once having reviewed the various interests put forward by the state in defense of the marriage statute, the Court concluded that "none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law. Accordingly, in the faith that a case beyond the imagining of the framers of our Constitution may, nevertheless, be safely anchored in the values that infused it, we find a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples."<sup>210</sup>

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203. Rep. Sunseri had argued that as a state legislator, his performance of his duties would be impacted by the decision, and that the court could be required to vacate an incorrect ruling. For additional information, see William C. Duncan and David O. Coolidge, *Marriage and Democracy in Oregon: The Meaning and Implications of Tanner v. Oregon Health Sciences University*, 36 WILLAMETTE L. REV. 503, 518-20 (2000).

204. Order Denying Petition for Writ of Mandamus, *Sunseri v. Court of Appeals* (Or. Mar. 15, 1999) (No. S46055).

205. *Tanner v. Or. Health Sciences Univ.*, 971 P.2d at 437.

206. *Id.* at 445-47.

207. *Baker v. State*, 744 A.2d 864, 878 n.10 (Vt. 1999).

208. *Id.* at 880.

209. *Id.* at 884.

210. *Id.* at 886.

It was in the Baker court's articulation of remedy that it became startlingly clear that the Vermont Supreme Court had turned a marriage controversy into a question of benefits.

Although plaintiffs sought injunctive and declaratory relief designed to secure a marriage license, their claims and arguments here have focused primarily upon the consequences of official exclusion from the statutory benefits, protections, and security incident to marriage under Vermont law. While some future case may attempt to establish that— notwithstanding equal benefits and protections under Vermont law— the denial of a marriage license operates per se to deny constitutionally-protected rights, that is not the claim we address today.

We hold only that plaintiffs are entitled under Chapter I, Article 7, of the Vermont Constitution to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples. We do not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as “domestic partnership” or “registered partnership” acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partners.<sup>211</sup>

The *Baker* court thus left the legislature with four options: (1) propose a constitutional amendment which would effectively reverse the *Baker* decision; (2) simply ignore the Court's directive, likely resulting in judicially imposed same-sex “marriage”; (3) adopt some parallel system of spousal recognition for same-sex couples; or (4) include same-sex couples within the existing statutory system governing marriage. Faced with these options, a number of legislators unsuccessfully pursued the first route, and the proposed constitutional amendment was eventually defeated 17-13 in the Vermont Senate.<sup>212</sup> Others favored full recognition of same-sex “marriage,” an idea that proved politically untenable.<sup>213</sup> Cowed by the court's authority, and also by the prospect of the court's retained jurisdiction over the case, the Legislature eventually

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211. *Id.*

212. David O. Coolidge and William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 VT. L. REV. 61, 77 (2000) (citing Journal of the Senate, Proposal 6, 65th Gen. Assem. Bienn. Sess. (Vt.) (Apr. 18, 2000), at 2, available at <http://www.leg.state.vt.us/docs/2000/journals/sj000418.htm>).

213. *Id.* at 74 (same-sex “marriage” legislation was defeated by a 125-22 margin, providing political cover for many who eventually supported the civil unions legislation).

approved a system of “civil unions,” over the strong objections of a sizeable minority.<sup>214</sup>

There remain differences of opinion regarding the extent to which *Baker* is properly classified as a benefits case, or whether it belongs in the list of marriage litigation. For my purposes, I have included *Baker* on both lists, having been filed as a marriage case and decided as a benefits case. On its face, Justice Amestoy’s majority opinion goes out of its way to remind the parties that the decision is not about the right to legal recognition of same-sex marriage, but only about providing benefits for same-sex couples.<sup>215</sup> In reserving judgment on the question of marriage licenses, it can be argued that the *Baker* court left open the possibility that marriage, as an independent social institution, may represent something greater than the accumulation of legal benefits attached to it. Other commentators, however, have argued that the *Baker* decision itself is in fact a reductionist redefinition of marriage, making marriage into nothing more than a policy device by which to achieve certain social ends and upon which to confer certain legal benefits.<sup>216</sup> This alone, the argument would continue, is a striking redefinition of marriage, perhaps necessary to the inclusion of same-sex couples, though not in itself requiring such inclusion.

In *Tanner*, the Oregon Court of Appeals became the first court to constitutionally compel the extension of marital benefits to unmarried same-sex couples. The *Baker* court took this reasoning and extended it in an expansive ruling that applied to all marital benefits and responsibilities available under state law. Begun as a challenge the definition of marriage in Vermont and concluded as a dispute over spousal benefits, *Baker* uniquely demonstrates the close doctrinal relationship between marriage and benefits litigation.

*d. New York – Levin v. Yeshiva.* Additional cases have brought marital benefits litigation to other states. In *Levin v. Yeshiva University*,<sup>217</sup> two female Yeshiva University students challenged a university policy which established priority for married couples in applications for certain student apartments maintained by the university.<sup>218</sup> The complaint alleged (1) that the married student housing policy discriminated against unmarried students on the basis of their marital status in contravention of state law and municipal code, and (2)

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214. The civil unions bill ultimately passed the Vermont House by a 76-69 margin, and was approved in the Senate on a 19-11 vote. *Id.* at 74, 78.

215. *Baker v. State*, 744 A.2d 864, 886.

216. See Coolidge and Duncan, *supra* note 212, at 61-67.

217. 754 N.E.2d 1099 (N.Y. 2001).

218. *Id.* at 1101.

that the policy had a disparate discriminatory impact against gay and lesbian students in violation of New York City Code.<sup>219</sup>

The trial court and Appellate Division both rejected the disparate impact claims, finding that the policy “had the same impact on non-married, heterosexual medical students as it had on non-married homosexual medical students.”<sup>220</sup> On further appeal, after briefly disposing of the marital status claim, the New York Court of Appeals applied a similar disparate impact analysis as was applied by the Oregon Court of Appeals in *Tanner*, remanding the case to the trial court for a factual determination of “whether [the University’s] housing policy has a disparate impact that falls along the impermissible lines of sexual orientation.”<sup>221</sup> Moreover, the Court rejected the Appellate Division’s reasoning, which found an equal impact upon unmarried opposite-sex couples and unmarried same-sex couples.<sup>222</sup>

*e. Recent benefits cases.* More recently, cases filed in Indiana and Montana have sought to replicate *Tanner* in other states. In Indiana, a state employee applied for bereavement leave upon the death of her lesbian partner’s father.<sup>223</sup> The funeral leave policy provided three days of paid leave upon the death of certain extended family members, including relatives by marriage, thus creating certain benefits available only to married persons.<sup>224</sup> Claiming that the policy was discriminatory as applied to gay and lesbian persons, the complaint alleged a violation of the Privileges and Immunities Clause of the Indiana Constitution.<sup>225</sup>

The trial court concluded that the benefit statute did not discriminate on the basis of sexual orientation, but rather distinguished between classes of married and unmarried individuals.<sup>226</sup> The court then adopted the state’s argument, *inter alia*, that the marriage-based bereavement leave policy was reasonable insofar as it provided an objective and easily identifiable standard upon which to base employee benefits, relying on the longstanding legal structure of marriage.<sup>227</sup> On appeal, the court took a more skeptical approach, summarily rejecting the state’s proffered justifications for the policy and declaring simply, “[T]he policy exists to

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219. *Id.*

220. *Levin v. Yeshiva Univ.*, 709 N.Y.S.2d 392, 393 (N.Y. App. Div. 2000), *rev’d on appeal* 754 N.E.2d 1099 (N.Y. 2001).

221. *Levin v. Yeshiva Univ.*, 754 N.E.2d at 1106.

222. *Id.* at 1105-06.

223. *Cornell v. Hamilton*, 791 N.E.2d 214, 215 (Ind. Ct. App. 2003).

224. *Id.* at 219.

225. *Id.* at 215.

226. *Cornell v. Hamilton*, Findings of Fact, Conclusions of Law and Entry of Summary Judgment, 49D04 0002 CP 180 (Ind. Marion Super. Ct., July 15, 2002), *aff’d on appeal*, 791 N.E.2d 214 (Ind. Ct. App. 2003).

227. *Id.*

strengthen family relationships, and families are different today than they once were.”<sup>228</sup> Nonetheless, the court found that the plaintiff had conceded a rational connection between marriage and the bereavement policy, arguing only that it was discriminatory as applied to same-sex couples. This framing of the question deprived the court of the opportunity to decide “the close question of whether, in this age of changing family relationships, the policy’s distinction based on marital status is rational.”<sup>229</sup> Finding no allegation that the marriage-based policy had been applied in a discriminatory fashion against gay and lesbian persons, the court upheld the constitutionality of the policy.<sup>230</sup>

Finally, in a case still pending before the Montana Supreme Court, two University of Montana employees filed suit alleging that they had been unconstitutionally denied the opportunity to obtain spousal benefits for their unmarried partners.<sup>231</sup>

### *C. Interstate Marriage Recognition Questions*

The adoption of civil unions legislation in Vermont gave practical significance to the theoretical questions regarding interstate marriage recognition widely discussed during the *Baehr* litigation in Hawaii. In making Vermont the first American state to recognize same-sex partners as “spouses” with all the rights, benefits and responsibilities of married couples,<sup>232</sup> the civil unions legislation raised real and immediate questions regarding the legal status of couples who traveled to Vermont, entered into a civil union, and then returned home to Boston, Boise, or Birmingham. Like marriage, the civil union law contains no residency requirement for applicants, and within a year, same-sex couples from each of the 50 states had obtained civil union licenses in Vermont.<sup>233</sup> After the first year, more than 75 percent of the more than two thousand civil union licenses issued by the state of Vermont had been granted to non-residents.<sup>234</sup> As of August 1, 2003, more than 85 percent of the 5914

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228. *Cornell v. Hamilton*, 791 N.E.2d 214, 219 (Ind. Ct. App. 2003) (noting that same-sex couples can participate in childrearing).

229. *Id.* at 219.

230. *Id.* at 220.

231. *Snetsinger v. Bd. of Regents*, No. 03-238.

232. VT. STAT. ANN. tit. 15 § 1204(b) (2004) (“A party to a civil union shall be included in any definition or use of the terms “spouse,” “family,” “immediate family,” “dependent,” “next of kin,” and other terms that denote the spousal relationship, as those terms are used throughout the law.”).

233. State of Vermont 2001 Vital Statistics at I-1, Vermont Department of Health (2001 Civil Unions: Place of Residence of Party A and Party B), available at: <http://www.healthyvermonters.info/hs/vital/2001/i01.htm>.

234. Elizabeth Mehren, *Gay Couples Do “Wedding” March to Vt.*, L.A. TIMES, July 8, 2001, at A1. See also *Civil Union Statistics*, MarriageWatch.org, available at



civil union licenses granted by the Vermont Bureau of Vital Statistics had been issued to non-Vermonters.<sup>235</sup> After rising steadily for a time, the ratio of new licenses granted to out-of-state residents appears to have leveled off at around 90 percent.<sup>236</sup> These recent statistics indicate that there are now more than 5,000 couples from all across the nation with civil union certificates, questioning whether those certificates will be recognized by their home state.<sup>237</sup>

### 1. Principles of interstate marriage recognition<sup>238</sup>

Though filled with complex questions that may arise,<sup>239</sup> the general principles of interstate marriage recognition are relatively settled. While courts virtually always recognize marriages performed in other states or nations,<sup>240</sup> it has long been understood that they are under no

<http://www.marriagewatch.org/media/cudata.htm> (as of July 1, 2001, there had been 2258 civil union licenses issued, including 1795 to out-of-state couples, and 463 to Vermont residents.).

235. E-mail from Bill Apao, Vermont Department of Health (Aug. 8, 2003) (on file with author) (5914 civil unions, including 859 to Vermont residents); Fred A. Bernstein, *Gay Unions Were Only Half the Battle*, N.Y. TIMES, Apr. 6, 2003, at s.9 p.2 (reporting that 85% of civil union licenses had been issued to out-of-state couples in April 2003).

236. In 2000, 78% of civil unions were issued to out-of-state couples, while that number jumped to nearly 87% in 2001. See *2001 Summary of Vermont Civil Unions*, Vermont Department of Health, available at <http://www.healthyvermonters.info/hs/vital/2001/cu.shtml>. Though official 2002 data is not yet available, civil union data from February 1, 2002 and August 1, 2003 indicates that 90.2% (2130) of the 2361 civil unions issued during that period went to non-Vermonters. See *Civil Union Statistics*, MarriageWatch.org, available at <http://www.marriagewatch.org/media/cudata.htm>. Coupled with U.S. Census 2000 data showing 1,933 same-sex couples in Vermont, these numbers suggest that approximately 24% of same-sex couples in Vermont entered into civil unions law during the first year the law was in effect. By August 2003, that ratio jumped to 44%, though the census data does not account for same-sex couples who may have relocated to Vermont since 2000. Tavia Simmons and Martin O'Connell, *Married Couple and Unmarried Partner Households: 2000*, Table 2, at 4, U.S. Census Bureau (Feb. 2003).

237. See Bernstein, *supra* note 235.

238. Others with expertise in the area of conflicts of laws have ably set forth the relevant principles in other articles. As one without particular expertise in this area, my purpose here is simply to articulate the general principles and highlight areas raising more specific questions. See, e.g., Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns*, 2001 BYU L. REV. 1235 (2001); Richard Myers, *Same-Sex 'Marriage' and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 47 (1998); see also Patrick L. Borchers, *Baker v. General Motors Corp.: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147 (1998).

239. For example, questions concerning interstate recognition of divorce decrees, adoptions, or other legal judgments that may be dependent upon or incident to a marriage valid in one state.

240. 52 AM. JUR. 2D *Marriage* § 63 ("a marriage which is valid under the law of the state or country in which it is contracted will generally be recognized as valid"); see also Donlann v. Macgurn, 55 P.3d 74, 77 (Ariz. Ct. App. 2002) ("Unless strong public policy exceptions require otherwise, the validity of the marriage is generally determined by the law of the place of marriage."); Hudson Trail Outfitters v. District of Columbia Dep't of Empl. Servs., 801 A.2d 987, 989 (D.C. 2002) ("[A] marriage's validity is to be determined by the law of the state where the marriage took place, unless the result would contradict or offend public policy."); Xiong *ex rel.* Edmondson v. Xiong, 648 N.W. 2d 900, 903 (Wis. Ct. App. 2002) ("Marriages valid where celebrated are valid

compulsion to do so when a particular marriage would contradict a state's public policy.<sup>241</sup> As Professor Richard Myers noted in 1998 regarding the hypothetical case of a couple from one of the contiguous 48 states (or Alaska) who might travel to Hawaii to obtain a marriage license, "The answer to this question ought to be quite easy: the home state is not required to recognize such a union by either normal conflicts doctrine or by the Constitution, and in fact there are very legitimate reasons that the home state might well invoke to refuse to recognize such a union."<sup>242</sup> Thus, if a marriage valid in Vermont is deemed contrary to the public policy of Pennsylvania, Pennsylvania need not recognize the marriage.

Historically, marriage laws in the United States have been marked by a general uniformity and only minor differentiation, giving courts many opportunities to recite the public policy doctrine and few opportunities to apply it. The occasional conflicts that have arisen usually involve issues such as marriageable age,<sup>243</sup> first cousin marriages,<sup>244</sup> and common law marriages.<sup>245</sup> In each of these cases, courts have in most cases recognized the foreign marriage if valid where contracted, even where not permitted

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everywhere, except those contrary to the law of nature and those which the law has declared invalid upon the ground of public policy," quoting *In re Estate of Campbell*, 51 N.W.2d 709 (Wis. 1952)); *People v. Schmidt*, 579 N.W.2d 431, 434 (Mich. Ct. App. 1998) ("Michigan follows the general rule that 'a marriage valid where it is contracted is valid everywhere.'" (citations omitted)); *Bogardi v. Bogardi*, 542 N.W.2d 417 (Neb. 1996) ("The general rule is that the validity of a marriage is determined by the law of the place where it was contracted; if valid there, it will be held valid everywhere, and conversely, if invalid by the *lex loci contractus*, it will be invalid wherever the question may arise.").

241. 52 AM. JUR. 2D *Marriage* § 64 ("The general rule that a state will recognize as valid a marriage that was valid in the state in which it was contracted is subject to an exception where recognition in the forum state would be contrary to the public policy of that state.").

242. Richard Myers, *Same-Sex 'Marriage' and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 47 (1998); see also Patrick L. Borchers, *Baker v. General Motors Corp.: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147 (1998); *Judicial Activism vs. Democracy: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the Senate Comm. on the Judiciary*, 108th Cong., Mar. 3, 2004 (written statement of Prof. Lea Brilmayer, Howard M. Holtzmann Professor of International Law, Yale Law School).

243. See, e.g., *State v. Graves*, 307 S.W.2d 545 (Ark. 1957) (recognizing validity of Mississippi marriage of 13-year-old girl even though not permitted under Arkansas law); *Wilkins v. Zelichowski*, 140 A.2d 65 (N.J. 1958) (declining to recognize an underage marriage of New Jersey residents which was valid in Indiana, the state in which it was solemnized); *Keith v. Pack*, 187 S.W.2d 618 (Tenn. 1945) (recognizing underage marriage of Tennessee residents which was valid in Georgia, the state in which it was solemnized).

244. See, e.g., *Mason v. Mason*, 775 N.E.2d 706 (Ind. Ct. App. 2002) (recognizing validity of Tennessee marriage between first cousins, even though not permitted under Indiana law).

245. See, e.g., *Metropolitan Life Ins. Co. v. Chase*, 294 F.2d 500 (3d Cir. 1961) (declining to recognize a common law marriage entered into in the District of Columbia by New Jersey residents); *People v. Schmidt*, 579 N.W.2d 431, 466 (Mich. Ct. App. 1998) (recognizing common law marriage entered into in Alabama).

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under the laws of the receiving state.<sup>246</sup> Marriages from other nations are also generally granted recognition, though courts have on various occasions refused to recognize bigamous or incestuous marriages as contrary to state public policy.<sup>247</sup>

For purposes of this choice of law question, courts are not strictly bound by a Full Faith & Credit analysis under Article IV of the Constitution.<sup>248</sup> In 1998, the United States Supreme Court reaffirmed this distinction between choice of laws and interstate recognition of judgments in *Baker v. General Motors Corp.*, explaining:

Our precedent differentiates the credit owed to laws (legislative measures and common law) and to judgments. “In numerous cases this Court has held that credit must be given to the judgment of another state although the forum would not be required to entertain the suit on which the judgment was founded.” The Full Faith and Credit Clause does not compel “a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. . . . A court may be guided by the forum State’s “public policy” in determining the law applicable to a controversy.”<sup>249</sup>

This public policy doctrine is embodied in both Restatements on Conflicts of Laws. Under the First Restatement, a marriage contrary to the public policy of either party’s home state was invalid in the cases of polygamous marriages, incestuous marriages, certain interracial marriages, and other marriages explicitly denied recognition by statutory enactment.<sup>250</sup> The Second Restatement, published in 1971, modifies the First Restatement’s rule by deleting reference to specific marriages held invalid and replacing it with a more general choice of law statement based on a state’s relationship to the parties and the marriage:

(1) The validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant

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246. The most common exception to this practice arises where the case involves residents of the state who left the state in order to circumvent the state’s marriage laws. *See, e.g., Metropolitan Life Ins. Co. v. Chase*, 294 F.2d 500 (3d Cir. 1961).

247. *See, e.g., People v. Ezeonu*, 588 N.Y.S. 2d 116 (N.Y. Sup. Ct. 1992) (declining to recognize a second Nigerian marriage as a defense to a charge of rape); *Catalano v. Catalano*, 170 A.2d 726 (Conn. 1961) (declining to recognize Italian marriage between Connecticut resident and his Italian niece).

248. 52 AM. JUR. 2D *Marriage* § 62 (“Such effect as may be given by one state to the marriage laws of another state is merely because of comity, or because public policy and justice demand the recognition of such laws, and no state is bound by comity to give effect in its courts to laws which are repugnant to its own laws and policy.”).

249. *Baker v. Gen. Motors Corp.*, 118 S. Ct. 657, 663-64 (1998) (quoting *Milwaukee County v. M.E. White Co.*, 296 U.S. 268; *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493, 501 (1939)).

250. RESTATEMENT (FIRST) CONFLICTS OF LAWS § 132 (1934).

relationship to the spouses and the marriage under the principles stated in § 6.<sup>251</sup>

(2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.<sup>252</sup>

Exercising its authority under the Full Faith & Credit provision of the United States Constitution,<sup>253</sup> Congress in 1996 adopted the Defense of Marriage Act, which, in part, provides that no state shall be compelled to recognize a “marriage” between persons of the same sex, even if that marriage was lawful in the state in which it was contracted.<sup>254</sup>

In reliance upon this authority, 38 states have adopted statutory or constitutional provisions barring recognition of foreign marriages between persons of the same sex.<sup>255</sup> The first of these was adopted in Hawaii in 1994 in an unsuccessful attempt to head off the *Baehr* marriage litigation.<sup>256</sup> Utah followed in 1995 out of concern that Hawaii would soon recognize same-sex “marriages.”<sup>257</sup> Fifteen additional states adopted marriage recognition (mini-DOMA) laws in 1996,<sup>258</sup> with 9 more states following their lead in 1997.<sup>259</sup> By the end of 1998, a total of 30 states had adopted affirmative policies denying recognition of same-

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251. RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 6 (1971) (stating that a court will first “follow a statutory directive of its own state on choice of law,” and where there is no applicable statute, setting forth seven factors to be considered in determining choice of law).

252. RESTATEMENT (SECOND) CONFLICTS OF LAW § 283.

253. U.S. CONST. art. IV, § 1.

254. Pub. L. 104-199 sec. 2, 100 Stat. 2419 (Sep. 21, 1996) *codified at* 28 U.S.C. §1738C (1997).

255. *Supra* note 20.

256. 1994 Haw. Sess. Laws 217. *See* David O. Coolidge & William C. Duncan, *State Marriage Recognition Statutes*, 32 CREIGHTON L. REV. 1, 6 (1998).

257. UTAH CODE ANN. § 30-1-2 (1995); Utah Code Ann. § 30-1-4 (Supp. 1998).

258. ALASKA STAT. § 25.05.013 (Michie 1996); ARIZ. REV. STAT. § 25-101 (1991); DEL. CODE ANN. tit. 13, § 101 (1993); GA. CODE ANN. § 19-3-30 (1996); IDAHO CODE § 32-209 (Michie 1996); 750 ILL. COMP. STAT. ANN. 5/212 (West 1998); KAN. STAT. ANN. § 23-101 (1996); H.B. 5662 (Mich. 1996); S.B. 937 (Mich. 1995); MO. REV. STAT. § 451.022 (1997); N.C. GEN. STAT. § 51.1.2 (1996); OKLA. STAT. ANN. tit. 43-3, 43-3.1 (1996); 23 PA. CONS. STAT. ANN. § 1704 (West Supp. 1998); S.C. CODE ANN. § 20-1-10 (Supp. 1997); S.C. CODE ANN. § 20-1-15 (Supp. 1997); S.D. CODIFIED LAWS § 25-1-1 (Michie 1992); TENN. CODE ANN. § 36-3-113 (1996).

259. H.B. 1004, 81<sup>st</sup> G.A. (Ark. 1997); S.B. 5, 81<sup>st</sup> G.A. (Ark. 1997); H.B. 147 (Fla. 1997); House Enrolled Act 1265, 110<sup>th</sup> G.A. (Ind. 1997); Laws 65, 118<sup>th</sup> Leg. (Me. 1997); S.F. 830 (Minn. 1997); S.B. 2053 (Miss. 1997); H.B. 323 (Mont. 1997); S.B. 2230, 55<sup>th</sup> Leg. (S.D. 1997); Acts 365 (Va. 1997).

sex “marriage.”<sup>260</sup> In the five years since then, eight additional states have adopted marriage recognition statutes.<sup>261</sup>

## 2. *Marriage recognition litigation*

To date, there have been only two direct challenges to defense of marriage legislation at the state or federal levels. The first case, the only reported challenge to the federal Defense of Marriage Act, arose in the Seventh Circuit, when Robert Mueller on two occasions attempt to file a joint tax return with his partner, Todd Bates, arguing that the Defense of Marriage Act unconstitutionally refused to recognize his same-sex marriage. In the first case, Mueller’s DOMA challenge was dismissed because the Defense of Marriage Act was not in effect for the tax years in question. When the case returned to the Seventh Circuit for subsequent tax years, the court dismissed the case for lack of standing, finding that no state had licensed the purported same-sex “marriage,” and it is impossible to recognize a marriage license that has not been granted.<sup>262</sup>

The second challenge comes in the form of a lawsuit filed on April 30, 2003 against the state of Nebraska, alleging that the Nebraska marriage amendment violates the federal constitutional guarantee of equal protection and constitutes an unconstitutional bill of attainder.<sup>263</sup> Rather than directly challenge the same-sex marriage ban, the lawsuit focuses on the second sentence of the amendment, which prohibits recognition of any same-sex civil union or domestic partnership, arguing that the amendment erects a higher bar to recognition of same-sex domestic partnerships than would be required to enact opposite-sex domestic partnerships.<sup>264</sup> Lambda Legal and the ACLU on behalf of

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260. H.B. 152 (Ala. 1998); H.F. 382 (Iowa 1998); H.B. 13 (Ky. 1998); H.B. 1130, 55<sup>th</sup> Leg. (Wash. 1997).

261. CAL. FAM. CODE § 308.5 (Proposition 22, approved Mar. 7, 2000); NEB. CONST. art. I, § 29 (Initiative Measure 416, approved Nov. 7, 2000); Nev. Question 2 (approved Nov. 5, 2002); TEX. FAM. CODE ANN. § 6.204 (Acts 2003, 78<sup>th</sup> Leg., ch. 124, § 1, eff. Sept. 1, 2003); MO. REV. STAT. § 451.022 (L.2001, H.B. 157, § A) (reenacted after being stricken on procedural grounds); 2004 Ohio Laws 61 (H.B. 272); W.VA. CODE § 48-2-603 (Acts 2001, c.91, eff. Sept. 1, 2001); S.D. CODIFIED LAWS § 25-1-1 (Michie 2003); COLO. REV. STAT. § 14-2-104 (Laws 2000, Ch. 233, § 1, eff. May 26, 2000).

262. *Mueller v. C.I.R.*, 2002 WL 1401297 (not selected for publication in the Federal Reporter) (also warning Mr. Mueller that “if he continues to file frivolous tax appeals, he faces the possibility of sanctions”).

263. *Complaint, Citizens for Equal Protection v. Att’y Gen.*, 290 F.Supp.2d 1004 (D. Neb. 2003) (No. 4:03CV3155).

264. NEB. CONST. art. I, § 29 (“The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”).

three Nebraska non-profit educational and advocacy organizations filed the case jointly.<sup>265</sup>

On June 30, 2003, the Nebraska Attorney General's office moved to dismiss the litigation, arguing that the plaintiffs had failed to satisfy the Article III case or controversy requirements for subject matter jurisdiction of federal courts.<sup>266</sup> The state also sought to dismiss the bill of attainder claim for failure to state a cause of action.<sup>267</sup> Federal District Judge Joseph Bataillon denied the state's motion to dismiss on November 10, 2003, and the case is currently pending before the U.S. District Court for the District of Nebraska.<sup>268</sup>

As these two cases demonstrate, standing is a major hurdle in any constitutional challenge to state or federal marriage recognition (DOMA) provisions. Moreover, standing will remain an issue unless or until one or more states issues a marriage license to a same-sex couple, giving them a potential grievance in the event another state refuses to recognize their marriage.

### 3. *Civil union recognition cases*

In the absence of any American jurisdiction granting marriage licenses to persons of the same sex, there have been few grounds upon which to challenge the recognition provisions of the various state marriage statutes. The handful of cases that have arisen have done so in the context of Vermont civil unions.<sup>269</sup> Though not directly a question of "marriage" recognition, several couples have sued to have their Vermont civil union certificates recognized as proof of marriage or spousal status in other states.<sup>270</sup>

Because "civil unions" are not "marriages," this litigation requires courts to address a two-pronged inquiry.<sup>271</sup> The first prong of analysis requires some identification of a civil union – deciding whether a Vermont civil union is the same as a marriage. If not, a state may conclude that it has no structure or basis under which to recognize the

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265. The organizations include Citizens for Equal Protection, Inc. (CFEP), Nebraska Advocates for Justice and Equality (NAJE), and ACLU Nebraska. Complaint, ¶¶ 8-10, *Citizens for Equal Protection v. Att'y Gen.*, 290 F.Supp.2d 1004 (D. Neb 2003) (No. 4:03CV3155).

266. Motion to Dismiss, *Citizens for Equal Protection v. Att'y Gen.*, 290 F.Supp.2d 1004 (D. Neb 2003) (No. 4:03CV3155).

267. *Id.*

268. Robynn Tysver, *Court OKs Suit on Same-Sex Union Ban*, OMAHA WORLD-HERALD, Nov. 11, 2003, at 2B.

269. *See, e.g.*, *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002); *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170 (Conn. App. Ct. 2002); *Langan Estate of Spicehandler v. St. Vincent's Hosp. of N.Y.*, 765 N.Y.S.2d 411 (N.Y. Sup. Ct. 2003).

270. *Id.*

271. *See, e.g.*, *Burns v. Burns*, 560 S.E.2d at 48-49.

civil union. That is, in a state which has no system of civil unions (currently including all 49 of Vermont's neighboring states),<sup>272</sup> a court has three choices in dealing with the civil union: (1) recognize the civil union as a marriage; (2) recognize the civil union as some other domestic, contractual, or equitable relationship; or (3) refuse to recognize the civil union. If a court elects to treat a civil union as either a marriage or some other form of relationship, the court must then proceed to the second prong of analysis. Under the second prong, the court must determine whether the civil union is entitled to recognition under either the Full Faith and Credit Clause of the United States Constitution or under common law principles of comity.

To date, three reported opinions (two intermediate appellate opinions and one trial court ruling) have addressed these questions,<sup>273</sup> while court documents and newspaper reports identify several additional cases that have not led to a published opinion.<sup>274</sup> In each of the published cases, the court has recognized that it is not automatically required to recognize a civil union, but that it must undertake an analysis of state public policy to determine whether the union is consistent with the policy of the jurisdiction.

The first of these cases, *Burns v. Burns*, arose in the context of a child custody consent decree in which the divorced Darian and Susan Burns had agreed that neither spouse would have an overnight adult guest in the home while the children were present, unless the parent and the third party were "legally married" or closely related.<sup>275</sup> In July 2000, Susan Burns and her lesbian partner, Debra Freer, traveled to Vermont where they obtained a civil union license and subsequently returned to their home in Georgia.<sup>276</sup> Following their civil union, Susan and Debra deemed themselves married for purposes of the consent decree, and two months later Darian Burns filed a motion for contempt, alleging violation of the consent decree.<sup>277</sup> The trial judge ruled that Susan Burns was in

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272. Under a recently adopted California law, California would begin recognizing civil unions within its "domestic partnership" provisions in January 2005. 2003 Cal. AB 205.

273. *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002); *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170 (2002); *Langan Estate of Spicehandler v. St. Vincent's Hosp. of N.Y.*, 765 N.Y.S.2d 411 (N.Y. Sup. Ct. 2003).

274. First Amended Complaint, 10 at ¶¶ 65-67, *Morrison v. Sadler*, No. 49D13-0211-PL-001946 (Ind. Marion Super. Ct. [date needed]) (the recognition claim was dropped in the second amended complaint); *Hall v. Beauchamp*, 833 So.2d 123 (table) (Fla. App. 1 Dist. 2002) (unanimously affirming the circuit court order denying recognition of a Vermont civil union); *Melissa Drosjack, Gay Couple Won't Get Texas Divorce*, HOUSTON CHRONICLE, Mar. 28, 2003; *Judge Dismisses Request for Same-Sex Divorce*, FORT WORTH STAR-TELEGRAM, Apr. 2, 2003, at 9 (the plaintiff later withdrew his case when the judge ordered a further hearing on the matter).

275. *Burns v. Burns*, 560 S.E.2d at 48.

276. *Id.*

277. *Id.*

violation of the consent decree, though declining to hold her in contempt. On appeal, Susan argued that she and her partner were married in Vermont, and that their Vermont “marriage” was entitled to full faith and credit in Georgia.<sup>278</sup> Additionally, they argued that the Georgia Protection of Marriage Act violated federal constitutional guarantees as well as a right to privacy under the state constitution.<sup>279</sup>

Among the various groups filing amicus curiae briefs in the case were two groups of legislators. A group of 69 Vermont legislators filed a brief in support of the father, explaining that even under Vermont law, a civil union and a marriage are distinct legal entities,<sup>280</sup> while a group of Georgia legislators presented a comprehensive analysis of Georgia public policy with respect to same-sex unions.<sup>281</sup>

The Georgia Court of Appeals issued its ruling on January 23, 2002, holding that (1) a civil union is not a marriage under Vermont law, and thus not entitled to recognition as a “legal marriage” under Georgia law;<sup>282</sup> (2) even if the lesbian couple had obtained a “legal marriage” under Vermont law, same-sex marriage was contrary to the public policy of Georgia and statutorily denied recognition;<sup>283</sup> and (3) the right to privacy under the Georgia Constitution did not require affirmative legal recognition of the couple’s partnership.<sup>284</sup>

The Georgia Court of Appeals subsequently denied a motion for reconsideration,<sup>285</sup> and the Georgia Supreme Court denied review of the case.<sup>286</sup>

In *Burns*, because the underlying consent decree used the precise language of “legally married,” the court did not address the question of whether a civil union is entitled to alternative recognition as some form of non-marital domestic or contractual relationship. That was precisely the question faced by the Connecticut Court of Appeals, however, in

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278. Brief for Appellant at 6, *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002) (No. A01A1827).

279. *Id.* at 7.

280. Brief of Amici Curiae Members of the Vermont Legislature, *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002) (No. A01A1827).

281. Brief of Amici Curiae Members of the Georgia Legislature, *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002) (No. A01A1827).

282. *Burns v. Burns*, 560 S.E.2d at 48-49.

283. *Id.* at 49.

284. *Id.*

285. *Id.* at 47. The motion for reconsideration argued that the court, having already concluded that Vermont civil unions were not marriages, should not have proceeded to discuss the effect of a same-sex marriage under Georgia law. Appellant’s Motion for Reconsideration, *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002) (No. A01A1827).

286. *Burns v. Burns*, 560 S.E.2d 47 (Ga.App. Jan 23, 2002), reconsideration denied (Feb 07, 2002), certiorari denied (Jul 15, 2002).



*Rosengarten v. Downes*.<sup>287</sup> On December 31, 2000, Glen Rosengarten, a Connecticut resident, and Peter Downes, a New York resident, entered into a Vermont civil union.<sup>288</sup> When their relationship ended several months later, Peter Rosengarten sued for divorce in Connecticut Superior Court.<sup>289</sup> Because Vermont law requires that at least one party be a 12-month resident of Vermont before a divorce is granted,<sup>290</sup> they were ineligible for a divorce under Vermont law and sought to dissolve their civil union in a Connecticut court.

Much like the *Burns* court, the Connecticut Court of Appeals was forced to determine whether a civil union was the same as a marriage, and, if so, whether an out-of-state marriage between persons of the same sex could be recognized in Connecticut. Complicating the question somewhat, however, was the fact that a catchall clause in the Connecticut domestic relations act gave broad jurisdictional authority to the court to resolve other domestic relations matters not explicitly addressed in the statute.<sup>291</sup> Though Connecticut does not have a marriage recognition statute that expressly precludes recognition of same-sex “marriages,” the court reached much the same result as the Georgia Court of Appeals had in *Burns*, relying heavily on a clause in the adoption code that stated that same-sex “marriage” was contrary to state public policy.<sup>292</sup>

In his petition for certiorari to the Connecticut Supreme Court, Rosengarten argued that Connecticut policy favored recognition of a Vermont civil union,<sup>293</sup> but that even if a civil union were not recognized as a marriage under Connecticut law, the family court still had jurisdiction in the case under the catchall provision giving the court jurisdiction over all domestic relations matters.<sup>294</sup> On September 19,

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287. 802 A.2d 170 (Conn. App. Ct. 2002).

288. Brief of Plaintiff-Appellant at 1, *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170 (2002) (Ct. A.C. No. 22253). There was no brief filed by the Appellee in the case, as he did not oppose the initial divorce petition.

289. *Id.* at 1. The complaint was filed on July 11, 2001.

290. VT. STAT. ANN. tit. 15, § 592 (requiring six months’ residency prior to filing, and 12 months’ residency prior to issuance of the divorce decree).

291. CONN. GEN. STAT. § 46b-1(17) (2003) (extending jurisdiction over “all such other matters within the jurisdiction of the Superior Court concerning children or family relations as may be determined by the judges of said court.”).

292. *Rosengarten v. Downes*, 802 A.2d 170, 179 (Conn. App. Ct. 2002) (quoting CONN. GEN. STAT. § 46a-81r, which provides that “nothing in [the ban on sexual orientation discrimination] shall be deemed or construed . . . to authorize the recognition of or the right of marriage between persons of the same sex.”).

293. Petition for Certification at 5, *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170 (2002) (No. 16836).

294. *Id.* at 10.

2002, the Supreme Court accepted the case for review,<sup>295</sup> weeks before Peter Rosengarten died after a struggle with lymphoma and HIV.<sup>296</sup> Following Rosengarten's death, which legally dissolved the civil union, the Supreme Court dismissed the appeal as moot, leaving the appellate decision intact.<sup>297</sup>

The final reported opinion dealing with interstate recognition of a Vermont civil union comes from a New York trial court, the only court thus far to extend marital recognition to a Vermont civil union in a reported opinion.<sup>298</sup> *Langan v. St. Vincent's Hospital* is a wrongful death case in which the partner of the deceased Neal Spicehandler is seeking to pursue a wrongful death claim against St. Vincent's Hospital. Without declaring the Vermont civil union a full equivalent of marriage for all cases, the trial judge found no expression of New York public policy opposing same-sex unions, and ruled that the Vermont civil union gave Spicehandler's partner standing to sue as a spouse in the context of the wrongful death suit.<sup>299</sup> This case is currently pending on appeal before the New York Appellate Division.

Several additional civil union recognition cases have been filed,<sup>300</sup> including a West Virginia trial court that dissolved a civil union in a divorce proceeding. According to news reports, Marion County Family Court Judge David P. Born dissolved the civil union of Misty Gorman and Sherry Gump in a divorce judgment issued on December 22, 2002.<sup>301</sup> In granting the divorce, Judge Born described the situation of the two women as "citizens of West Virginia in need of a judicial remedy to dissolve a legal relationship created by the laws of another state."<sup>302</sup>

A second case was filed in Florida, in a situation similar to that addressed by the Georgia Court of Appeals in *Burns v. Burns*.<sup>303</sup> When

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295. Order on Petition for Certification to Appeal, *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170 (2002) (No. 16836) (entered Sept. 19, 2002). The question on review was, "Did the Appellate Court properly conclude that the trial court had no subject matter jurisdiction to dissolve a civil union entered into pursuant to the laws of Vermont?" *Id.*

296. Lindsay Faber, *Attorneys Hope Death of Plaintiff Won't End Gay Divorce Lawsuit*, GREENWICH TIME, Nov. 9, 2002. In an interesting twist, the article also indicates that Rosengarten's attorney is the current husband of Rosengarten's ex-wife.

297. Order, *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170 (2002) (No. 16836) (entered Dec. 31, 2002) ("It is hereby ordered, sua sponte, that the captioned matter is dismissed as moot.").

298. *Langan v. St. Vincent's Hosp.*, 765 N.Y.S.2d 411 (N.Y. Sup. Ct. 2003).

299. *Id.* at 422.

300. See, e.g., Jyoti Thottam, *Why Breaking Up is So Hard to Do*, TIME, Mar. 8, 2004, at 31 (describing civil union divorce cases in Iowa and Texas).

301. Bernstein, *supra* note 237, at s.9p.2; Sam Hemingway, *Texas Case Provides Exposure to Civil Union Law*, BURLINGTON FREE PRESS, Apr. 6, 2003, at 1B.

302. Bernstein, *supra* note 301.

303. *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002).

Robert Hall and Traci Beauchamp divorced in 1999, their settlement contained a provision forbidding the presence of overnight guests other than “close family members” while the children were in the home.<sup>304</sup> Robert Hall and his same-sex partner subsequently traveled to Vermont where they entered into a civil union, and returned to petition the court for a modification of the divorce judgment. The court concluded that there had been no change in circumstances sufficient to justify a modification of the order as: (1) the former husband had voluntarily consented to the initial order; (2) Florida law does not recognize marriages between persons of the same sex; and (3) the Vermont civil union does not establish a “special category” rising to the level of a substantial change in circumstances.<sup>305</sup> On appeal to the 1st District Court of Appeals in Tallahassee, the case was unanimously affirmed without a published opinion.<sup>306</sup>

Another matter arose, at least briefly, in Indiana, where the plaintiffs in the same-sex “marriage” litigation included an alternative claim for recognition as spouses pursuant to their Vermont civil union license.<sup>307</sup> Following the Attorney General’s motion to dismiss, which argued that such unions were against Indiana public policy and that Indiana had no duty to recognize a Vermont civil union, the plaintiffs amended their complaint and dropped the recognition claim.<sup>308</sup>

A fourth case arose in Texas, while the Texas Legislature was considering legislation that would eventually make Texas the 37<sup>th</sup> state to adopt marriage recognition (DOMA) legislation. On March 3, 2003, Beaumont Family Court Judge Tom Mulvaney granted a divorce decree to two Texas men who had obtained a civil union license in Vermont.<sup>309</sup> When news of the divorce decree hit the newspapers, Texas Attorney General Greg Abbott intervened, asking the judge to reconsider the decree. Abbott argued, “Because these two men were never married under either Vermont or Texas law, they cannot legally petition for divorce under the Texas Family Code. The court’s final decree of divorce

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304. Editorial, *A Ruling in Need of Reconsideration*, ST. PETERSBURG TIMES, Dec. 1, 2002, at 2D.

305. Hall v. Beauchamp, No. 98-09CA, (Fla. 14<sup>th</sup> Cir. Ct. Dec. 2001) (order regarding modification of final judgment).

306. Hall v. Beauchamp, 833 So.2d 123 (table) (Fla. App. 1 Dist. 2002) (unanimously affirming the circuit court order denying recognition of a Vermont civil union).

307. Complaint, Morrison v. O’Bannon, No. 49D11-0208-PL-1415 (Ind. Marion Super. Ct. (filed Aug. 22, 2002)).

308. Plaintiffs’ Second Amended Complaint, Morrison v. Sadler, No. 49D11-0208-PL-1415 (Ind. Marion Super. Ct. (filed Feb. 3, 2003)).

309. Sam Hemingway, *Texas Case Provides Exposure to Civil Union Law*, BURLINGTON FREE PRESS, Apr. 6, 2003, at 1B.

is void as a matter of law.”<sup>310</sup> Taken aback by the sudden interest in the matter, the judge withdrew the divorce decree and ordered the parties to brief the question of whether a Texas court had jurisdiction to dissolve a Vermont civil union.<sup>311</sup> Faced with the prospect of opposition from the Attorney General’s office, the two men withdrew their petition for the divorce.<sup>312</sup>

### III. CONCLUSION—THE ROAD AHEAD

#### A. *The Future of Marriage Litigation*

In this article, I have attempted to provide a snapshot of the marriage debate as it stood at the beginning of 2004. By the time this article goes to press, there will undoubtedly be much more that has occurred, but such is the nature of a snapshot.

While the legal debate continues to intensify in courtrooms and legislative chambers in Washington D.C. and across the country, the future of the marriage debate lies in the opinion of the American public. A majority which favors same-sex marriage will ultimately see that policy reflected in the law; a sufficiently motivated majority supporting marriage as a means of providing children with both mothers and fathers will overcome even the most stubborn court judgment with constitutional amendments. To date, the marriage debate has been driven largely by elite opinion; the past six months have opened the debate to the American public.

#### B. *Dynamics of Public Opinion*

Writing in the September 11, 2001 edition of *The Advocate*, Evan Wolfson, now president of the New York-based Freedom to Marry, described his public relations strategy, outlining three elements of a campaign to win same-sex marriage. The first of Wolfson’s three elements acknowledges the value of strategic lawsuits and legislative efforts, but casts its focus on “enhanced public education and outreach work.” The second element of the strategy requires “development of a clear and sophisticated understanding of what demographics we need to reach in order to firm up our 30%–35% base and soften up and move the 15%–20% of the public who are movable.” Finally, the third aspect of

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310. Melissa Drosjack, *Gay Couple Won’t Get Texas Divorce*, HOUSTON CHRONICLE, Mar. 29, 2003, at A39.

311. *Judge Dismisses Request for Same-Sex Divorce*, FORT WORTH STAR-TELEGRAM, Apr. 2, 2003, at 9.

312. Bernstein, *supra* note 302.

the Wolfson plan calls for the “deployment of resources, trainings, messages, messengers, and vehicles to help non-gay and gay partners in different states and constituencies communicate transformative information and enlist additional non-gay support.”<sup>313</sup> Each of these strategic goals is focused primarily on winning the marriage debate in the arena of public opinion.

In 2001, Wolfson described a 30-35 percent base of public support for same-sex marriage.<sup>314</sup> CNN and Time pollsters first asked respondents about “marriages between homosexual men and woman” in 1989, finding 23% support for same-sex marriage.<sup>315</sup> When Gallup conducted its first poll on same-sex “marriage” in 1996, 27 percent of respondents supported the legal recognition of same-sex unions, while 68 percent of respondents opposed the proposition.<sup>316</sup> Over the next 6 years, polling data continued to show a slow rise in public acceptance of same-sex unions.<sup>317</sup> By July 2003, 38 percent of respondents to a Pew Research Center poll endorsed same-sex marriage, while opposition decreased to 53 percent. In the short term, at least, early July 2003 appears to be the high water mark in public support for same-sex marriage. Between July and November 2003, support for same-sex marriage dropped 6 percentage points according to identical Pew Research Center polls, negating much of the increase of the past six years.<sup>318</sup> Other polls have shown a similar reversal, with a December 2003 Gallup poll finding a 10-point rise in opposition to same-sex marriage since June 2003, while support for same-sex marriage dropped to its lowest level since 1996.<sup>319</sup>

It remains to be seen whether these recent poll results point to the start of a new trend or merely a short-term backlash against unpopular judicial decisions of 2003. Polls gauging intensity of opinion give further insight into the dynamics of the debate, suggesting that opinions are beginning to solidify, particularly among opponents of same-sex marriage. A Pew Research Center poll released in November 2003 shows 35 percent of respondents “strongly opposed” to same-sex marriage,

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313. Evan Wolfson, *All Together Now*, THE ADVOCATE, Sept. 11, 2001.

314. *Id.*

315. The same poll found 69% of Americans opposed to same-sex marriage. Karlyn Bowman, *Attitudes About Homosexuality: AEI Studies in Public Opinion*, AMERICAN ENTERPRISE INSTITUTE, at 21 (Feb. 13, 2004), available at [www.aei.org/doclib/20040122\\_Homosexuality3\\_Rocky.pdf](http://www.aei.org/doclib/20040122_Homosexuality3_Rocky.pdf) (compiling polling data related to same-sex unions).

316. *Id.* at 19.

317. *Id.*

318. *Id.*; see also Joshua K. Baker, *Summary of Opinion Research on Same-Sex Marriage (1988-2003)*, iMAPP Policy Brief, Dec. 5, 2003, available at <http://www.imapp.org>.

319. Bowman, *supra* note 311. A February 2004 Gallup poll showed a 5-point increase in support for same-sex marriage since December, highlighting the fluid nature of public opinion at this time. *Id.*

compared to just 9 percent who “strongly favor” the idea. A National Public Radio poll from December 2003 found 48 percent of respondents strongly opposed to same-sex marriage, while 17 percent strongly favored the idea.<sup>320</sup>

Another gauge of public opinion has come in the form of ballot referenda in Alaska, Hawaii, California, Nebraska, and Nevada. In each of these five states, voters have approved measures defining marriage as the union of a man and a woman by margins of more than 20 percentage points.<sup>321</sup> With a cumulative turnout of 9.4 million voters over a three-year period from 1998 through 2000, American voters in the five states supported these measures by a cumulative 63.1 percent to 36.9 percent margin.<sup>322</sup>

These numbers represent the future of marriage in the United States. Ironically, a Massachusetts court’s effort to remove the marriage question from the realm of public debate has thrust marriage to a prominent place in public discourse. Though laws and judicial decisions will continue to play an important educational role in our culture, public policy is a lagging indicator of public opinion and will necessarily follow the consensus of the American people. The marriage debate taking place today is a healthy debate, informing and instructing not only individual Americans, but also our national conception of marriage.

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320. National Public Radio, *Frequency Questionnaire*, q.13 (Dec. 10-15, 2003).

321. Hawaii, *Legislative Power to Reserve Marriage to Opposite-Sex Couples*, Nov. 3, 1998, p.004, middle column, available at <http://www.state.hi.us/elections/reslt98/general/98swgen.html> (Yes: 69.2% (285,384); No: 28.6% (117,827); Blank: 2.0% (8,422); Overvotes: 0.2% (887)); Alaska, Measure No. 2, *Constitutional Amendment Limiting Marriage*, Nov. 3, 1998, available at <http://www.gov.state.ak.us/lrgov/elections/elect98/general/results.htm> (Yes: 68.1% (152,965); No: 31.9% (71,631)); California, Proposition 22, Mar. 7, 2000, available at [http://www.ss.ca.gov/elections/sov/2000\\_primary/measures.pdf](http://www.ss.ca.gov/elections/sov/2000_primary/measures.pdf) (pages 153-155) (Yes: 61.4% (4,618,673); No: 38.6% (2,909,370)); Nebraska, Initiative Measure 416, Nov. 7, 2000, available at <http://www.sos.state.ne.us/Canvass2000/416and417.pdf> (Yes: 70.1% (477,571); No: 29.9% (203,667)); Nevada, Question 2, Nov. 7, 2000, available at <http://sos.state.nv.us/nvelection/2000General/ElectionSummary.htm> (Yes: 69.6% (412,668); No: 30.4% (180,077)); Nevada, Question 2, Nov. 5, 2002, available at <http://sos.state.nv.us/nvelection/2002General/ElectionSummary.htm> (Yes: 67.2% (337,197); No: 32.8% (164,573)).

322. The approximate totals from these combined sources is 5,947,261 yes votes; 3,482,572 no votes. Total votes: 9,429,833 (using Nevada figures from the higher voter turnout in 2000).