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SAME-SEX MARRIAGE AND FEDERALISM

by NANCY J. KNAUER*

INTRODUCTION

According to the 2000 Census, same-sex partner households exist in 99.3 percent of all counties in the United States.¹ The increasing visibility of same-sex couples and the families they form represents part of the ever-changing face of the American family. The influence of these families and their demand for recognition has been felt clearly in both the marketplace and the political arena. Hundreds of Fortune 500 companies, numerous municipalities, and nonprofit organizations now offer domestic partner benefits.² Currently ten states, as well as the District of Columbia, provide some level of recognition for same-sex relationships.³ This recognition ranges from actual marriage in Massachusetts⁴ or marriage equivalence in states such as New Jersey⁵ to a lesser package of rights, such as the “reciprocal

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1. DAVID M. SMITH & GARY GATES, GAY AND LESBIAN FAMILIES IN THE UNITED STATES: SAME-SEX UNMARRIED PARTNER HOUSEHOLDS (2001), *available at* <http://www.urban.org/publications/1000491.html>. Commentators contend that 2000 census represents an undercount of same-sex households. *Id.*

2. According to the Human Rights Campaign, the majority of Fortune 500 companies now offer domestic partnership benefits. Human Rights Campaign, Employers that Offer Domestic Partner Health Benefits, http://w3.hrc.org/Template.cfm?Section=Search_the_Database&Template=/CustomSource/WorkNet/srch.cfm&searchtypeid=3&searchSubTypeID=1 (last visited May 18, 2008) [hereinafter Domestic Partner Health Benefits]. An estimated 8653 private employers offer domestic partner benefits. *Id.* Approximately thirteen states and 144 counties and municipalities offer such benefits to their employees. *Id.* In addition, 304 colleges and universities provide domestic partner health benefits for their employees. *Id.*

3. Human Rights Campaign, Relationship Recognition in the U.S. (Apr. 22, 2008), http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf [hereinafter Relationship Recognition]. The ten states are: California, Connecticut, Hawaii, Maine, Massachusetts, New Hampshire, New Jersey, Oregon, Vermont, and Washington. *Id.*

4. In 2003 the Supreme Court of Massachusetts held that limiting access to the protections and benefits of civil marriage to opposite-sex couples violated the state constitution. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948-49 (Mass. 2003). As this article was pending publication, the Supreme Court of California ruled in favor of same-sex marriage. *In re Marriage Cases*, 43 Cal. 4th 757 (2008). Same-sex marriages in California began on June 16, 2008. Jesse McKittrick, *A Landmark Day in California as Same-Sex Marriages Begin to Take Hold in California*, N.Y. TIMES, June 17, 2008, at A19.

5. In 2006 the New Jersey Supreme Court held that limiting access to the protections and benefits of civil marriage to opposite-sex couples violated the state constitution, but it did not require the state to permit same-sex couples to marry. *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006). In response, the New Jersey state legislature enacted the Civil Union Act which extends all the benefits of marriage to

beneficiaries” status available in Hawaii.⁶ As a result, at the present time, twenty-one percent—or one in five—of all same-sex couples live in a jurisdiction where some level of legal recognition is available.⁷

The increasing willingness of states to recognize same-sex relationships illustrates the central theme of this Symposium: federalism provides states the freedom to experiment with novel solutions to pressing social issues. Other areas where the states have implemented innovative programs include: universal health insurance,⁸ environmental standards,⁹ and medicinal use of marijuana.¹⁰ Taken together, the development of these progressive policies seem to bear out Justice Brandeis’ optimistic vision of federalism where “a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹¹

With respect to same-sex relationships, however, state level reform efforts have not been uniformly progressive. To the contrary, the vast majority of these efforts prohibit the legal recognition of same-sex relationships and, in many instances, have been downright hostile to same-sex couples and their families.¹² The states have overwhelmingly chosen to prohibit the legal recognition of same-sex relationships. Forty-five states prohibit same-sex marriage by either statute or constitutional amendment—some actually have both for good measure.¹³ Of these states, seventeen have particularly aggressive provisions that not only prohibit

same-sex couples who enter a civil union. N.J. STAT. ANN. § 37:1-28 (2007). Four additional states offer same-sex couples rights equivalent to marriage. Relationship Recognition, *supra* note 3. These states are: Connecticut, New Hampshire, Oregon, and Vermont. *Id.*

6. HAW. REV. STAT. ANN. § 572C-1 (2007). Two other states, Maine and Washington, and the District of Columbia extend partial benefits to same-sex couples. Relationship Recognition, *supra* note 3.

7. Lambda Legal, Marriage, <http://www.lamdalegal.org/our-work/issues/marriage-relationships-family/marriage> (last visited Apr. 14, 2008) (“[A]s many as 21 percent of all same-sex couples now have access to some type of legal protection or status through civil marriage, civil unions or domestic partner-type laws.”).

8. See Kevin Sack, *States’ Widening of Health Care Hits Roadblocks*, N.Y. TIMES, Dec. 25, 2007, at A1 (outlining state efforts to provide universal health care to residents).

9. See Felicity Barringer, *California Sues E.P.A. Over Denial of Waiver*, N.Y. TIMES, Jan. 3, 2008, at A14 (describing California’s stricter emission standards).

10. See Dean E. Murphy, *Drug’s Users Say Ruling Won’t End Their Efforts*, N.Y. TIMES, June 7, 2005, at A21 (describing U.S. Supreme Court opinion *Gonzales v. Raich*, 545 U.S. 1 (2005)).

11. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

12. For example, the organization known as Minnesota Citizens in Defense of Marriage lobbies in favor of an amendment to the Minnesota state constitution that would prohibit same-sex marriage. Minnesota Citizens in Defense of Marriage, Position Statement Regarding the Minnesota Marriage Amendment, <http://www.mnmarriage.com/docs/MCDM%20Position%20Statement.pdf> (last visited May 18, 2008). The organization’s website does not attempt to hide its disdain for homosexuality. Minnesota Citizens in Defense of Marriage, <http://www.mnmarriage.com/> (last visited May 18, 2008).

13. Human Rights Campaign, Statewide Marriage Prohibitions (Sept. 19, 2007), http://www.hrc.org/documents/marriage_prohibit_20070919.pdf [hereinafter Statewide Marriage Prohibitions]. The only states without a marriage prohibition are: Massachusetts, New Jersey, New Mexico, New York, and Rhode Island. *Id.*

same-sex marriage, but also purport to prohibit all other forms of relationship recognition.¹⁴

This widespread anti-marriage and anti-recognition sentiment should serve as a valuable reminder that there is nothing inherently progressive about state-level attempts to address social issues. To the contrary, the mantle of federalism has been used to justify some of this country's most ignoble legal practices, specifically the Jim Crow laws.¹⁵ Federalism is an institutional alternative; it is not a political ideology.¹⁶ It served as the foundation for certain progressive era reforms, such as state workmen's compensation laws,¹⁷ but it later provided a rationalization for the "massive resistance" segregationist movement.¹⁸ Federalism can facilitate both a progressive and a conservative impulse, and, in the case of same-sex relationships it does both.

The Essay makes three general observations concerning the current legal status of same-sex relationships and the inadequacy of state and local reform measures to secure broad based minority rights. Part I of this Essay maps the current legal status of same-sex relationships and notes that, despite considerable gains, state level reform has been designed largely to deny legal recognition for same-sex couples. Part II establishes that federalism offers, at best, an imperfect institutional choice for those seeking broad based minority rights because state level protections currently are not portable and are particularly vulnerable to being overturned through majoritarian measures such as citizens' initiatives.

Finally, Part III explores the human cost of the existing lack of uniformity among the states regarding the recognition of same-sex relationships. It is important to remember that relationship recognition is not merely a question of academic interest. The confusing and conflicting status of same-sex relationships weighs heavily on same-sex couples. Four out of five same-sex couples live in jurisdictions without relationship protection.¹⁹ These partners remain legal strangers to one another with no reliable way to designate their partners as family. The one in five couples who do reside in a jurisdiction with relationship recognition enjoy a certain level of protection within the borders of their own state, but must travel at their own risk.

14. *Id.* The seventeen states are: Alabama, Arkansas, Georgia, Kentucky, Idaho, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin. *Id.*

15. Kathleen Sullivan, *From States' Rights Blues to Blue States' Rights*, 75 *FORDHAM L. REV.* 799, 811 (2006) (remarking that with medicinal marijuana and physician-assisted suicide, "suddenly states' rights were not just for segregationist southerners").

16. In the area of comparative institutional choice, Neil Komesar explains that certain goals are frequently associated with certain institutions. NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 174 (2001). In this way, progressive reform is generally associated with the courts, whereas conservative policies are typically associated with the market. *Id.* The same can be said of federalism, which was generally associated with conservative causes throughout the 1950s and 1960s.

17. See John Fabian Witt, *Crystal Eastman and the Internationalist Beginnings of American Civil Liberties*, 54 *DUKE L.J.* 705, 720-22 (2004) (describing origin of workmen's compensation laws).

18. See generally FRANCIS M. WILHOIT, *THE POLITICS OF MASSIVE RESISTANCE* (1973) (describing "massive resistance").

19. Lambda Legal, *Marriage*, *supra* note 7.

I. STATE REGULATION OF SAME-SEX RELATIONSHIPS

In the United States, the status of same-sex relationships varies wildly from jurisdiction to jurisdiction. Currently, ten states and the District of Columbia provide some level of recognition for same-sex relationships.²⁰ Forty-five states specifically forbid same-sex marriage by statute or state constitutional amendment.²¹ Some states have both.²² For all federal purposes, the Defense of Marriage Act (DOMA) provides that marriage is only between one man and one woman.²³ This means that despite a valid marriage under Massachusetts or California law, a legally married same-sex couple will not be eligible for the 1138 federal statutory provisions under “which marital status is a factor in determining or receiving benefits, rights, and privileges.”²⁴ The couple can file their state income taxes jointly, but for federal purposes they must check the box “unmarried” and file separately.²⁵ DOMA further purports to authorize any state to refuse to recognize a same-sex marriage performed in another state.²⁶ As a result, a couple legally married in Massachusetts or California cannot be assured that their marriage will be respected if they move to another state.

In the case of same-sex relationships, state level innovation has not been unidirectional in favor of progressive social change. The disparate approaches adopted by the various states reflect deep political and social divisions regarding LGBT efforts to normalize homosexuality. Although some state courts and legislatures have been responsive to the demand for the legal recognition of same-sex couples, the bulk of state level reform concerning same-sex relationships has

20. Statewide Marriage Prohibitions, *supra* note 13.

21. The only states without a marriage prohibition are: Massachusetts, New Jersey, New Mexico, New York, and Rhode Island. *Id.*

22. *Id.* The states that have both a constitutional amendment and a statutory provision are: Alabama, Alaska, Arkansas, Colorado, Georgia, Idaho, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virginia, Wisconsin, and Utah. Human Rights Campaign, Laws, http://www.hrc.org/issues/marriage/marriage_laws.asp (last visited May 18, 2008).

23. The Federal Defense of Marriage Act (DOMA) was enacted in 1996. It adds a definition of “marriage” and “spouse” to Title 1 of the United States Code, also known as the Dictionary Act. 1 U.S.C. § 7 (2006). DOMA provides:

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 wife.

Id.

24. Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Senator Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), *available at* <http://www.gao.gov/new.items/d04353r.pdf>.

25. See E.J. Graff, *Marrying Outside the Box*, N.Y. TIMES MAG., Apr. 10, 2005, at 22 (explaining that same-sex couples legally married in Massachusetts must file as “unmarried” for federal tax purposes).

26. DOMA purports to grant states the authority not to recognize same-sex marriages performed in sister states. 28 U.S.C. § 1738C (2007). For a discussion of the Full Faith and Credit concerns raised by this provision, see Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

been decidedly anti-recognition.²⁷ This section first describes the relative gains that have been made on the state and local levels with respect to securing legal recognition for same-sex couples. It then outlines the pervasive anti-recognition measures adopted by the vast majority of states.

A. Relationship Recognition

Over the last ten years, states and municipalities have increasingly extended rights to same-sex couples, whereas federal law remains firm that marriage must be between one man and one woman.²⁸ As noted above, statewide relationship recognition ranges from actual marriage in Massachusetts and California to the limited set of rights available to “reciprocal beneficiaries” under Hawaii law. The ten states where such recognition is available are: California,²⁹ Connecticut,³⁰ Hawaii,³¹ Maine,³² Massachusetts,³³ New Hampshire,³⁴ New Jersey,³⁵ Oregon,³⁶

27. Forty-five states specifically forbid same-sex marriage by statute or constitutional provision. Statewide Marriage Prohibitions, *supra* note 13.

28. In this regard, the United States is increasingly out of step with emerging international norms. Same-sex marriage is legal in five countries (Belgium, Canada, the Netherlands, South Africa, and Spain) and numerous countries offer some form of parallel relationship recognition, such as domestic partnership. Human Rights Campaign, About International Rights & Immigration, http://www.hrc.org/issues/int_rights_immigration/5899.htm (last visited May 18, 2008). These countries include: Argentina, Australia, Brazil, Croatia, Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Norway, Portugal, South Africa, Sweden, Switzerland, and the United Kingdom. *Id.*

29. As this article was pending publication, the Supreme Court of California ruled in favor of same-sex marriage. *In re Marriage Cases*, 43 Cal. 4th 757 (2008). Same-sex marriages in California began on June 16, 2008. Jesse McKimley, *A Landmark Day in California as Same-Sex Marriages Begin to Take Hold in California*, N.Y. TIMES, June 17, 2008, at A19. Since 2005, “registered domestic partners” had enjoyed substantially all the rights and responsibilities of spouses under California law. CAL. FAM. CODE §§ 297, 297.5, 290, 298.5 (West 2007) (establishing procedure for “registered domestic partners”). Prior law had extended to “registered domestic partners” a number of rights traditionally reserved for spouses, including inheritance rights, certain health care decision-making authority, and standing to sue for wrongful death. *See, e.g.*, CAL. CIV. PRO. CODE § 377.60 (West 2007) (authorizing a decedent’s surviving domestic partner to assert a cause of action for wrongful death). In 2005, the California legislature passed legislation that would have legalized same-sex marriage, but Governor Schwarzenegger vetoed the bill. *California: No Same-Sex Marriages*, N.Y. TIMES, Sept. 30, 2005, at A18.

30. In 2005, Connecticut enacted civil union legislation. 2005 CT. ALS 3; 2005 CT. P.A. 3; 2005 CT. HB 7502 (2005). The Connecticut law is modeled on Vermont’s civil union legislation and grants same-sex couples all the rights and responsibilities applicable to married couples. Unlike Vermont, Connecticut was not pressured to do so through litigation. William Yardley, *Connecticut Approves Civil Unions for Gays*, N.Y. TIMES, Apr. 21, 2005, at B5.

31. In 1993, the Hawaii Supreme Court ruled in *Baehr v. Lewin* that prohibiting same-sex couples from marrying constituted gender discrimination and violated the Equal Rights Amendment to the state constitution. 852 P.2d 44 (Haw. 1993). The court remanded the case to the trial court to determine whether the prohibition against same-sex marriage was justified by a compelling state interest. *Id.* at 68. While the litigation was ongoing, the state legislature enacted legislation that extends some rights and benefits to unmarried partners who qualify as “reciprocal beneficiaries.” *See* HAW. REV. STAT. ANN. § 572C-5 (2007) (authorizing two persons who are properly registered to enter into a “reciprocal beneficiary” relationship). Individuals must sign a “declaration of reciprocal beneficiary relationship” in order to be eligible for the benefits. *Id.* A reciprocal beneficiary is afforded the same status as a spouse under the rules of intestate succession. HAW. REV. STAT. ANN. § 560:2-102 (2007).

Vermont,³⁷ and Washington.³⁸ These states, along with the District of Columbia,³⁹ represent examples of states acting as laboratories for progressive social change.⁴⁰

The forms of recognition available do not share the same terminology nor do they extend the same benefits. For example, until recently California granted rights to “registered domestic partners” that were equivalent to those extended to opposite-sex married couples,⁴¹ whereas Vermont and Connecticut also provide marriage equivalence, but use the term “civil union.”⁴² Other states offer different levels of recognition that fall short of the rights and obligations enjoyed by married couples. For example, Maine has a statewide domestic partner registry and grants registered domestic partners certain rights with respect to health care decision-making and inheritance.⁴³ Hawaii, on the other hand, created the legal category of “reciprocal beneficiaries,” which provides a number of rights and responsibilities commonly associated with marriage,⁴⁴ including the right to inherit through intestate succession.⁴⁵ Some states extend this recognition to opposite-sex couples.⁴⁶ Others restrict it to same-sex couples.⁴⁷ Both California and New Jersey

32. In 2004, Maine enacted legislation establishing a statewide domestic partner registry and extending to same-sex couples certain health care decision-making authority and inheritance rights equivalent to spouses. ME. REV. STAT. ANN. tit. 22, § 2710 (2007).

33. In November 2003, the Massachusetts Supreme Court ruled 4-3 in *Goodridge v. Department of Public Health* that the right to marry was protected under the state constitution. 798 N.E.2d 941, 948 (Mass. 2003). Numerous attempts to forestall the implementation of the court order pending voter consideration of a constitutional amendment prohibiting same-sex marriage were unsuccessful, and the first same-sex marriages were performed in 2004. Pam Belluck et al., *Same Sex Marriage: The Overview; Hundreds of Same-Sex Couples Wed in Massachusetts*, N.Y. TIMES, May 18, 2004, at A1.

34. New Hampshire enacted civil union legislation in 2007. N.H. REV. STAT. ANN. § 457-A:1 (2008).

35. N.J. STAT. ANN. § 37:1-28 (2007).

36. *Oregon Law is Delayed*, N.Y. TIMES, Dec. 29, 2007, at A18 (stating that Oregon domestic partnership law is postponed from taking effect pending court challenge).

37. In 1999, the Vermont Supreme Court ruled in *Baker v. State* that same-sex couples are entitled under the Vermont state constitution to all of the protections and benefits provided by marriage. 744 A.2d 864, 886 (Vt. 1999). The court stayed the implementation of its ruling pending consideration of the newly articulated constitutional mandate by the Vermont legislature. *Id.* at 887. In 2000, the legislature created the parallel institution of civil unions, which grants same-sex couples all of the benefits and responsibilities of marriage except the name. VT. STAT. ANN. tit. 15, §§ 1201-1207 (2007).

38. WASH. REV. CODE. § 26.60.010 (2007).

39. The Domestic Partnership Equality Amendment Act of 2006, 2006 D.C. Sess. Law Serv. 16-79.

40. *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

41. CAL. FAM. CODE § 297.5 (West 2007).

42. See CONN. GEN. STAT. ANN. § 46b-38aa (West 2007) (defining “civil union”); VT. STAT. ANN. tit. 15, §§ 1201-07 (2007) (establishing “civil unions”).

43. ME. REV. STAT. ANN. tit. 22, § 2710 (2007) (establishing and regulating domestic partner registry); see 2004 ME. LEGIS. SERV. CH. 672, H.P. 1152, L.D. 1579 (indicating the changes to relevant statutes extending certain rights to domestic partners).

44. HAW. REV. STAT. ANN. §§ 572C-1 to -3 (2007) (defining reciprocal beneficiaries and extending some of the rights and benefits of marriage).

45. HAW. REV. STAT. ANN. § 560:2-102 (2007).

46. Hawaii does not restrict “reciprocal beneficiaries” to same-sex couples. HAW. REV. STAT. ANN. § 572C-1 (2007). In addition, New Jersey permits opposite-sex couples who are aged sixty-two or older to register as domestic partners. N.J. STAT. ANN. § 26:8A-4(b)(5) (West 2007).

started with relatively modest forms of relationship recognition, but eventually expanded the scope of recognition to provide marriage or marriage equivalence.⁴⁸ Hawaii, however, has not increased the quantum of rights afforded same-sex couples since 1997 when it was the first state to enact relationship recognition.⁴⁹

In some instances, the state legislature enacted relationship recognition laws in response to a decision by the state supreme court. This was the case in Massachusetts, New Jersey, and California where the state supreme courts ruled that the refusal to extend to same-sex couples the same rights enjoyed by opposite-sex married couples violated the state constitution.⁵⁰ In other instances, the legislature acted in order to forestall court-ordered same-sex marriage or marriage equivalence. For example, Hawaii enacted its reciprocal beneficiary law in the midst of a state constitutional crisis occasioned by the 1993 state supreme court decision, *Baehr v. Lewin*.⁵¹

As explained more fully below, it remains to be seen whether state-specific recognition will be respected by other states. States that recognize same-sex relationships generally respect the status conferred by other states. For example, New Jersey offers marriage equivalence in the form of “civil unions.”⁵² It will honor out-of-state relationship recognition that confers rights that are equal to or greater than those available under New Jersey law.⁵³ This means that a couple who entered into a civil union in Vermont will be considered the same as a couple who entered a New Jersey civil union.⁵⁴ However, a same-sex couple who were legally married in Massachusetts will also be treated as being in a civil union.⁵⁵ They will not be considered “married” because in New Jersey that term is reserved for opposite-sex couples.⁵⁶ A couple who were reciprocal beneficiaries under Hawaii law would not qualify to be considered members of a New Jersey civil union,

47. *E.g.*, CONN. GEN. STAT. § 46b-38bb(2) (restricting eligibility to individuals of the same sex); VT. STAT. ANN. tit. 15, § 1202 (same).

48. California initially enacted domestic partnerships with limited benefits in 1999. CAL. FAM. CODE § 297; *see* 1999 Cal. Stat. ch. 588, A.B. 26 (describing in section 1 the legislature’s intent). It later extended the “same rights, protections, and benefits” of marriage to “registered domestic partners” in § 297.5. *Id.* In 2008 the California State Supreme Court ruled in favor of same-sex marriage. In re Marriage Cases, 43 Cal. 4th 757 (2008). New Jersey started with the category of “registered domestic partner.” N.J. STAT. ANN. § 26:8A-1. Domestic partners were eligible for some, but not all, of the rights afforded to spouses. *Id.* The status continues to be available for opposite-sex couples who are 62 years of age or older. *Id.* § 26:8A-4(b)(5). Following *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006), which required that all of the rights and benefits afforded to married couples be extended to same-sex partners, the legislature enacted § 37:1-28, providing for civil unions.

49. HAW. REV. STAT. ANN. §§ 572C-1 to -7 (2000).

50. *Goodridge*, 798 N.E.2d at 948-49; *Lewis*, 908 A.2d at 200; *Marriage Cases*, 43 Cal. 4th at 785.

51. 852 P.2d 44, 67-68 (Haw. 1993) (reversing summary judgment, holding that strict scrutiny applied, and remanding for further proceedings).

52. N.J. STAT. ANN. § 37:1-28.

53. Att’y Gen. of the State of N.J. Formal Opinion No. 3-2007, at 1 (Feb. 16, 2007), *available at* <http://www.nj.gov/oag/newsreleases07/ag-formal-opinion-2.16.07.pdf>.

54. *Id.* at 2.

55. *Id.*

56. *Id.* at 6-7.

because Hawaii law grants fewer rights to same-sex couples than the New Jersey civil union law.⁵⁷

States that do not recognize same-sex relationships typically do not respect relationships formed under the laws of other states. As noted above, DOMA purports to grant states the power to refuse to recognize same-sex marriages performed in other states.⁵⁸ In addition, many states have enacted their own so-called “mini-DOMA’s” or state constitutional amendments which generally provide that out-of-state same-sex marriages will be considered void.⁵⁹ A recent appellate court decision in New York, however, ruled that the state must recognize out-of-state same-sex marriages because it recognizes out-of-state opposite-sex marriages.⁶⁰ This position is unique in that New York does not extend relationship recognition to same-sex couples.⁶¹

It also bears mentioning that same-sex relationships have achieved some degree of legal recognition on the local and municipal level. For example, by ordinance, a county or municipality can establish the status of domestic partner and provide a registry system to formalize the relationship.⁶² The registry provides a governmental acknowledgement of the relationship, but the rights obtainable under these ordinances are necessarily limited to those rights that a county or municipality can grant.⁶³ By far the most important of these rights is domestic partner health care coverage to public employees.⁶⁴ Beyond that, the rights conferred by such ordinances are relatively meager. They include such benefits as

57. *Id.* at 2-3. Instead, such couples would be treated as registered domestic partners under New Jersey Law. *Id.*

58. 28 U.S.C. § 1738C (2007).

59. *See, e.g.*, OKLA. CONST. art. II, § 35 (providing that “a marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage”).

60. *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 742 (2008). *See* Robert D. McFadden, *State Court Recognizes Gay Marriages From Elsewhere*, N.Y. TIMES, Feb. 2, 2008, at 1B (describing appellate court ruling).

61. *See Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (holding state constitution does not compel recognition of same-sex marriage).

62. The San Francisco Human Rights Commission website maintains a comprehensive list of all domestic partnership ordinances on the city and county level, including the requirements for registration and the rights conferred. San Francisco Human Rights Commission, State Domestic Partnership Registries, http://www.sfgov.org/site/sfhumanrights_page.asp?id=6283 (last visited May 18, 2008) [hereinafter State Domestic Partnership Registries]. Domestic partner registries are largely symbolic, but the act of registration with local authorities also provides evidence of the relationship if it were to be challenged in litigation.

63. *Id.*

64. According to the Human Rights Campaign Foundation, thirteen state governments and 144 municipal or county governments extend domestic partnership benefits. Domestic Partner Health Benefits, *supra* note 2. In order to qualify for these employee benefits, a same-sex couple must establish either that they are registered as domestic partners with the relevant jurisdiction or they must satisfy a prescribed number of factors establishing a relationship. *Id.* The range of benefits extended varies from employer to employer. Of course, the most valuable benefit is employer-provided health insurance. Other benefits may include bereavement or sick leave, tuition reimbursement, and retirement or pension benefits. Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less than Perfect Institutional Choice*, 6-7 TEMP. POL. & CIV. RTS. L. REV. 337, 348 (1998) [hereinafter Knauer, *Domestic Partnership and Same-Sex Relationships*].

the right to visit a partner incarcerated at a county prison, local tax benefits enjoyed by married couples (such as exemption from realty transfer taxation), and the ability to transfer certain municipal licenses (such as a liquor license) to a same-sex partner.⁶⁵ Some counties and municipalities have adopted so-called “equal benefits ordinances” that attempt to provide rights to a broader class of individuals.⁶⁶ For example, the San Francisco domestic partnership ordinance requires all city contractors to offer domestic partnership benefits equal to those provided for spouses.⁶⁷

B. Anti-Recognition Efforts

As explained earlier, the reform on the state level has been far from unidirectional in favor of relationship recognition. To the contrary, anti-marriage measures—some exceedingly hostile to same-sex relationships—predominate. The existing gains with respect to relationship recognition are the result of an orchestrated effort by a social movement dedicated to securing LGBT civil rights—a movement that over the last ten years has increasingly focused on relationship recognition.⁶⁸ This movement is locked in a culture war with its counterpart, the so-called “traditional values movement.”⁶⁹

The traditional values movement responded to the early modest gains regarding relationship recognition and forcefully pursued prophylactic measures in

65. See State Domestic Partnership Registries, *supra* note 62 (listing the rights and benefits afforded to registered couples by states and municipalities).

66. The Human Rights Campaign reports that at least twelve cities and counties currently have so-called “equal benefits” ordinances. Human Rights Campaign, Equal Benefits Ordinances, http://www.hrc.org/issues/workplace/benefits/equal_benefits_ordinances.htm (last visited May 18, 2008).

67. San Francisco Human Rights Commission, Nondiscrimination in Contracts—SF Administrative Code Chapter 12B, http://www.sfgov.org/site/sfhumanrights_page.asp?id=5922 (last visited May 18, 2008); see *Myers v. City and County of San Francisco*, 253 F.3d 461, 467-76 (9th Cir. 2001) (upholding ordinance).

68. See generally GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY* (2004) (discussing historical roots of efforts to obtain relationship recognition); see also MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 87 (1999) (“Marriage became the dominant issue in lesbian and gay politics in the late 1990s, but not before.”).

69. The traditional values movement began using the term “culture war” as a “catch-phrase” for the debate over homosexuality in 1992. See DIDI HERMAN, *THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT* 55 (1997) (defining “culture wars” as “struggles over ideas and values, rights and responsibilities”). The term is now issued to describe a number of polarizing public policy disputes regarding family and individual rights. The traditional values movement is the social movement opposing the legal, political, and social recognition of same-sex couples. Eskridge refers to this as the “traditional family values” “countermovement.” William N. Eskridge, Jr., *Some Effects of Identity Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2161 (2002). The traditional values movement is often characterized as a backlash against the recent successes of the LGBT movement. Didi Herman, who has conducted a comprehensive study of the anti-gay policies and activities of pro-family organizations, rejects that these activities represent a “backlash.” HERMAN, *supra* at 69. Instead, Herman describes the traditional values movement as a “paradigmatic movement for social change.” *Id.* For a description of the rise of the traditional values movement, see CHAUNCEY, *supra* note 68, at 147-52 (describing history of movement).

the form of mini-DOMAs and state constitutional amendments designed to forestall any future advances.⁷⁰ In recent years, these DOMAs have become increasingly aggressive and are now drafted to prohibit all forms of relationship recognition—not simply same-sex marriage.⁷¹ A recent Virginia law goes one step further and purports to void private contracts granting same-sex couples the incidents of marriage.⁷² Accordingly, the novel experiment that is being undertaken on the state level is not simply about what quantum of rights to extend to same-sex couples. It is principally about what quantum of disabilities to impose on same-sex relationships.

1. The Federal DOMA and Marriage Amendment

As of January 2004, the United States General Accountability Office identified 1138 federal statutory provisions under which “marital status is a factor in determining or receiving benefits, rights, and privileges.”⁷³ These include favorable joint tax rates, social security spousal benefits, and pension rights.⁷⁴ Until the federal DOMA was enacted in 1996, marriage was the province of the states.⁷⁵ There was no federal definition of marriage. In questions involving federal law, the validity of the marriage was determined under state law.⁷⁶ DOMA defined marriage for all federal purposes as the union between one man and one woman.⁷⁷ As explained below, the proposed Federal Marriage Amendment would write this definition into the U.S. Constitution.⁷⁸

DOMA was introduced in the Senate by then-Presidential candidate Senator Bob Dole during the 1996 Republican primaries.⁷⁹ The 1993 Hawaii Supreme Court decision, *Baehr v. Lewin*, had signaled that the judicial imposition of same-

70. Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23, 55 (2006) [hereinafter Knauer, *The Recognition of Same-Sex Relationships*].

71. For example, the Oklahoma constitution provides, “Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.” OKLA. CONST. art. II, § 35A (2007).

72. VA. CODE ANN. § 20-45.3 (2007).

73. Letter from Dayna K. Shah, *supra* note 24.

74. See 26 U.S.C. § 1(a)(2) (2005) (joint tax rates); 42 U.S.C. § 402 (2004) (social security benefits). The federal pension statute, ERISA, provides protection for a spouse’s interest in certain retirement funds. See CHAUNCEY, *supra* note 68, at 118-19 (describing federal pension protections).

75. The traditional view is that family law is a state matter. See, e.g., *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (identifying domestic relations as “an area that has long been regarded as a virtually exclusive province of the States”); but see Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 619-23 (2004) (explaining traditional view that marriage is a state issue while outlining history of significant federal regulation).

76. See, e.g., *McCarty v. United States*, No. 01-4942(SRC), 2004 WL 325603, at *2 (D.N.J. Jan. 19, 2004) (stating a marriage valid under state law is valid for federal tax purposes).

77. 1 U.S.C. § 7 (2007).

78. The Federal Marriage Amendment, H.R.J. Res. 56, 108th Cong. (2003).

79. The Defense of Marriage Act was introduced in the Senate on May 8, 1996 by Senator Don Nickles of Oklahoma and Senator Dole of Kansas. Defense of Marriage Act, S. 1740, 104th Cong. (1996).

sex marriage was a clear possibility.⁸⁰ In the wake of the Hawaii marriage litigation, the goal of DOMA was to clarify the definition of marriage and pre-empt judicial interpretation.⁸¹ This clarification was necessary because, in many instances, state marriage law was gender neutral.⁸² Until the 1990s, the force of heteronormativity was sufficient to restrict marriage to a union between a man and a woman.⁸³

Once marriage was challenged in the courts, Congress sought to establish a federal definition of marriage.⁸⁴ It amended the seldom-used Dictionary Act to provide the following definition of marriage:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.⁸⁵

In addition, DOMA purports to authorize a state to refuse to recognize a same-sex marriage performed under the laws of another state.⁸⁶ At the time of DOMA's enactment, constitutional law scholars questioned its validity under the Full Faith and Credit Clause of the U.S. Constitution.⁸⁷ To date, however, the provision of DOMA concerning the recognition of out-of-state same-sex marriages has not been challenged.

80. *Baehr*, 852 P.2d 44. The decision reversed a summary judgment, holding the Hawaii statute presumptively unconstitutional and remanded for consideration of a compelling state interest. *Id.* at 68.

81. In introducing the bill that defined "marriage" and "spouse," Senator Nickles stated the legislation was necessary in response to "challenges from courts, lawsuits, and an erosion of values," and specifically cited the decision of the Hawaii Supreme Court. 142 CONG. REC. S4851, S4869-71 (1996).

82. There were several same-sex marriage cases that date from the early 1970s around the same time when states began adopting Equal Rights Amendments and ratification of the federal Equal Rights Amendment was pending before the states. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974). See CHAUNCEY, *supra* note 68, at 146-47 (describing the Equal Rights Amendment). The claims for equal marriage rights were rejected largely on definitional grounds: marriage can only exist between a man and a woman.

83. For example, in *Jones*, the Court of Appeals of Kentucky consulted two dictionaries and easily determined that the failure to issue a marriage license to Marjorie Jones and Tracey Knight did not implicate any constitutional rights. 501 S.W.2d at 589-90. Although the state statute did not specify that the applicants for a marriage license had to be of opposite sexes, the court concluded that by definition Jones and Knight could not marry. *Id.* at 589. The judge reasoned: "It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined." *Id.*

84. See 142 CONG. REC. at S4870 (statement of Sen. Nickles) (citing court challenges as a driving force behind the need for a definition of marriage).

85. 1 U.S.C. § 7 (2007).

86. 28 U.S.C. § 1738C.

87. See Kramer, *supra* note 26, at 1976-2008 (discussing constitutional issues raised by DOMA).

The 2003 U.S. Supreme Court decision *Lawrence v. Texas*⁸⁸ raised concern that the Court could invalidate DOMA on constitutional grounds and impose same-sex marriage.⁸⁹ *Lawrence v. Texas* overruled *Bowers v. Hardwick*⁹⁰ and found that sexual expression between two individuals of the same sex was a constitutionally protected liberty interest.⁹¹ In his dissent, Justice Scalia predicted that *Lawrence* represented a slippery slope that would inexorably lead to Court-mandated same-sex marriage.⁹² Within days of the decision, Republican congressional leaders, with the backing of President Bush, voiced their support of the Federal Marriage Amendment (FMA).⁹³ An amendment to the federal Constitution represented the ultimate endgame strategy of the traditional values movement. The FMA provides in full:

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.⁹⁴

The FMA would forestall a potential claim for same-sex marriage under the U.S. Constitution. It would also put an end to regional experimentation. As currently drafted, the FMA follows the tactic adopted by the new generation of DOMAs by prohibiting the extension of the “legal incidents” of marriage.⁹⁵ This would reverse all forms of state and local relationship recognition, even those that fall short of marriage equivalence.

2. State DOMAs and Other Anti-Relationship Measures

The success of DOMA was replicated many times on the state level. Currently, forty-five states have laws or constitutional amendments (or both) restricting marriage to a union of one man and one woman.⁹⁶ As noted above, most of these laws and constitutional amendments were put in place long before any

88. 539 U.S. 558 (2003).

89. *See id.* at 604-05 (Scalia, J., dissenting) (stating that *Lawrence* could invalidate prohibitions against same-sex marriage).

90. 478 U.S. 186 (1986).

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

92. *Id.* at 604-05 (Scalia, J., dissenting). Justice Scalia warned that “judicial imposition of homosexual marriage . . . has recently occurred in Canada.” *Id.* at 604.

93. Senate majority leader Bill Frist expressed his unqualified support for the constitutional amendment three days after the Court decided *Lawrence*. *Frist Opposes Gay Marriage*, N.Y. TIMES, June 30, 2003, at B8. A few weeks later, President Bush addressed the issue of same-sex marriage during a Rose Garden news conference, stating that marriage as between a man and woman should be “codified.” Neil A. Lewis, *Bush Backs Bid to Block Gays From Marrying*, N.Y. TIMES, July 31, 2003, at A1.

94. H.R.J. Res. 56, 108th Cong.

95. *Id.*

96. Statewide Marriage Prohibitions, *supra* note 13. The only states without a marriage prohibition are Massachusetts, New Jersey, New Mexico, New York, and Rhode Island. *Id.*

state sanctioned same-sex marriage. Thus, by the time the Massachusetts Supreme Court ruled in favor of same-sex marriage in 2003, anti-marriage laws and constitutional amendments had swept through the states.⁹⁷ All but three of the current anti-marriage laws were enacted in response to the same-sex marriage litigation that began in the 1990s.⁹⁸

Taking their cue from the federal DOMA, the states followed suit and began enacting so-called mini-DOMAs that defined marriage as a union between one man and one woman or expressly prohibited same-sex marriage.⁹⁹ As originally conceptualized in the mid-1990s, these state DOMAs were definitional statutes similar to the federal DOMA.¹⁰⁰ They were designed to remedy the gender-neutral marriage statutes that were then in effect in many states. To supplement the DOMA legislation, many states began to amend their state constitutions to provide a definition of marriage.¹⁰¹ This was necessary to prevent a state court from declaring that the state DOMA was in violation of state constitutional safeguards.

As noted above, within the last several years, there has emerged a new generation of DOMAs and constitutional amendments that expand their reach well beyond same-sex marriage. No longer content to prohibit only actual marriage, the new DOMAs and constitutional amendments are much more aggressive and purport to prohibit any grant of the “incidents of marriage” to same-sex couples.¹⁰² They target grants of parallel status by the legislature, such as civil unions and municipal registries, as well lesser forms of relationship recognition, such as the provision of domestic partner employee benefits by public employers.¹⁰³ Some states provide criminal penalties for the issuance of marriage licenses to same-sex

97. *Goodridge*, 798 N.E.2d at 990.

98. Knauer, *The Recognition of Same-Sex Relationships*, *supra* note 70, at 65 n.231.

99. *See, e.g.*, 23 PA. CONS. STAT. ANN. § 1102 (West 2007) (Pennsylvania law defines marriage as “[a] civil contract by which one man and one woman take each other for husband and wife.”).

100. ABA Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 397-403 (2004) (listing DOMA state laws).

101. *Statewide Marriage Prohibitions*, *supra* note 13 (listing twenty-six states with constitutional amendments).

102. For example, the Oklahoma state constitution specifically forbids the grant of the “legal incidents” of marriage to same-sex couples. OKLA. CONST. art. II, § 35. The constitutions of Kentucky and Louisiana speak of “a legal status identical or substantially similar to that of marriage” as being invalid and not recognized. KY. CONST. § 233A (2004), LA. CONST. art. XII, § 15. North Dakota and Utah both state in their constitutions that “no other domestic union” may be given “the same or substantially equivalent effect” as marriage. N.D. CONST. art. XI, § 28; UTAH. CONST. art. I, § 29. Ohio forbids any “legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.” OHIO. CONST. art. XV, § 11.

103. *See, e.g.*, VA. CODE ANN. § 20-45.3 (2007) (threatening to void not only domestic partnership benefits offered by private employers but also private contractual arrangements between same-sex partners). The full text of the statute, known as The Affirmation of Marriage Act, provides:

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

Id.

couples.¹⁰⁴ Finally, this new generation of laws could be interpreted to inhibit the ability of courts to apply concepts of “functional” family or equity to secure certain rights and standing for same-sex partners.¹⁰⁵ Seventeen states have adopted these so-called “DOMAs with teeth.”¹⁰⁶

One state, Virginia, has taken its anti-relationship public policy to a new level. Whereas the state-level mini-DOMAs and the state constitutional amendments target government recognition of same-sex relationships, Virginia has enacted a law that is directed at private agreements.¹⁰⁷ The Marriage Affirmation Act purports to prohibit private agreements that attempt to secure the “privileges or obligation of marriage” for same-sex couples.¹⁰⁸ This would include private workplace domestic partner benefits, as well as *private* relationship contracts between same-sex partners.¹⁰⁹

II. AN IMPERFECT, BUT STRATEGIC, INSTITUTIONAL CHOICE

LGBT advocates for same-sex relationship recognition have achieved considerably more success at the state level than at the federal level. Beginning in 1993, some state courts have expressed a willingness to extend marriage rights to same-sex couples under their state constitutions.¹¹⁰ Although the states have proven to be more responsive to the demand for relationship recognition, state reform measures offer an imperfect institutional choice with respect to securing minority civil rights because any gains are necessarily partial and not portable.¹¹¹ Without the guarantee of Full Faith and Credit, state level reforms are inadequate to secure broad based minority rights. Moreover, state level reforms, particularly those initiated by judicial order, are uniquely susceptible to majoritarian forces that may seek to overturn them. For this reason, state level reforms are inevitably partial and potentially transitory.

On the one hand, it is not at all surprising that states have led the way in relationship recognition for same-sex couples. Marriage is historically a state law issue, as is parenting and a host of related family law matters.¹¹² On the other hand,

104. The Oklahoma constitution provides that anyone who issues a marriage license to a same-sex couple is guilty of a misdemeanor. OKLA. CONST. art. II, § 35C.

105. *See, e.g., Vazquez v. Hawthorne*, 33 P.3d 735, 736 (Wash. 2001) (upholding a same-sex partner’s equitable claim against the estate of his deceased partner).

106. *See* Statewide Marriage Prohibitions, *supra* note 13 (identifying the seventeen states as: Alabama, Arkansas, Georgia, Kentucky, Idaho, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin).

107. VA. CODE ANN. § 20-45.3 (2007).

108. *Id.*

109. *See, e.g.,* Editorial, *Uncivil Disunion*, WASH. POST, May 9, 2004, at B6 (noting potential impact on health care powers of attorney). Constitutional law scholars have raised the concern that the law could be constitutionally invalid to the extent that it voids pre-existing contracts, and Article I, Section 10 of the U.S. Constitution prohibits states from interfering with obligations under existing contracts. U.S. CONST. art. I, § 10.

110. *See, e.g., Baehr*, 852 P.2d at 74 (ruling that prohibiting same-sex couples from marrying constituted gender discrimination and violated the Equal Rights Amendment to the state constitution).

111. *See* KOMESAR, *supra* note 16, at 51-52 (discussing “imperfect alternatives”).

112. *See* Stein, *supra* note 75, at 619 (noting that marriage traditionally is a state issue).

it is also worth noting that liberty interests involving marriage, child rearing, and basic issues of family autonomy form the core of our unenumerated fundamental rights protected and guaranteed by the U.S. Constitution.¹¹³ Until *Lawrence v. Texas*, however, relief at the federal level was largely foreclosed by the 1986 U.S. Supreme Court decision, *Bowers v. Hardwick*.¹¹⁴ It was difficult to argue that the same behavior that could be criminalized could also form the basis of a relationship entitled to the same rights and benefits afforded opposite-sex couples.¹¹⁵

LGBT activists and litigators did not look to state courts for relief out of a commitment to federalism or Justice Brandeis' vision of social experimentation.¹¹⁶ To the contrary, the turn toward the states was a simple example of strategic institutional choice.¹¹⁷ Barred from relief at the federal level for the foreseeable future, LGBT advocates made a pragmatic decision to pursue relief on the state level, despite the fact that such relief would be jurisdiction-specific. They also turned their attention to the marketplace and increased efforts to secure workplace domestic partnership benefits.¹¹⁸ Basing their demand on an "equal pay for equal work" argument, LGBT advocates met with even greater success in the market where numerous employers responded favorably to the claim for relationship recognition.¹¹⁹ Indeed, the term "domestic partner," which is now widely used to describe a legal status that is the equivalent of marriage, originally arose in the context of employee benefits.¹²⁰

As LGBT advocates began to pursue relationship recognition in the 1990s, they devised a litigation strategy that was reminiscent of the so-called "Road to Brown," orchestrated by Charles Houston.¹²¹ First, the advocates identified states with gender-neutral marriage laws.¹²² They then examined state constitutions to identify which ones contained provisions that were perceived to be favorable, such as equal rights clauses.¹²³ Potential plaintiffs were discouraged from bringing cases in states where the law was considered unfavorable in order to avoid creating bad

113. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (finding a fundamental right to marry); *Meyer v. Nebraska*, 262 U.S. 390, 391 (1923) (establishing fundamental right of parents to make education decisions regarding their children).

114. 478 U.S. at 195-96.

115. In his dissent in *Romer v. Evans*, Justice Scalia wrote, "If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct." 517 U.S. 620, 642 (1996) (Scalia, J., dissenting).

116. *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

117. KOMESAR, *supra* note 16, at 174-82 (discussing strategic institutional choice).

118. See generally Knauer, *Domestic Partnerships and Same-Sex Relationships*, *supra* note 64 (discussing creation of market-based rights, such as domestic partnership benefits).

119. *Id.* at 342.

120. *Id.* at 337-38.

121. See Mark C. Rahdert, *Obstacles and Wrong Turns on the Road From Brown: Milliken v. Bradley and the Quest for Racial Diversity in Education*, 13 TEMP. POL. & CIV. RTS. L. REV. 785 (2004) (discussing *Brown v. Board of Education* and subsequent history).

122. David J. Garrow, *Toward a More Perfect Union*, N.Y. TIMES MAG., May 9, 2004, at 52 (describing evolution of coordinated same-sex marriage litigation).

123. *Id.*

precedent.¹²⁴ This strategy included the decision not to challenge DOMA until such point as there was greater recognition on the state level.¹²⁵

As previously stated, in *Baehr v. Lewin*, the Hawaii Supreme Court ruled that the failure of the state to issue marriage licenses to same-sex couples violated the equal rights clause of the Hawaii constitution.¹²⁶ This case set off a firestorm of anti-recognition legislation in the form of DOMAs that specified that marriage could only be between one man and one woman and citizen initiatives that proposed state constitutional amendments to prohibit same-sex marriage.¹²⁷ The Supreme Court of Hawaii remanded the case to the trial court to determine whether the prohibition against same-sex marriage could be justified by a compelling state interest.¹²⁸ After fact-finding and hearings, the trial court ruled that no compelling state interest was served by the denial of marriage licenses to same-sex couples.¹²⁹

The state appealed, and while the appeal was still pending, the voters amended the state's constitution to provide that the definition of marriage was the exclusive jurisdiction of the legislature.¹³⁰ This left the judiciary powerless to change the definition of marriage to include same-sex couples. This institutional jockeying represented the initial phase of anti-recognition efforts, when such measures focused on the definition of marriage and constraining the power of the judiciary to "redefine" marriage. Although the Supreme Court of Hawaii eventually affirmed the lower court decision mandating same-sex marriage, the constitutional amendment effectively mooted its final decision.¹³¹

In the midst of this ongoing litigation, the Hawaii state legislature adopted "reciprocal beneficiary" legislation that, as discussed above, extends some rights and benefits to same-sex partners, primarily those related to inheritance rights and property interests.¹³² The status of reciprocal beneficiaries is not limited to same-sex couples;¹³³ it is available to two single adults who are not eligible to marry.¹³⁴ It grants approximately sixty rights and responsibilities commonly associated with marriage, including wrongful death rights, the right to inherit through intestate succession, and the right to make certain health care decisions.¹³⁵

The Hawaii controversy illustrates the potential fragility of state court gains. Before the marriage litigation was concluded, voters had successfully mobilized

124. *Id.*

125. *Id.*

126. 74 Haw. at 582.

127. Knauer, *The Recognition of Same-Sex Relationships*, *supra* note 70, at 55.

128. 74 Haw. at 582.

129. *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996).

130. Article I, Section 23 of the Constitution of the State of Hawaii now provides: "The legislature shall have the power to reserve marriage to opposite-sex couples." HAW. CONST. art. I § 23. *See* CHAUNCEY, *supra* note 68, at 126 (describing concerted efforts by national organizations to derail same-sex marriage in Hawaii).

131. *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at *8 (Haw. Dec. 9, 1999).

132. HAW. STAT. ANN. § 572C-1 (2007).

133. *Id.*

134. *Id.*

135. Partners Task Force for Gay & Lesbian Couples, Reciprocal Beneficiaries: The Hawaiian Approach (Aug. 29, 2006), <http://www.buddybuddy.com/d-p-hawa.html>.

and amended the state constitution by a citizens' referendum. The same trajectory was followed again in 1998 when an Alaska court ruled in favor of same-sex marriage.¹³⁶ Given the experiences of Hawaii and Alaska, the citizens of other "courageous states" did not wait to organize against relationship recognition until there was marriage litigation pending in their state courts. Following the much-publicized decision in *Baehr v. Lewin*, forty-two states took steps to prohibit same-sex marriage, whether by statute or constitutional amendment.¹³⁷ This level of activity is particularly remarkable given that no state recognized same-sex marriage until 2003, when the Supreme Court of Massachusetts ruled that same-sex marriage was required under the state constitution.¹³⁸

After the defeats in Hawaii and Alaska, LGBT advocates added another criterion to their list of factors indicating that a jurisdiction would be receptive to same-sex marriage. In addition to looking for favorable constitutional provisions, LGBT advocates had to consider a state's procedure for amending its constitution. Accordingly, it was not an accident that the next major round of marriage litigation occurred in Vermont. Vermont does not have a statewide referendum process and, therefore, a court decision could not be overturned by resort to direct democracy.¹³⁹ Only the state legislature can introduce a constitutional amendment, and the process takes a period of several years.¹⁴⁰

In 1999, the Vermont Supreme Court ruled that same-sex couples were entitled to the same rights and privileges afforded to married couples.¹⁴¹ The decision suspended the issuance of marriage licenses to same-sex couples until the state legislature could attempt to remedy the situation.¹⁴² A year later, the legislature enacted the parallel status of civil unions in order to avoid the implementation of the 1999 court decision.¹⁴³ The law grants same-sex couples all of the rights of marriage.¹⁴⁴

Since the Vermont litigation, the supreme courts of three states, Massachusetts, New Jersey, and California, have ruled that the failure to extend benefits to same-sex couples violated the state constitution.¹⁴⁵ The Massachusetts court specifically held that a parallel status such as a Vermont-style civil union would not be constitutionally permissible.¹⁴⁶ The majority of the Supreme Court of New Jersey reserved judgment on whether such a parallel status would pass constitutional scrutiny until such time as a challenge was before it.¹⁴⁷ In both

136. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Alaska Super. Ct. Feb. 27, 1998).

137. Knauer, *The Recognition of Same-Sex Relationships*, *supra* note 70, at 43 n.231.

138. *Goodridge*, 798 N.E.2d at 948-49.

139. VT. CONST. ch. II, § 72.

140. *Id.*

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

142. *Id.*

143. VT. STAT. ANN. tit. 15, §§ 1201-07 (2008).

144. *Id.*

145. *Goodridge*, 798 N.E.2d at 948; *Lewis*, 908 A.2d at 200; *In re Marriage Cases*, 43 Cal. 4th 757 (2008),

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

147. *Lewis*, 908 A.2d at 222.

Massachusetts and New Jersey, the traditional values movement led efforts to amend the state constitution and thereby reverse the rulings. As a result, a same-sex couple who were married in Massachusetts in 2004 had to live with several years of uncertainty as the cumbersome constitutional amendment process proceeded.¹⁴⁸ Efforts to overturn the decisions by amending the state constitution continue in both states and have begun in California.¹⁴⁹

III. THE HUMAN COSTS

This confusing and conflicting state of relationship recognition weighs heavily on same-sex couples.¹⁵⁰ The lack of uniformity creates a level of uncertainty that complicates daily life in ways that opposite-sex couples need never consider. Indeed, in its 2004 resolution in favor of same-sex marriage, the American Psychological Association noted the extreme minority stress experienced by same-sex couples due to the absence of uniform recognition and the fact that relationship recognition granted by one jurisdiction is rarely “portable.”¹⁵¹ In 2005, the American Psychiatric Association followed suit with a similar resolution.¹⁵² As explained in the preceding section, relationship recognition is not only jurisdiction-specific, but it is under continual assault by the traditional values movement. In this way, same-sex relationships remain contested even after they have been granted legal recognition.

The resolution passed by the American Psychological Association underscores the fact that the movement for relationship recognition is about much more than the expressive value of the term marriage or the social status afforded to married couples.¹⁵³ It is also about much more than favorable car insurance rates or joint tax returns.¹⁵⁴ Even the 1138 federal benefits conferred on account of marital status pale in comparison to the simple fact that marriage or some parallel form of

148. Pam Belluck, *Massachusetts Gay Marriage Referendum is Rejected*, N.Y. TIMES, June 15, 2007, at A16 (noting that now the earliest a measure could be before voters is 2012).

149. For example, the Massachusetts Family Institute continues to work for the repeal of same-sex marriage. Massachusetts Family Institute, Marriage and Family, <http://www.mafamily.org/issues/?item=5> (last visited May 18, 2008). The New Jersey Family Policy Council is working to introduce an amendment banning same-sex marriage. New Jersey Family Policy Council, Legislative Watch, <http://www.njfdc.org/html/LegWatch.asp> (last visited May 18, 2008). In November 2008 voters in California will face a ballot initiative to ban same-sex marriages. Jesse McKinley, *‘I Do’? Oh, No. Not Here, You Don’t*, N.Y. TIMES, June 13, 2008, at A18. When the California Supreme Court ruling took effect on June 16, 2008, some county clerk’s offices stopped issuing marriage licenses entirely in order to avoid issuing licenses to same-sex couples. *Id.*

150. Although outside the scope of this Essay, the widespread prohibition against same-sex marriage presents a unique challenge for transgender individuals. For example, DOMA authoritatively declares that marriage must be between one *man* and one *woman*. Defense of Marriage Act, 1 U.S.C. § 7.

151. American Psychological Association, Resolution on Sexual Orientation and Marriage (July 2004), <http://www.apa.org/pi/lgbcpolicy/marriage.pdf>.

152. American Psychiatric Association, Same Sex Marriage Resource Document (Nov. 2004), http://archive.psych.org/edu/other_res/lib_archives/archives/200417.pdf.

153. See Lewis, 908 A.2d at 225 (discussing “deep and symbolic significance”).

154. The Supreme Court of Hawaii has included tax benefits in its list of the most salient marital rights and benefits. *Baehr*, 852 P.2d at 59.

recognition is the only way to make your partner *family*. Despite many advances, the law continues to privilege relationships defined by blood, marriage, and adoption. Without relationship recognition, your partner is a legal stranger.

As a legal stranger, your partner stands behind children, parents, siblings, grandparents, aunts and uncles, cousins, and even the state in terms of priority and legal standing.¹⁵⁵ On a very personal level, this absence of relationship can have significant bearing in cases of relationship dissolution, child custody,¹⁵⁶ second parent adoption, inheritance, and health care decision-making. Accordingly, the central question presented by relationship recognition is not whether a same-sex partner will be treated equally as a spouse, but whether a same-sex partner will be recognized *at all*. Marriage provides a way to make your partner *family*, to include your partner's name on a list that is otherwise determined solely in terms of biology and adoption.

In the absence of relationship recognition, either in the form of same-sex marriage or a parallel status, a same-sex couple must rely on private contract, beneficiary designations,¹⁵⁷ dependent classifications, and, at times, the goodwill of family members to secure recognition. Although private contract may be adequate to sort out the rights and responsibilities of the parties vis-à-vis each other, it often falls woefully short when asked to compel third parties to respect or recognize the relationship. Even the continued efficacy of private contract to mediate rights between the parties could be placed in question in jurisdictions enacting laws such as the Virginia Marriage Affirmation Act.¹⁵⁸

Some of the most disturbing examples of what happens when your partner is considered a legal stranger occur in the context of surviving same-sex partners.¹⁵⁹ The majority of jurisdictions deny a surviving same-sex partner any of the property rights or decision-making authority that inure automatically to the benefit of a surviving spouse or next of kin, such as the right to take under the rules of intestate succession or standing to file a wrongful death action.¹⁶⁰ In these jurisdictions, a same-sex couple must rely on a combination of testamentary documents, lifetime transfers, beneficiary designations, and other declarations to safeguard the interests of the surviving partner. Although courts will uphold an otherwise valid will that primarily benefits a same-sex partner, such a will remains subject to challenge by

155. See generally Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family through Tragedy*, 75 TEMP. L. REV. 31 (2002) (discussing legal disabilities imposed on surviving same-sex partners) [hereinafter Knauer, *Surviving Same-Sex Partners*].

156. According to the 2000 Census, thirty-four percent of female same-sex households and twenty-two percent of male same-sex households have at least one child under the age of eighteen. SMITH AND GATES, *supra* note 1.

157. Employment-related survivor benefits and life insurance provide an important source of financial support for surviving family members. These benefits are nonprobate property which means their distribution is not determined by the decedent's will or the rules of intestate succession. See Knauer, *Surviving Same-Sex Partners*, *supra* note 155, at 49-51 (discussing employment-related survivor benefits in the context of same-sex relationships).

158. VA. CODE ANN. § 20-45.3 (2007).

159. Knauer, *Surviving Same-Sex Partners*, *supra* note 155 (discussing legal disabilities imposed on surviving same-sex partners).

160. *Id.*

the relatives of the deceased partner and will most likely fail to address or remedy every eventuality.¹⁶¹ Thus, notwithstanding a comprehensive estate plan and thorough beneficiary designations, there will remain certain instances where a surviving same-sex partner will be legally invisible—a mere stranger.

Against the backdrop of pervasive heteronormativity, it is difficult to ensure that a surviving same-sex partner will have the authority to make certain decisions, such as funeral and burial arrangements.¹⁶² Sometimes state law is vague concerning who has the legal authority to make such decisions and sometimes a third party, such as a funeral director or a cemetery, will simply refuse to honor the directions of the surviving partner, especially when they are contrary to the wishes of the next of kin.¹⁶³ When this occurs, the only recourse for a surviving partner may be litigation.

Some courts have been willing to recognize same-sex partners in specific instances, such as protection from eviction under municipal rent control guidelines,¹⁶⁴ standing to sue for wrongful death,¹⁶⁵ and the right to take from a partner's estate.¹⁶⁶ However, these decisions are based on the notion of a "functional" family or equitable principles, not a declaration of equality for same-

161. *Id.* at 45-46.

162. See Jennifer E. Horan, Note, "When Sleep at Last Has Come": Controlling the Disposition of Dead Bodies for Same-Sex Couples, 2 J. GENDER RACE & JUST. 423 (1999) (discussing difficulty encountered by surviving same-sex partners).

163. Knauer, *Surviving Same-Sex Partners*, *supra* note 155, at 48-49.

164. For example, New York City rent-control guidelines allowed a member of the decedent's immediate family who shared the household to stay in a rent-controlled apartment even where the family member was not a named party to the lease. N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6(d) (1991). The ground-breaking 1989 case of *Braschi v. Stahl Associates Co.*, 543 N.E.2d 49 (N.Y. 1989), extended this protection to a surviving same-sex partner through the adoption of a functional definition of family, with an emphasis on mutual interdependence. *Id.* at 53-54.

165. Standing to sue for wrongful death is established by statute. The order of priority starts with the surviving spouse and continues through the next of kin. Only a handful of states include surviving same-sex partners as spousal equivalents. The California Superior Court in San Francisco allowed a surviving same-sex partner to bring a wrongful death action. *Smith v. Knoller*, No. 319532, 2001 WL 36128129, at *1 (Cal. Super. Ct. Aug. 9, 2001); see also Peter Hartlaub, *Same-Sex Partner Can Sue for Damages; Wrongful-Death Claim in Dog-Mauling Case*, S.F. CHRON., July 28, 2001, at A1. Diane Whipple, a lacrosse coach, was mauled to death by her neighbors' two large dogs in the hallway outside the door to the apartment that she shared with her partner of almost seven years, Sharon Smith, on January 26, 2001. *Id.*; Christopher Heredia, *Dog Mauling Victim's Partner to Test Wrongful Death Law*, S.F. CHRON., Feb. 19, 2001, at A13. In the face of clear statutory language to the contrary, Smith pursued her wrongful death action against the owners arguing that the exclusion of same-sex partners was invalid under the California state constitution and met with unexpected success at the trial court level. *Smith*, 2001 WL 36128129, at *1, 3; see also, Hartlaub, *supra*; Heredia, *supra* (noting that "no case like Smith's has ever been successful").

166. When Frank Vasquez's partner of twenty-eight years, Robert Schwerzler, died without a will, Vasquez asserted an equitable claim against the estate. *Vasquez v. Hawthorne*, 33 P.3d 735 (Wash. 2001) (en banc); Marsha King, *Should Companion Get Deceased's Estate?*, SEATTLE TIMES, Jan. 23, 2001, at A1. Over the protests of Schwerzler's family, the Washington Supreme Court remanded the case for consideration of the equitable claim. *Vasquez*, 33 P.3d at 738. The court extended to same-sex couples an established equitable doctrine that allows an unmarried opposite-sex partner who relied on the decedent to execute the necessary documents to secure the survivor's property interests to maintain an action against the estate that is somewhat akin to equitable adoption. *Id.* at 737-38.

sex couples.¹⁶⁷ Although taken together, they represent a trend toward greater relationship recognition, such court-approved recognition is based on a variety of theories and remains largely a case-by-case enterprise. For many surviving partners, litigation offers too little too late.

This was the case when Sherry Barone's partner of thirteen years, Cynthia Friedman, died at age thirty-five.¹⁶⁸ Even though Friedman left a will that appointed Barone as executor and expressly authorized Barone to "arrange for the disposition" of Friedman's remains,¹⁶⁹ it took Barone close to three years to get the cemetery to respect Barone's wishes regarding the inscription of her partner's headstone.¹⁷⁰ The cemetery where Friedman was buried refused to inscribe her headstone with the epitaph directed by Barone—"beloved life partner, daughter, granddaughter, sister and aunt"—because Friedman's parents objected to the use of the term "beloved life partner."¹⁷¹ The parents preferred the following inscription: "beloved daughter, sister, granddaughter, and loving friend"¹⁷²—an epitaph that erased the nature of Friedman's relationship with Barone and relegated Barone to a "friend" who was only mentioned after Friedman's family relationships. The cemetery finally agreed to Barone's instructions as part of a settlement agreement reached in the federal lawsuit Barone brought against the cemetery.¹⁷³

Barone's ordeal was no doubt horrific. However, the 2000 case of Bill Flanigan and Robert Daniel illustrates an instance when a same-sex partner literally did not have time to resort to litigation.¹⁷⁴ Flanigan and Daniel were on a cross-country trip when Daniel became seriously ill in Maryland.¹⁷⁵ Daniel was admitted to a hospital operated by the University of Maryland Health System.¹⁷⁶ The staff refused to allow Flanigan to see his dying partner despite the fact that they were registered domestic partners in their hometown of San Francisco and despite the fact the Flanigan was Daniel's health care attorney-in-fact.¹⁷⁷ The hospital connected Daniel to life support against Daniel's previously expressed wishes and without consulting with Flanigan.¹⁷⁸ The hospital continued to refuse to allow

167. See, e.g., *Braschi*, 543 N.E.2d at 53-54 (stressing importance of "emotional and financial commitment and interdependence" in lieu of legal status); *Vasquez*, 33 P.3d at 736-37 (noting equitable claims "not limited by the gender or sexual orientation of the parties").

168. Debbie Woodell, *Gay Partner Battles for Rights Even at the Grave*, AUSTIN AMERICAN-STATESMAN, May 31, 1997, at C8.

169. Murray Dubin, *Late Woman's Parents, 'Life Partner' Wage Legal Battle Over Headstone Inscription*, PHILA. INQUIRER, June 30, 1997.

170. Claudia N. Ginanni, *Cemetery To Inscribe Headstone, Pay \$15,000*, THE LEGAL INTELLIGENCER, Sept. 8, 1997, at 5.

171. Dubin, *supra* note 169.

172. *Id.*

173. Ginanni, *supra* note 170.

174. Complaint, *Flanigan v. Univ. of Md. Med. Sys. Corp.* (Md. Cir. Ct. 2002), available at <http://data.lambdalegal.org/pdf/118.pdf> (last visited May 18, 2008).

175. Lambda Legal, *Flanigan v. University of Maryland Hospital System*, <http://www.lambdalegal.org/our-work/in-court/cases/flanigan-v-university-of-maryland.html> [hereinafter *Lambda Legal, Flanigan*] (last visited May 18, 2008).

176. Complaint, *supra* note 174, at 2, 7.

177. *Id.* at 2, 5, 7.

178. *Id.* at 5.

Flanigan to see Daniel until Daniel's mother arrived and gave permission.¹⁷⁹ By the time Flanigan was permitted to see Daniel, he was unconscious.¹⁸⁰ Daniel died a short time later, after the "family" authorized the removal of life-sustaining treatment.¹⁸¹ He never regained consciousness.¹⁸² Flanigan sued the hospital for negligence and intentional infliction of emotional distress,¹⁸³ but the jury found in favor of the hospital.¹⁸⁴

Flanigan was barred from Daniel's hospital room because he did not qualify as "family." Under Maryland law, Flanigan and Daniel were legal strangers. The fact that Flanigan and Daniel were registered as domestic partners under the San Francisco ordinance did not carry any weight with the hospital staff in Maryland. The hospital staff also chose to disregard the health care power of attorney that Flanigan presented in an attempt to establish his decision-making authority and, instead, waited for Daniel's mother to arrive. Flanigan and Daniel had done everything possible to ensure that their relationship would be respected, but they could not control for the pervasive heteronormativity that would work to render their relationship invisible. Luckily, Flanigan was on good terms with Daniel's mother. If not, Flanigan might not have gotten to see his partner before he died.

For Flanigan and Daniel, litigation was not a viable option. Efforts to enforce the health care power of attorney in court would have taken too long. Flanigan had to be his own advocate under intolerable circumstances. He had to argue with health care providers regarding the validity of the health care power of attorney, as he tried to make third parties respect his relationship. In retrospect, the only thing that Flanigan and Daniel could have done differently was to have stayed home in San Francisco where, at the time, a local ordinance offered some government recognition of their relationship and where it was much more likely that Daniel's health care power of attorney would have been respected. Their story illustrates the unfortunate fact that same-sex couples who reside in a jurisdiction with some degree of relationship recognition must travel at their own risk.

179. *Id.* at 11.

180. *Id.*

181. *Id.*

182. Complaint, *supra* note 174, at 11.

183. *Id.*

184. Lambda Legal, Flanigan, *supra* note 175.