


3-1-2006

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Recommended Citation

Robert Wintemute, *Same-Sex Marriage: When Will It Reach Utah?*, 20 BYU J. Pub. L. 527 (2006).

Available at: <https://digitalcommons.law.byu.edu/jpl/vol20/iss2/12>

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Same-Sex Marriage: When Will It Reach Utah?

*Robert Wintemute**

Attempts to amend constitutions so as to make legal¹ marriage impossible for same-sex couples are futile. Amendments of this kind are nothing more than temporary “legal dikes” designed to create “legal islands” in which a heterosexual majority can continue to discriminate against a lesbian and gay minority in relation to access to legal marriage. These amendments seek to strip the gay and lesbian minority of any possibility of seeking protection against such discrimination from either the legislature or the courts. Where such amendments have been adopted, they will eventually be repealed or invalidated, because the “incoming tide,” i.e., the long-term international trend, will eventually bring full legal equality to our fellow human beings who happen to be lesbian and gay individuals, or members of same-sex couples, with or without children.

The first part of my handout² illustrates two international trends regarding equal access to legal marriage for same-sex couples. What I call “International Trend No. 1” is “treating sexual orientation as a suspect (or quasi-suspect) classification,” i.e., a classification that is presumed unconstitutional and requires a strong justification when used by a government. This is something that has been avoided by U.S. courts in recent decisions such as *Romer v. Evans*,³ *Baker v. State of Vermont*,⁴ *Lawrence v. Texas*,⁵ and *Goodridge v. Department of Public Health*.⁶ In

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1. I will refer to “legal marriage” (a marriage with legal but not religious consequences) and “religious marriage” (a marriage with religious but not legal consequences), but not “civil marriage” (a marriage performed by a state official with legal but not religious consequences). In some European countries, like the Netherlands, Belgium and France, “civil marriage” and “legal marriage” are synonymous, because a religious marriage can never be a legal marriage (have legal consequences). This is not true in the United Kingdom, Canada and the United States, where a marriage performed by a religious official (eg, in a Christian church) can be simultaneously a legal marriage and a religious marriage.

2. The first part of the handout follows this transcript as Appendix A.

3. 517 U.S. 620 (1996).

4. 744 A.2d 864 (Vt. 1999).

5. 539 U.S. 558 (2003).

all of these decisions, the courts have used a powerful form of rational basis review, and thus avoided the real question: whether or not classifications (differences in treatment) based on sexual orientation should be treated in the same way as classifications based on race, religion or sex. The debate is ongoing, certainly at the federal level in the United States, and most state supreme courts also seem to have managed to avoid answering this question.

International Trend No. 1 is to treat sexual orientation as similar to race, religion and sex, and therefore to require the same level of scrutiny for claims of discrimination based on sexual orientation as for claims of discrimination based on race, religion or sex. This trend manifests itself in two ways. First, since 1989, when a new constitutional bill of rights is being drafted, it is increasingly common to insert sexual orientation into the list⁷ of presumptively prohibited grounds in the provision that prohibits discrimination. In the handout, you will see a list of the constitutions of nation-states,⁸ or of constituent states within a federal system,⁹ that mention sexual orientation in their lists of such grounds. The best known and most influential of these provisions is the one in the South African Constitution, because South Africa is a country where the majority of people know what discrimination means, having suffered racial discrimination for decades.¹⁰ The first example at the international level is Article 21(1) of the Charter of Fundamental Rights of the European Union,¹¹ which builds on Article 13 of the European Community Treaty.¹² Although the Charter is only a political

6. 798 N.E.2d 941 (Mass. 2003).

7. Although the 14th Amendment to the U.S. Constitution contains no list of grounds (and does not even mention race), most other national constitutions and international human rights treaties contain such a list.

8. See CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT (No. 200 of 1993) § 8(2); CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT (No. 108 of 1996) § 9(3); FIJI ISLANDS, CONSTITUTION AMENDMENT ACT 1997 § 38(2)(a); ECUADOR CONST. art. XXIII, § 3 (1998); PORTUGAL CONST. art. XIII, § 2 (as amended in 2004).

9. Brazil, States of MATO GROSSO CONST. art. X, § 3 (1989), and SERGIPE CONST. art. III, § 2 (1989); Germany, States of BRANDENBURG CONST. art. XII, § 2 (1992); THURINGIA CONST. art. II, § 3 (1993); BERLIN CONST. art. X, § 2 (1995).

10. “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language and birth.” S. AFR. CONST. 1996 § 9(3) (emphasis added).

11. Charter of Fundamental Rights of the European Union art. XXI § 1 (EC 2000), available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/c_364/c_36420001218en00010022.pdf (last visited May 8, 2006).

12. See <http://europa.eu.int/eur-lex/lex/en/treaties/index.htm> (last visited May 8, 2006). Added in 1997, Article 13 does not itself prohibit discrimination, but gives the European Community legislature clear power to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or *sexual orientation*” (emphasis added).

proclamation that is not yet legally binding,¹³ its Article 21(1) was intended to be a “state of the art” anti-discrimination provision for the 21st century, by including grounds of discrimination that have only been recognized recently such as disability, age, sexual orientation, and genetic features (a ground that could become more significant in the future).¹⁴

The second way in which International Trend No. 1 manifests itself is through judicial interpretation of existing anti-discrimination provisions of national constitutions or international human rights treaties, which do not expressly mention sexual orientation. Often, these provisions were drafted long before anyone was talking about sexual orientation, and are difficult to amend. Yet, there is a trend towards acknowledging that sexual orientation is one of the grounds that is deserving of heightened scrutiny under such provisions. The Supreme Court of Canada reached that conclusion unanimously in 1995.¹⁵ The European Court of Human Rights, in a series of decisions, has made express or implied analogies between sexual orientation and race, religion or sex,¹⁶ and the United Nations Human Rights Committee has

13. Article II-81(1) of the Treaty establishing a Constitution for Europe (signed on 29 Oct. 2004) is identical to Article XXI(1) of the Charter, and would become legally binding if the Treaty were ratified by all 25 European Union member states (the ratification process has been stalled due to negative referendum results in France and the Netherlands in 2005).

14. “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or *sexual orientation* shall be prohibited.” Charter of Fundamental Rights of the European Union art. XXI § I (emphasis added).

15. See *Egan v. Canada*, [1995] 2 S.C.R. 513, ¶ 5, 173-175 (the Court held by 9 votes to 0 that, under Section 15(1) of the Canadian Charter of Rights and Freedoms, part of the federal Constitution of Canada, sexual orientation is an “analogous ground” of discrimination, analogous to the “enumerated grounds”: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability). The Court held by 5 votes to 4 that providing a social security benefit to unmarried different-sex couples but not to unmarried same-sex couples was *prima facie* discrimination based on sexual orientation that the federal government had to justify, and by 5 votes to 4 (one judge having switched sides), that the discrimination could be justified. See Robert Wintemute, “Discrimination Against Same-Sex Couples: Sections 15(1) and 1 of the Charter: *Egan v. Canada*,” (1995) 74 *Canadian Bar Review* 682-713. The Court implicitly overruled the result in *Egan* (by 8 votes to 1) in *M. v. H.*, [1999] 2 S.C.R. 3.

16. See *Smith & Grady v. United Kingdom*, 29 Eur. Ct. H.R. 493, ¶ 97 (1999) (stating that “[t]o the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes [of heterosexual members of the armed forces] cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the [lesbian and gay members’] rights . . . any more than similar negative attitudes towards those of a different *race*, origin or colour” (emphasis added)); *Mouta v. Portugal*, Eur. Ct. H.R. Application no. 33290/96, ¶ 36 (Dec. 21, 1999) (“the [Lisbon] Court of Appeal [by transferring custody of a child from her gay father to her heterosexual mother] made a distinction based on considerations regarding the applicant’s sexual orientation, a distinction which is not acceptable under the [European] Convention [on Human Rights] [like distinctions based on *religion*] (see, *mutatis mutandis*, . . . *Hoffmann* . . . [Jehovah’s Witness mother])”); *S.L. v. Austria*, Eur. Ct. H.R., ¶ 37 (2003) (“[T]he Court reiterates that sexual orientation is a concept covered by Article 14 [the

recently interpreted the anti-discrimination provision that it is responsible for enforcing as including sexual orientation.¹⁷ Time does not permit me to discuss the analogies between sexual orientation and race, religion or sex. However, if you turn to my egocentric reading list (page ten of the handout), which cites only my own publications,¹⁸ you will find the published book version of my doctoral thesis, *Sexual Orientation and Human Rights*, which analyzes these analogies at length.¹⁹ Sexual orientation can be compared to race because many lesbian and gay people would say that their emotional and sexual attractions to persons of the same sex are immutable: they did not choose these internal feelings and have no control over them, just as people cannot choose their race. Acting on those feelings (by engaging in same-sex sexual activity or establishing a long-term couple relationship) brings in a voluntary element, which makes sexual orientation similar to religion – a fundamental choice that should be respected in the same way that religious practices are respected. Finally, in the case of sex, the argument is not that sexual orientation is “like” sex (other than in the sense that the feelings related to sexual orientation are immutable), but that sexual orientation discrimination is generally *also* sex discrimination, even when it relates to chosen conduct. If most cases of sexual orientation discrimination are analyzed correctly, it can be seen that they are *simultaneously* cases of sex discrimination, because a rule is telling people that how they are permitted to live their lives depends on the sex chromosomes with which they were born.²⁰

‘equal protection clause’ of the European Convention] . . . Just like differences [in treatment] based on *sex* [emphasis added], . . . differences [in treatment] based on sexual orientation require particularly serious reasons by way of justification . . .”).

17. See *Young v. Australia* (Communication No. 941/2000), United Nations Human Rights Committee, 6 Aug. 2003, ¶ 10.4, available at <http://www.unhcr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/3c839cb2ae3bef6fc1256dac002b3034?OpenDocument> (“[T]he prohibition against discrimination under article 26 [of the International Covenant on Civil and Political Rights, ratified by the USA in 1992] comprises also discrimination based on sexual orientation.”).

18. See, e.g., ROBERT WINTEMUTE, *From “Love Rights” to “Sex Rights”: Partnership Rights as Human Rights*, in *SEX RIGHTS* (Nicholas Bamforth ed., Oxford University Press 2005); ROBERT WINTEMUTE, *Sexual Orientation and Gender Identity*, in *HUMAN RIGHTS IN THE COMMUNITY* (Colin Harvey ed., Oxford: Hart Publishing 2005); ROBERT WINTEMUTE, *Strasbourg to the Rescue? Same-Sex Partners and Parents Under the European Convention*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* (Robert Wintemute ed., Oxford, Hart Publishing, 2001).

19. ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER* (Oxford University Press 1997).

20. Robert Wintemute, *Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes*, 60 *MOD. L. REV.* 334 (1997); Robert Wintemute, *Sex Discrimination in MacDonald and Pearce: Why the Law Lords Chose the Wrong Comparators*, 14 *KING’S C. L.J.* 267 (2003).

International Trend No. 2 is the gradual, historical trend towards the elimination of all public-sector sexual orientation discrimination, and the prohibition of many forms of private-sector sexual orientation discrimination. International Trend No. 2 is merely the application, to specific areas of law or life, of the principle that results from International Trend No. 1: all sexual orientation discrimination is presumptively a violation of national constitutional rights or international human rights, and requires a strong justification. The typical steps in the elimination of sexual orientation discrimination are: (1) repeal of the death penalty for some or all forms of sexual activity between men or between women; (2) repeal of all criminal prohibitions of private, adult, consensual, same-sex sexual activity, which means that lesbian women and gay men can no longer be considered as criminals; (3) passage of legislation prohibiting sexual orientation discrimination in public and private employment or services, which means that lesbian women and gay men are viewed as equal citizens and entitled, as individuals (but not as members of same-sex couples), to equal opportunities in society; and (4) provision of equal rights to same-sex couples, including equal access to legal marriage and joint or second-parent adoption of children.

With regard to step (1), one example was Connecticut Colony's 1642 statute, apparently plagiarized from Leviticus,²¹ which authorized the death penalty for male-male anal intercourse: "If any man lyeth with mankind as hee lyeth with woman, both of them have committed abomination, they both shall surely be put to death."²² In the 21st century, as a small but growing number of countries permit same-sex couples to contract legal marriages, it is important to remember that the death penalty was the starting point for legal reforms in relation to same-sex couples. This allows us to appreciate how far they have come. As recently as 1860 in England, Wales and Ireland (1888 in Scotland), two men living together as a couple and having a sexual relationship risked execution by hanging.²³ That was the respect that was accorded to same-sex couples by British law in the 19th century.

Fortunately, we've moved on from there. I trust that no one in this room would say, "Bring back the death penalty because Leviticus requires it!" Leviticus, for me, as a human rights lawyer, is a nightmare,

21. *Leviticus* 20:13 (King James).

22. Quoted in the exhibition "The Pink and the Blue: Lesbian and Gay Life at Yale and in Connecticut, 1642-2004," Sterling Library, Yale University (2004) (Jonathan Ned Katz, curator). The exhibition noted that William Plaine was executed in New Haven in 1646 for "sodomy." The crime was extended to female-female sexual activity by the New Haven Colony in 1656.

23. Statutes authorizing the death penalty for male-male anal intercourse were repealed in 1861 in England, Ireland and Wales, and in 1889 in Scotland. See PAUL CRANE, *GAYS AND THE LAW*, 12 (London, Pluto Press, 1982).

and I'm grateful that most of Leviticus is ignored by Christians who otherwise take the texts of the Bible very seriously. Remember that Leviticus would also support the death penalty for cursing one of your parents, committing adultery, committing blasphemy (in which case you should be stoned by your congregation), or being a wizard: in each case, the guilty party "shall surely be put to death."²⁴ Leviticus is silent as to the penalty for breaching its injunction not to wear "a garment mingled of linen and woollen," but authorizes "eye for eye, tooth for tooth" justice (e.g., the state may cut off the leg of a person convicted of causing the amputation of the leg of another).²⁵

After the repeal of the death penalty for some or all forms of same-sex sexual activity (which has still to take place in Afghanistan, Iran, Pakistan, Saudi Arabia and a few other Muslim-majority countries, as well as some states of Nigeria),²⁶ a country, state or province can move on to steps (2), (3) and (4). The two tables of data in the handout (one for Europe and one for Canada and the U.S.) give the years in which various countries (or parts of countries) in Europe, provinces in Canada, or states in the U.S., have taken these steps.²⁷ For Canada and the U.S., the step (2) year is the one in which private, consensual, adult same-sex sexual activity was decriminalized, whereas for Europe, it is the more significant year in which the age of consent to sexual activity was equalized for male-female, male-male and female-female sexual activity. After decriminalization, most European countries chose to continue to condemn and stigmatize same-sex sexual activity by imposing a higher age of consent.

For Europe, Canada and the U.S., step (4) has been divided into five sub-steps: (a) allowing one same-sex partner to adopt the other partner's child, i.e., second-parent adoption; (b) allowing a same-sex couple to adopt jointly a child who is not related to either partner; (c) allowing same-sex couples to register their relationships and acquire some of the rights and duties of married couples, without calling the registration a legal marriage; (d) allowing same-sex couples to register their relationships and acquire all of the rights and duties of married couples (except possibly in relation to adoption and medically assisted procreation), without calling the registration a legal marriage; and (e) allowing same-sex couples to contract legal marriages and acquire all of the rights and duties of married couples. Sub-steps (a) and (b) have

24. *Leviticus* 20: 9, 10, 27; 24: 16 (King James).

25. *Id.* at 19: 19; 24: 20.

26. See http://www.ilgaeurope.org/europe/publications/non_periodical/rights_not_crimes_april_2005.

27. See Appendices A and B.

generally come before sub-steps (c), (d) and (e) in Canada and the U.S., because legislatures and courts often consider that the possibility of adoption by a same-sex couple is in the best interests of the child, even if the legislature or court is not yet ready to grant the child's parents equal access to rights and duties as a couple. In Europe, the order has varied. In 2003, Belgium introduced legal marriage for same-sex couples without the right to adopt a child jointly, whereas in 2002, Sweden, as well as England and Wales, introduced joint adoption by same-sex couples but continue to exclude them from legal marriage. However, as of April 20, 2006, 9 countries²⁸ in Europe had decided to allow joint and second-parent adoption, or only second-parent adoption, but only 3 had granted equal access to legal marriage to same-sex couples. Thus, in Europe, Canada and the U.S., it can be said that equal access to legal marriage is legally and politically harder to achieve than equal access to joint adoption. However, there is one clear difference. In Canada, the U.S. and the United Kingdom, the most common order has been: (a)-(b) adoption rights; (c)-(d) a broader package of rights for same-sex couples; (e) equal access to legal marriage. In Continental Europe, the most common order has been: (c)-(d) a broad package of rights for same-sex couples (excluding adoption rights); (a)-(b) adoption rights; (e) equal access to legal marriage.

The table on Canada and the U.S. allows you to see where Utah stands in relation to International Trend No. 2.²⁹ Step (2), repeal of the criminal prohibition of same-sex or different-sex oral or anal intercourse ("sodomy"), was not taken voluntarily by the legislature or the courts in Utah, and had to be imposed by the U.S. Supreme Court in *Lawrence v. Texas* in 2003.³⁰ In the case of different-race marriage, Utah acted voluntarily, albeit very late, repealing its ban³¹ only four years before the U.S. Supreme Court struck down the remaining state anti-miscegenation laws in *Loving v. Virginia* in 1967. Utah has yet to take step (3), passing a law prohibiting sexual orientation discrimination in employment or services, and steps (4)(a)-(e) do not seem imminent, in light of the 2004 amendment to the Utah Constitution defining marriage as only between "a man and a woman."³² Clearly there is a long way to go, but I would

28. The two countries not listed in Appendix A are Iceland and Norway.

29. See Appendix B.

30. 539 U.S. 558 (2003).

31. Utah Code Annotated s. 30-1-2, repealed in 1963, prohibited marriages: "(5) Between a negro and a white person. (6) Between a Mongolian, member of the Malay race or a mulatto, quadroon, or octoroon, and a white person."

32. Utah Constitution, Article I, Section 29 (added in 2004): "(1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."

argue that these steps are historically inevitable – it is therefore only a question of time before they will be taken in Utah, either voluntarily or involuntarily, as a result of the intervention of the U.S. Supreme Court or Congress.

Turning to the topic of today's symposium, if we look back five years to September 2000, no country in the world granted equal access to legal marriage to same-sex couples. This form of equality for the lesbian and gay minority that exists in every country is very new. But the number of countries that have decided to grant it, so as to eliminate the last major form of discrimination based on sexual orientation, is growing, slowly but steadily. The first country to do so was the Netherlands, in December 2000.³³ In accordance with Dutch tradition regarding this kind of social issue, it was the legislature that took this step rather than the Dutch Supreme Court.³⁴ The example of the Netherlands strongly influenced the legislature of its neighbor, Belgium, which adopted a similar law in 2003.³⁵ Spain, which has taken human rights very seriously since the return of democracy in 1978 (after the death of the dictator Franco in 1975), built on a series of laws recognizing same-sex couples at the regional level by granting equal access to legal marriage and joint adoption in 2005.³⁶ The fourth European country to open up

33. Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage), *Staatsblad* 2001, nr. 9, <http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=86> (last visited May 8, 2006), in force 1 April 2001: Article 30: "1. A marriage can be contracted by two persons of different sex or of the same sex. 2. The law only considers marriage in its civil relations."

34. Dutch courts do not have the power to strike down Acts of the Dutch Parliament that violate the equality provision of the Dutch Constitution. See Kees Waaldijk, *Constitutional Protection Against Discrimination of Homosexuals*, (1986-87) 13 JOURNAL OF HOMOSEXUALITY 57. They do have the power to strike down laws that violate an international human rights treaty, but the Dutch Supreme Court has been reluctant to depart from the case-law of the European Court of Human Rights with respect to the right to marry. And with respect to the right to be free from discrimination, the Dutch courts often refer controversial issues to Parliament, rather than find a violation of Article 14 of the European Convention on Human Rights, or of Article 26 of the International Covenant on Civil and Political Rights. Both these practices of judicial restraint led to the rejection, by the Dutch Supreme Court in 1990, of a claim by two women who wanted to marry each other. See Hoge Raad (Supreme Court), Oct. 19, 1990, [1992] *Nederlandse Jurisprudentie*, No. 129; see also Kees Waaldijk, "How the Road to Same-Sex Marriage Got Paved in the Netherlands," in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW (Robert Wintemute ed., Oxford, Hart Publishing, 2001).

35. Law of 13 Feb. 2003 opening up marriage to persons of the same sex and modifying certain provisions of the Civil Code), *Moniteur belge*, 28 Feb. 2003, Edition 3, p. 9880, available at http://www.moniteur.be/index_fr.htm (last visited May 8, 2006), *Moniteur belge*, electronic item 2003009163), in force 1 June 2003: Art. 143. – "Two persons of different sex or of the same sex may contract marriage."

36. Law 13/2005, of 1 July, providing for the amendment of the Civil Code with regard to the right to contract marriage), *Boletín Oficial del Estado* no. 157, 2 July 2005, pp. 23632-23634, <http://www.boe.es/boe/dias/2005-07-02/pdfs/A23632-23634.pdf> (in force 3 July 2005): Article 44 (new second para.): "Marriage shall have the same requirements and effects whether both parties are of the same or different sex."

legal marriage to same-sex couples is likely to be Sweden, where a parliamentary commission of inquiry is currently studying the question.³⁷

Unlike European countries, where courts have been reluctant to strike down laws excluding same-sex couples from legal marriage, and have left the question to the legislature,³⁸ Canada and South Africa have new, but robust, traditions of judicial review of discriminatory laws under their constitutional bills of rights: the Canadian Charter of Rights and Freedoms, added to Canada's federal Constitution in 1982;³⁹ and the Bill of Rights in South Africa's final Constitution, adopted in 1996⁴⁰. This judicial review has, to a large extent, been inspired by judicial review under the federal and state Constitutions in the U.S.

In Canada in 2003, both the Ontario Court of Appeal⁴¹ and the British Columbia Court of Appeal⁴² held that that the common-law definition of marriage as between persons of different sexes constituted unjustifiable discrimination based on sexual orientation, contrary to Section 15(1), the equality provision of the Charter. To eliminate the discrimination, both courts reformulated the common-law definition of marriage as being the union of "two persons." Unlike the Supreme Judicial Court of Massachusetts in *Goodridge*, both courts gave immediate effect to their judgments, and ordered that marriage licenses be issued to same-sex couples from the dates of the judgments. Same-sex couples began to marry in Ontario and British Columbia, and in other provinces and territories as a result of trial court decisions adopting the same reasoning, which the federal government did not appeal. However, without a decision of the Supreme Court of Canada, or an Act of the federal Parliament,⁴³ the legal validity of these marriages was not entirely

37. See <http://www.homo.se/o.o.i.s/1820> (last visited May 8, 2006).

38. See, e.g., Netherlands, Hoge Raad (Supreme Court), Oct. 19, 1990, [1992] *Nederlandse Jurisprudentie*, No. 1291; Germany, Bundesverfassungsgericht (Federal Constitutional Court), 4 Oct. 4, 1993, [1993] *Neue Juristische Wochenschrift* 3058; Spain, Tribunal Constitucional (Constitutional Court), *Auto* TC 222/1994 (July 11, 1994); Constitutional Court of Hungary (13 March 1995), 14/1995 (III.13.) AB *határozat*; see László Sólyom & Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (Ann Arbor, Univ. of Michigan Press, 2000), at 316-21.

39. Part I of the Constitution Act, 1982, enacted as Schedule B to the Canada Act 1982 (Acts of the United Kingdom Parliament, 1982, chapter 11).

40. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT (No. 108 of 1996), Chapter 2.

41. See *Halpern v. Att'y Gen.* (Canada), [2003] 65 O.R.3d 161.

42. See *Barbeau v. Att'y Gen.* (British Columbia), [2003] 228 D.L.R. 416, 2003 B.C.C.A. 251; see also *Barbeau v. Att'y Gen.* (British Columbia), [2003] 225 D.L.R. 472, 2003 B.C.C.A. 406.

43. In Canada, as in the United States., most family law is under the jurisdiction of the provinces and territories. However, unlike in the United States, there is an exception for "marriage" (which has been interpreted as meaning capacity to marry) and "divorce," which fall within the jurisdiction of the federal Parliament. See Constitution Act, 1867, s. 91(26). This means that equal access to legal marriage for same-sex couples in Canada has been, and remains, a federal question, which must be answered in the same way for the entire country at the same time. The state-by-state

certain.

In 2003, the federal Government decided not to appeal the Ontario and British Columbia decisions, and instead to refer a bill that would allow same-sex couples to marry to the Supreme Court of Canada, with questions about the bill's constitutionality.⁴⁴ In 2004, the Court held that the federal Parliament has the constitutional power to pass the bill (Parliament may pass it), but refused to say whether the equality provision of the Charter requires the bill (whether Parliament must pass it).⁴⁵ In 2005, the federal Parliament passed the bill,⁴⁶ and therefore clearly authorized legal marriages by same-sex couples in all ten provinces and three territories. The only remaining uncertainty is whether the federal Parliament could constitutionally repeal the 2005 legislation, without invoking Section 33(1) of the Charter, which permits temporary (five-year) overrides of certain Charter rights, and has never been used by the federal Parliament. Canadian legal academics overwhelmingly support the view that the Supreme Court of Canada would (in an appropriate case) interpret Section 15(1) of the Charter as requiring equal access to legal marriage for same-sex couples, and therefore that the 2005 legislation could not be repealed without invoking Section 33(1).⁴⁷ Because capacity to marry is a federal question in Canada, no province or territory may opt out of the 2005 legislation. I am from Alberta, Canada's most conservative province, where the legislature is as eager as the Utah legislature (and electorate) to exclude same-sex couples from legal marriage. However, the Alberta legislature's attempt to do so in 2000 was clearly beyond its constitutional powers.⁴⁸

In South Africa, applying the express prohibition of sexual orientation discrimination in the 1996 Constitution, the Constitutional Court has developed what is probably the strongest case-law in the world in relation to discrimination against same-sex couples.⁴⁹ In 2004, the

changes to marriage law that are necessary in the United States are not possible in Canada.

44. See Robert Wintemute, *Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits*, 49 MCGILL L.J. 1143 (2004), available at <http://www.journal.law.mcgill.ca/abs/vol49/4winte.html> (last visited May 8, 2006). Canadian governments may submit hypothetical questions to the Supreme Court.

45. See *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698.

46. Civil Marriage Act, 2005 S.C., ch. 33, § 2 (Can.) ("Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.").

47. See <http://www.equal-marriage.ca/resource.php?id=143> (last visited May 8, 2006).

48. See Marriage Act, Revised Statutes of Alberta, c. M-5, as amended by Marriage Amendment Act, 2000, Statutes of Alberta 2000, c. 3: s. 1(c.) ("marriage" means a marriage between a man and a woman); s. 1.1 ("This Act operates notwithstanding (a) the provisions of sections 2 and 7 to 15 of the *Canadian Charter . . .*" [an invalid attempt to invoke Section 33(1) of the Charter to insulate the legislation from judicial review]).

49. See <http://www.constitutionalcourt.org.za/site/home.htm> (last visited May 8, 2006): Case

Supreme Court of Appeal applied this case-law to the common-law definition of marriage, and concluded that the exclusion of same-sex couples was discrimination violating the 1996 Constitution.⁵⁰ This judgment has been appealed, but I would be very surprised if the Constitutional Court did not reach the same conclusion as the Supreme Court of Appeal.⁵¹

By Dec. 1, 2006, after only six years, we will have gone from no countries granting equal access to legal marriage to same-sex couples to five countries granting such access (the Netherlands, Belgium, Spain, Canada, and South Africa), along with Massachusetts. Outside the United States, are there any attempts to prevent the culmination of International Trend No. 2 (eliminating the last major form of sexual orientation discrimination, the exclusion of same-sex couples from legal marriage) through constitutional amendments, such as the proposed "Federal Marriage Protection Amendment" in the United States? I would suggest that the countries the United States should compare itself with are a group of 32 other democracies with good records of protecting human rights (and combined populations of around 560,000,000, or nearly double that of the United States): the 25 member states of European Union,⁵² Iceland, Norway, Switzerland, Canada, South Africa, Australia and New Zealand. It is easy to browse through the constitutions of the other 158 or so member states of the United Nations and find examples of "one man and one woman" definitions of marriage. However, many of these countries have, by the standards of the United

No. CCT10/99, National Coalition for Gay & Lesbian Equality v. Minister of Home Affairs (Dec. 2, 1999) (unmarried same-sex partners entitled to same immigration rights as married different-sex partners); Case Nos. CCT45/01, CCT48/02, Satchwell v. President of Republic of South Africa (July 25, 2002; March 17, 2003) (unmarried same-sex partners of judges entitled to same employment benefits as married different-sex partners); Case No. CCT40/01, Suzanne Du Toit & Anna-Marie De Vos v. Minister for Welfare and Population Development (Sept. 10, 2002) (unmarried same-sex partners cannot be excluded from the right of married different-sex partners to adopt children jointly); Case No. CCT46/02, J. & B. v. Director General, Department of Home Affairs (March 28, 2003) (unmarried lesbian partners cannot be excluded from the right of married different-sex partners to both be registered as the parents of a child born to the wife after donor insemination).

50. Case No. 232/2003, Fourie v. Minister of Home Affairs (Supreme Court of Appeal Nov. 30, 2004), para. 49, <http://www.law.wits.ac.za/sca/index.php> (declaring with immediate effect that "the common law concept of marriage is developed to embrace same-sex partners as follows: 'Marriage is the union of two persons to the exclusion of all others for life,'" but leaving a statutory obstacle to legal marriage for same-sex couples in place).

51. The Constitutional Court agreed with the Supreme Court of Appeal in Case nos. CCT60/04, CCT10/05, Minister of Home Affairs v. Fourie, Lesbian and Gay Equality Project v. Minister of Home Affairs (Constitutional Court Dec. 1, 2005), <http://www.constitutionalcourt.org.za/Archimages/5257.PDF>. The Court's order (at para. 162) gives the South African Parliament until Dec. 1, 2006 to pass legislation allowing same-sex couples to marry. If Parliament fails to act, the Court's judgment will take effect and the changes to the the Marriage Act (No. 25 of 1961), necessary to allow same-sex couples to marry, will be "read in," from Dec. 1, 2006.

52. See <http://www.europa.eu.int> (last visited May 8, 2006).

States and the 32 other countries mentioned above, relatively weak democracies and relatively poor records of protecting human rights.⁵³

Among the 32 democracies mentioned above,⁵⁴ I found only one example⁵⁵ of a constitution in which marriage is clearly defined as different-sex only, thereby preventing either the legislature or the courts from granting equal access to legal marriage to same-sex couples. This example appears in the 1997 Constitution of Poland,⁵⁶ a country the laws of which are now heavily influenced by the Roman Catholic Church. Australia has a federal law similar to the U.S. Defense of Marriage Act, but which could be repealed tomorrow, because it is an ordinary statute of the federal (Commonwealth) Parliament and not a part of the Australian Constitution.⁵⁷

In most of these 32 democracies, the national or federal constitution contains no definition of marriage, leaving it up to the legislature to grant equal access to legal marriage to same-sex couples, or to the courts to interpret the constitution's equality clause as requiring equal access. Both the legislature and the courts are free to do so in accordance with changing social conditions, and are not required to wait for a constitutional definition of marriage to be repealed or struck down by a higher authority. In a few countries, such as Spain, the constitution contains an ambiguous reference to "man and woman" but does not say that marriage is only between "a man and a woman."⁵⁸ In a pending case, the Constitutional Court of Spain is likely to interpret this provision as

53. For example, the Constitution of Uganda was amended in 2005 to read: "it is unlawful for same-sex couples to marry." See <http://www.365gay.com/newscon05/09/093005uganda.htm> (last visited May 8, 2006). See also the (non-constitutional) bill before the Parliament of Nigeria, where same-sex sexual activity is already criminalized. The bill (introduced in response to the Dec. 1, 2005 judgment of the Constitutional Court of South Africa) goes well beyond defining marriage as only between "a man and a woman." The bill will make it an offense, punishable by up to five years in prison, to be a party to, perform, witness, aid or abet a same-sex marriage, or to be involved in "the registration of gay clubs, societies and organizations, . . . procession or meetings." See http://okrasoup.typepad.com/black_looks/files/nigeria_gay_bill.pdf (last visited May 8, 2006) (clauses 7-8).

54. Data for the survey is available at <http://confinder.richmond.edu> (last visited May 8, 2006).

55. A second example was approved by the Parliament of Latvia on Dec. 15, 2005. Amended Article 110 of the Latvian Constitution now reads: "The State protects and support marriage – a union between a man and a woman . . ." See http://www.ilga-europe.org/europe/media/latvia_cements_homophobia_in_the_constitution.

56. "Marriage, being a union of a man and a woman . . . shall be placed under the protection and care of the Republic of Poland." POLAND CONST. art. 18 (1997) (emphasis added) available at http://poland.pl/info/information_about_poland/constitution/ch1.htm (last visited May 8, 2006).

57. Marriage Amendment Act, 2004 (No. 126 of 2004), available at http://www.austlii.edu.au/au/legis/cth/num_act/maa2004n1262004192 (last visited May 8, 2006).

58. See SPAIN CONST. art. XXXII, § 1 available at <http://www.constitucion.es/constitucion/lenguas/ingles.html> (May 8, 2006) (1978) ([Marriage, Matrimonial Equality]: "Man [*el hombre*] and woman [*la mujer*] have the right to contract matrimony with full legal equality").

permitting the 2005 legislation that allowed same-sex couples to marry, and to remain silent on whether the equality clause of the Spanish Constitution required the legislation. Some international human rights treaties refer in a similarly ambiguous way to “men and women,” but do not say that a man may only marry a woman and that a woman may only marry a man. Both Article 12 of the European Convention on Human Rights, and Article 23(2) of the International Covenant on Civil and Political Rights, refer to the right to marry of “men and women of marriageable age.” The European Court of Human Rights has interpreted Article 12 as no longer requiring two persons of opposite biological (chromosomal) sex, in the case of a post-operative male-to-female transsexual person who sought to marry a non-transsexual man,⁵⁹ but has yet to consider the proposed marriage of two non-transsexual men or two non-transsexual women. The United Nations Human Rights Committee has considered such a case and concluded that Article 23(2) does not yet protect the right of a same-sex couple to marry.⁶⁰ It is important to note that neither Article 12 nor Article 23(2) has been interpreted as precluding a country that has ratified either treaty from voluntarily deciding to allow same-sex couples to marry. Article 9 (right to marry) of the Charter of Fundamental Rights of the European Union deletes the reference to “men and women.” The official comment on Article 9 makes it clear that it is for each member state of the European Union to decide whether or not to allow same-sex couples to marry.⁶¹

It will come as no surprise that I am opposed to the proposed “Federal Marriage Protection Amendment,” because I think that same-sex couples should be granted equal access to legal marriage in Utah and

59. *Christine Goodwin v. United Kingdom* (July 11, 2002), <http://www.echr.coe.int/HUDOC> (last visited May 8, 2006).

60. *See* International Covenant on Civil and Political Rights art. 23, § 2, Dec. 16 1966, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited May 8, 2006) (“The right of men and women of marriageable age to marry and to found a family shall be recognized”); *Joslin v. New Zealand* (Communication No. 902/1999), U.N. Hum. Rts. Comm. ¶ 8.2 (July 17, 2002), available at <http://www.unhchr.ch/tbs/doc.nsf> (last visited May 8, 2006) (stating same-sex marriage *not* required because “the treaty obligation of States parties stemming from article 23, paragraph 2, of the [ICCPR] is to recognize as marriage only the union between a man and a woman wishing to marry each other”).

61. *See* Charter of Fundamental Rights of the European Union ch. 1, art. IX (European Commission, Dec. 7, 2000), available at http://ue.eu.int/uedocs/cms_data/docs/2004/4/29/Explanation%20relating%20to%20the%20complete%20text%20of%20the%20charter.pdf (last visited May 8, 2006). Article 9 provides: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.” The official comment on the text states: “The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the [European Convention on Human Rights], but its scope may be wider when national legislation so provides.”

every other state in the United States. I would put the proposed amendment in the same category as other unwise federal constitutional amendments that have never been adopted:

- Federal Protection of Democracy Amendment – “Only men shall be entitled to vote in the United States.”
- Federal Protection of Religion Amendment – “Notwithstanding the First Amendment, the only religion that may be practiced in the United States is Christianity, which does not include the Church of Jesus Christ of Latter-day Saints.”
- Federal Protection of White Supremacy Amendment (1955 version, seeking to prevent *Loving v. Virginia* in 1967): “Marriage in the United States is the union of two persons of the same race.”

Indeed, I would suggest that a more accurate name for the proposed amendment would be the “Federal Protection of Heterosexual Supremacy Amendment.” Please note that I am not opposed to constitutional amendments that overturn decisions of courts. I think that such amendments are a legitimate part of the democratic process, but that members of the majority (in this case the heterosexual majority) should think long and hard before they entrench discrimination against a minority (in this case the lesbian and gay minority). Constitutions should be difficult to amend. The Utah Constitution, for example, is much too easy to amend, given that the 2004 amendment defining marriage as different-sex only⁶² took less than one year. This does not give the majority sufficient time to reflect before entrenching discrimination against a minority.

The arguments against equal access to legal marriage for same-sex couples are astonishingly weak. They can be summarized as follows:

1. (the heterosexual majority’s) tradition (“it’s always been this way”);
2. religious objections (“not in my church/synagogue/mosque”);
3. marriage is for procreation (“Adam and Eve, not Adam and Steve”);

62. Utah Constitution, Article I, Section 29.

4. slippery slope (“what about incest and polygamy?”);
5. devaluation of marriage for different-sex couples (“get your own institution”); and
6. same-sex couples will become the majority (“they will take over!”).

These arguments are easily rebutted: (1) slavery and men-only elections were traditions; (2) equal access to legal marriage does not mean equal access to religious marriage (freedom of religion will protect the right of individual religious institutions to decide whether or not to marry same-sex couples); (3) no different-sex couple is ever asked to prove their desire or capacity to procreate prior to being issued a marriage license;⁶³ (4) incest and polygamy are entirely separate issues, which couples consisting of two unrelated men or two unrelated women seeking to marry are not raising; (5) legal marriage is a public institution which should be open to everyone; and (6) same-sex couples are likely always to be a small minority, because it is not discriminatory laws that make heterosexual people heterosexual (it is likely that members of the heterosexual majority have as little control over their sexual orientations as members of the lesbian and gay minority have over theirs).

I would like to conclude with a few more personal notes, and a comment on the majority position in Utah, which opposes equal access to marriage for same-sex couples. A theme that I developed briefly in Dublin in April 2005, when I last saw Professor Lynn Wardle was the question of lack of empathy on the part of the heterosexual majority, which I think is an important reason why many heterosexual people do not reconsider their position on same-sex marriage. I think that heterosexual people really have to try to put themselves in the position of a lesbian woman or gay man. Imagine waking up tomorrow in a society with a lesbian and gay majority, in which heterosexuals are a minority of 2 to 10 percent. You are told that even though you are a man who is attracted to women, falls in love with women, and wants to spend his life

63. The European Court of Human Rights rejected the “procreative capacity argument” in *Christine Goodwin v. United Kingdom* (July 11, 2002), para. 98, <http://www.echr.coe.int> (HUDOC) (last visited May 8, 2006), in which the male-to-female transsexual applicant was sterile: “Reviewing the situation in 2002, the Court observes that Article 12 [of the European Convention on Human Rights] secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision.”

with a particular woman, you must fight these impulses and seek treatment, because your feelings are wrong, immoral, and sinful. You must marry another man, because that is what is right for the majority of men (who are gay), whether or not it is right for you. Heterosexual women are told the same thing. In addition to thinking about what it would be like if the majority and minority positions were reversed, heterosexual people could also think about what it is like to be lesbian or gay. It is very easy. A heterosexual woman need only think about the good feelings of love and physical attraction and pleasure she can experience with a man. A lesbian woman experiences exactly the same feelings with another woman. And a gay man experiences exactly the same feelings with another man as a heterosexual man does with a woman. Why would you want to deny expression of these very positive feelings to one of your fellow human beings?

Apart from failing to engage their capacity for empathy, are people who are opposed to same-sex marriage “homophobic,” i.e., hostile to or prejudiced against lesbian and gay people? Given that same-sex marriage is such a recent development, available in only one of fifty states in the United States and (from Dec. 1, 2006) in only 5 of the 32 other democracies I mentioned above, I would say a heterosexual person can, in good faith and without being homophobic, oppose equal access to legal marriage (and joint adoption) for same-sex couples, because these are novel ideas with which they are not yet comfortable. However, the non-homophobic heterosexual opponent of same-sex marriage (and joint adoption) should be otherwise in favor of legal equality for lesbian and gay individuals. They should oppose criminalization of private, adult, consensual, same-sex sexual activity, and support legislation prohibiting discrimination based on sexual orientation against lesbian and gay individuals (if not yet same-sex couples) in access to employment, housing, education and other services. If, unlike the non-homophobic heterosexual person, you basically dislike same-sex sexual activity and couple relationships, think that they are wrong, immoral, evil, etc., actively supported the “sodomy” law in Utah when it was on the statute book, or did nothing to help repeal it, and are opposed to or are doing nothing to support a bill that would protect lesbian women and gay men in Utah against discrimination in employment, etc., then I would say: “Yes, you are homophobic!”⁶⁴

Is it permissible for a Christian to say “I love the sinner (the lesbian woman or gay man), but I hate his or her sin (same-sex sexual activity

64. See Russell Shorto, *What's Their Real Problem with Gay Marriage? (It's the Gay Part)*, NEW YORK TIMES SUNDAY MAGAZINE, June 19, 2005.

and couple relationships)”? Imagine if I were to say: “I have nothing against Mormons. I think that they are wonderful people, and I respect them, as long as they do not practice their religion.” If I were to say this, then I think that most of you would say that I was anti-Mormon. That is certainly not the case that I am anti-Mormon. I perfectly respect the right of Mormons to practice their religion. What I do not accept is anyone, from any religion, telling me how I should live my life, in relation to my sexual orientation. I accept and respect your religion. All I ask is that you accept and respect my sexual orientation.⁶⁵

I would like to thank Professor Lynn Wardle for inviting me to speak at this conference. As an openly gay man, I do not feel welcome in Utah, and I hesitated to come. When I arrived in Salt Lake City, the first place I visited was one where I felt welcome—it was not Temple Square. Rather, it was the Gay, Lesbian, Bisexual and Transgender Community Center of Utah,⁶⁶ where I purchased this souvenir running tank top: “Utah Pride 2005:⁶⁷ Equal Rights—No More No Less.”

I think it is a good idea for Brigham Young University to invite more openly lesbian and gay speakers,⁶⁸ because there is a desperate need for more contact between openly lesbian and gay people and religious communities. This will help members of religious communities to realize that lesbian women and gay men are not such bad people, and that we should be allowed to lead our lives as we see fit. Referring to my own life, I enjoyed a loving relationship for fifteen years with my male partner, until he decided to end our relationship in September 2004. I hope to find love again with another man, and perhaps to get married now that it is legally possible. My eighty-year-old mother has waited a long time and would be very pleased. The wedding could now take place in my home city of Calgary, and even at the Woodcliff United Church where I attended kindergarten. The United Church of Canada is the largest Protestant denomination in Canada. Legal same-sex marriages have been possible in United Churches, depending on the policy of each congregation, since 2003.⁶⁹ Would a few same-sex couples from Salt

65. See Robert Wintemute, “Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits,” (2004) 49 MCGILL L.J. 1143, available at <http://www.journal.law.mcgill.ca/abs/vol49/4winte.html> (last visited May 8, 2006).

66. See <http://www.glbtcu.org>.

67. See <http://www.utahpride.org>.

68. See *BYU, U. of U. Ranked Low in Acceptance of Queer Students*, SALT LAKE METRO, Sept. 1, 2005, at 10 (*Princeton Review* ranks BYU 352nd of 361 U.S. universities and colleges for acceptance of lesbian and gay people).

69. See Information sheet on covenant of marriage, United Church of Canada, available at <http://www.united-church.ca/moderator/short/2003/1008c> (38th General Council, 2003: “The United Church of Canada resolved to call upon the Government of Canada to recognize same-sex marriage in the marriage legislation.”).

Lake City like to join me?⁷⁰ I would point out, on behalf of the Calgary tourism officials, that Calgary is currently the closest city for same-sex couples in Utah who would like to get married— only a two-hour flight to the north. I am sure that you can get attractive honeymoon packages at the Banff Springs and Chateau Lake Louise Hotels.

The position of the United Church of Canada is the one I hope that all religious institutions will reach eventually. At its 37th General Council in 2000, the Church affirmed that “human sexual relations, whether heterosexual or homosexual, are a gift from God and part of the marvellous diversity of creation.”⁷¹ I certainly consider my own capacity to feel sexually attracted to other men, to experience sexual pleasure with other men, and to fall in love with other men, as a gift from God. I would say to opponents of same-sex marriage, and supporters of the “Federal Marriage Protection Amendment,” with the greatest respect, that despite your good intentions, you have made a mistake on this issue. I would urge you to accept this mistake, to stop opposing legal equality for lesbian and gay individuals and same-sex couples, and to find a genuine social problem, such as racism or poverty, in the United States or the developing world, to which you could devote your time, energy, and money. Working to make life more difficult for your fellow human beings who are lesbian and gay is not something of which your grandchildren, or your grandnephews and grandnieces, will be proud. I am glad to see that, in the Dutch Reformed Church in South Africa, the leadership has realized the mistake they made by supporting discrimination against lesbian and gay people.⁷²

Same-sex marriage is coming to Utah. The “Federal Marriage Protection Amendment” will never be adopted. The U.S. Supreme Court will invalidate the remaining anti-same-sex marriage constitutional amendments sometime between 2022 and 2045, which is between 19 and 42 years from the 2003 decision of the Supreme Judicial Court of Massachusetts in *Goodridge*.⁷³ The period of 19 years represents the gap between two decisions on laws banning different-race marriage: the *Perez*⁷⁴ decision of the Supreme Court of California in 1948, striking

70. If they are Mormon, they could face disciplinary action. See “Mormon in Legal Gay Marriage [in Toronto] Faces Expulsion” (March 15, 2006), available at <http://www.365gay.com/Newscon06/03/031506mormon.htm> (last visited May 8, 2006).

71. See *id.*

72. See Dutch Reformed Church’s statement, available at <http://www.365gay.com/newscon04/11/112204safChurch.htm> (last visited May 8, 2006): “We would like to ask forgiveness for the pain and suffering that we caused you and your families in the past. We accept that what we did in the past was wrong.”

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

74. *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948).

down California's law, and the *Loving*⁷⁵ decision of the U.S. Supreme Court in 1967, striking down all remaining laws of this kind. The period of 42 years represents the gap between the first repeal of a "sodomy" law (in Illinois in 1961), and the *Lawrence*⁷⁶ decision of the U.S. Supreme Court in 2003, striking down all remaining laws of this kind. Once same-sex couples are able to marry in Utah, perhaps my future spouse and I will, if we live that long, come to Utah to renew our vows. Thank you.

75. *Loving v. Virginia*, 388 U.S. 1 (1967).

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

*Appendix A:
Progression To Same-Sex Marriage In The First
15 European Union Member States
(Year The Law Was Enacted)*

Member State	(2) (b) equal age of consent to sexual activity (Without exceptions)	(3) legislation against discrimination in employment ⁷⁷ or services	(4) (a) same-sex couples: second-parent adoption (child of partner)	(4) (b) same-sex couples: joint adoption (child not related to either partner)	(4) (c) same-sex couples: register + some rights	(4) (d) same-sex couples: register + equal rights ⁷⁸	(4) (e) same-sex couples: register + equal rights (legal marriage)
Spain	1988	1995	2005	2005	1998-2003 ⁷⁹	2005	2005
Netherlands	1971	1991	2000	2000 ⁸⁰	1997	1997	2000
Sweden	1978	1987	2002	2002	1994	1994	committee
UK	2000	2003	2002 ⁸¹	2002	2004	2004	——
Belgium	1985	2003	2005 ⁸²	2005	1998	2003	2003
Denmark	1976	1987	1999	——	1989	1989	——
Finland	1998	1995	——	——	2001	2001	——
Germany	1994	2003	2004	——	2001	——	——
France	1982	1985	——	——	1999	——	——
Luxembourg	1992	1997	——	——	2004	——	——
Portugal	exceptions	2003	——	——	2001 ⁸³	——	——
Ireland	exceptions	1993	——	——	——	——	——
Italy	1889	2003	——	——	——	——	——
Austria	2002	2003	——	——	——	——	——
Greece	exceptions	2003	——	——	——	——	——

77. National legislation Directive 2000/78/EC (in force 2 Dec. 2003).

78. Perhaps excluding certain parental rights (adoption, medically assisted procreation).

79. Laws in the *comunidades autónomas* (regions).

80. The Netherlands plan to remove the exception for intercountry adoption in 2006 or 2007.

81. Adoption and Children Act 2002; England and Wales only; in force on 30 Dec. 2005; proposed for Scotland (second-parent and joint adoption).

82. See <http://www.senat.be>: *Projet de loi modifiant certaines dispositions du Code civil en vue de permettre l'adoption par des personnes de même sexe (Bill to modify certain provisions of the Civil Code to permit adoption by persons of the same sex)*, passed by the House of Representatives on Dec. 1, 2005, and by the Senate on April 20, 2006 (second-parent and joint adoption).

83. Recognition of de facto cohabitation; there is no register.

*Appendix B:
Progression To Same-Sex Marriage In Selected
Canadian Provinces and U.S. States
(Year The Law Was Enacted Or Year Of Court Decision)*

Province or State Note: dates not available for step (1), repeal of death penalty	(2)(a) decriminalization of same-sex sexual activity	(3) legislation against discrimination in employment or services	same-sex couples: second-parent adoption (child of partner)	same-sex couples: joint adoption (child not related to either partner)	same-sex couples: register + some rights	same-sex couples: register + equal rights	same-sex couples: register + equal rights + same name (legal marriage)
Québec	1969	1977	1991	1991	2002	2002	2004 ⁸⁴
Ontario	1969	1986	1995	1995	2003	2003	2003
British Columbia	1969	1992	1995	1995	2003	2003	2003
Massachusetts	1974 ⁸⁵	1989	1993	1993	2003	2003	2003 ⁸⁶
Vermont	1977	1991	1993	1993	1999/2000 ⁸⁷	1999/2000	_____
Connecticut	1969	1991	2000	2000	2005	2005	_____
California	1975	1992	2003	2003	1999	2003 ⁸⁸	_____
New York	1980	2002 ⁸⁹	1995	1995	_____	_____	_____
Texas	2003 ⁹⁰	_____	_____	_____	_____	_____	_____
Florida	2003	_____	_____ ⁹¹	_____	_____	_____	_____
Mississippi	2003	_____	_____ ⁹²	_____	_____	_____	_____
Utah	2003	_____	_____ ⁹³	_____	_____	_____	_____

84. The 2003 and 2004 judgments of the Courts of Appeal of Ontario, British Columbia and Québec were extended to all 10 provinces and 3 territories by the federal Civil Marriage Act in 2005.

85. Invalid as applied to “consensual conduct in private between adults.” *See* Commonwealth v. Balthazar, 318 N.E.2d 478 (Mass. 1974), as clarified by Gay & Lesbian Advocates & Defenders v. Attorney General, 763 N.E.2d 38 (Mass. 2002).

86. State recognition of same-sex couples generally does not apply at the federal level.

87. Vermont Supreme Court in 1999, legislature in 2000.

88. Some exceptions, e.g., with regard to state taxation.

89. But legislation was passed by New York City in 1986.

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

91. *See* Florida Statutes ch. 63.042, s. 3 (added in 1977): “No person eligible to adopt under this statute may adopt if that person is a homosexual.”

92. *See* Mississippi Code Annotated, § 93-17-3(2) (added in 2000), which provides that “[a]doption by couples of the same gender is prohibited.”

93. Utah expressly bans individual adoption by “a person who is cohabiting [residing with another person and being involved in a sexual relationship with that person] in a relationship that is not a legally valid and binding marriage under the laws of this state.” *See* Utah Code Annotated ss. 78-30-1(3)(b), 78-30-9(3) (added in 2000).

*Appendix C:
Overview Of International Trend: Legal
Recognition Of Same-Sex Couples*

Level of recognition of same-sex couples	Separate institution for same-sex couples (X = also for a few different-sex couples)	Institution open to all couples, different-sex or same-sex
<p>1) Legal marriage (but * = no federal recognition yet)</p>		<ul style="list-style-type: none"> - Netherlands (2000, in force in 2001) - Belgium (2003) - Canada (Ontario, British Columbia in 2003; federal legislation for all provinces/territories in 2005) - Massachusetts, since May 17, 2004* - Spain (2005) - South Africa (from Dec. 1, 2006) - Sweden (2007?)
<p>(2) Alternative registration system (a) package of rights/duties equal or almost equal to legal marriage (but * = no federal recognition yet)</p>	<p style="text-align: center;">separate but mostly equal</p> <ul style="list-style-type: none"> - Denmark (registered partnership) - Finland (registered partnership) - Iceland (confirmed cohabitation) - Norway (registered partnership) - Sweden (registered partnership) - Switzerland (registered partnership) - United Kingdom (civil partnership) - USA (California)*X (domestic partnership) - USA (Connecticut)* (civil union) - USA (Vermont)* (civil union) 	<p style="text-align: center;">not separate and mostly equal</p> <ul style="list-style-type: none"> - Australia (Tasmania)* (registered deed of relationship) - Canada (Québec) (civil union) - Netherlands (registered partnership) - New Zealand (civil union)
<p>(b) package of rights/duties substantially inferior to legal marriage (and * = no federal recognition yet)</p>	<p style="text-align: center;">separate and clearly unequal</p> <ul style="list-style-type: none"> - Czech Republic (registered partnership) - Germany (problem in <i>Bundesrat</i>) (registered life partnership) - Switzerland (Zürich)* (registered partnership) - USA (Hawaii)*X (reciprocal beneficiaries) - USA (New Jersey)*X (domestic partnership) 	<p style="text-align: center;">not separate but clearly unequal</p> <ul style="list-style-type: none"> - Andorra (stable unions of couples) - Argentina (Buenos Aires)* - Belgium (statutory cohabitation) - Canada (Alberta, Manitoba, Nova Scotia) - France (<i>pacte civil de solidarité</i>) - Luxembourg (<i>déclaration de partenariat</i>) - Spain (laws in at least 12 of 17 regions) - Switzerland (Geneva, Neuchâtel)* - USA (District of Columbia and many cities)* (domestic partnership)
<p>(3) Unregistered cohabitation (package of rights/duties varies greatly, but is often substantially inferior to legal marriage; no registration required, but minimum cohabitation period must be satisfied)</p>	<p style="text-align: center;">examples:</p> <ul style="list-style-type: none"> - UK (former rule: immigration for partners legally unable to marry) (mainly same-sex) - USA (some public and private sector employers' benefit plans only recognize same-sex partners unable to marry and not unmarried different-sex partners of employees) 	<p style="text-align: center;">examples:</p> <ul style="list-style-type: none"> - Australia (most states/territories but generally not federal level) - Canada (federal level and most provinces/territories) - Croatia - France (<i>concubinage</i>) - Hungary - Netherlands - New Zealand - Portugal - Slovenia - South Africa - Sweden - United Kingdom