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Sonia Bychkov Green  
*John Marshall Law School*

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CURRENCY OF LOVE:  
 CUSTOMARY INTERNATIONAL LAW AND THE BATTLE FOR SAME-SEX  
 MARRIAGE IN THE UNITED STATES

SONIA BYCHKOV GREEN\*

*Let's redesign the goings on.  
 Hey optimism anyone?  
 We believe the currency of love.  
 We believe the virgin falls in love.  
 Carefree, the beat'll pass it on.  
 Please believe the currency of love.<sup>1</sup>*

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<sup>1</sup> SILVERSUN PICKUPS, *Currency of Love*, on SWOON (Dangerbird Records 2009) [hereinafter SILVERSUN PICKUPS, *Currency of Love*]. This is not a song about same-sex marriage, but the lyrics fit here well. Evan Wolfson expressed the idea of marriage as a currency:

[Marriage] is a known commodity; no matter how people in fact conduct their marriages, there is a clarity, security, and automatic level of respect and legal status when someone gets to say, “That’s my husband” or “I love my wife.”

EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND THE GAY PEOPLE’S RIGHT TO MARRY 5 (2004) [hereinafter WOLFSON, WHY MARRIAGE MATTERS].

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## INTRODUCTION: THE IMMEDIACY OF THIS DEBATE

The struggle for same-sex marriage will likely be *the* civil rights issue of this decade. The debate has touched all levels of government and society and people throughout the world. United States courts have seen their share of arguments on both sides, and it is very likely that soon the Supreme Court will have to weigh in on this important battle. So far, the legal arguments have ranged from constitutional protection to reproductive rights and procreation issues and have included divergent notions of morality and social justice. This article presents a new argument in favor of same-sex marriage: that customary international law supports both recognition and legalization of same-sex marriage.<sup>2</sup>

In the last couple years, the world has seen some remarkable changes in this area. In Argentina, the first Latin American same-sex wedding was performed in December 2009.<sup>3</sup> Shortly before that, Sweden became the seventh country to legalize same-sex marriage.<sup>4</sup> In the United States, California roiled through the granting and taking away of same-sex marriage, and California now faces challenges to Proposition 8 in federal court.<sup>5</sup> At the same time, 2009 saw the enactment of a draconian law in Nigeria, which imposes severe and sometimes even capital punishment on same-sex couples who dare engage in affection.<sup>6</sup> 2009 also saw a strong Human

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<sup>2</sup> There has been some wonderful scholarship in this area already. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996) [hereinafter ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE] (providing a history of the treatment of same-sex marriage around the world and arguing that Western culture must recognize same-sex marriage); Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797 (2008) [hereinafter Fellmeth, *State Regulation of Sexuality*] (evaluating international practices in regard to sexual freedoms and arguing that the trend toward recognition of sexual privacy rights remains aspirational); Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61 (1996) (finding a growing trend towards prohibiting governments from discriminating on the basis of sexual orientation); Renée M. Landers, *A Marriage of Principles: The Relevance of Federal Precedent and International Sources of Law in Analyzing Claims For A Right to Same-Sex Marriage*, 41 NEW ENG. L. REV. 683 (2007) [hereinafter Landers, *A Marriage of Principles*] (arguing that the state courts should take into account federal decisions and the decisions of foreign courts and legislatures to find protections for same-sex couples); Vincent J. Samar, *Throwing Down the International Gauntlet: Same-Sex Marriage as a Human Right*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 1 (2007) [hereinafter Samar, *Throwing Down the International Gauntlet*] (analyzing the relationship between constitutionalism and human rights through the prism of same-sex marriage).

<sup>3</sup> Michael Winter, *2 Argentine Men Wed in Latin America's First Gay Marriage*, USA TODAY, Dec. 28, 2009, <http://content.usatoday.com/communities/ondcadline/post/2009/12/2-argentine-men-wed-in-first-gay-marriage-in-latin-america-1>.

<sup>4</sup> *Sweden Allows Same-Sex Marriage*, BBC NEWS, Apr. 2, 2009, <http://news.bbc.co.uk/2/hi/7978495.stm>.

<sup>5</sup> Maura Dolan, *Prop. 8 Trial to Include Unprecedented Testimony*, L.A. TIMES, Jan. 11, 2010, <http://articles.latimes.com/2010/jan/11/local/la-mc-prop8-trial11-2010jan11>.

<sup>6</sup> *Nigeria: Reject "Same Gender" Marriage Ban*, HUM. RTS. WATCH, Jan. 26, 2009,

Rights Watch and Amnesty International response to that Nigerian law.<sup>7</sup> In the United States, the voters in Maine denied same-sex couples the right to marry,<sup>8</sup> while New Hampshire began allowing gay marriages at the start of 2010.<sup>9</sup> At the legislative level, some ninety U.S. representatives proposed a complete repeal of the federal Defense of Marriage Act (“DOMA”),<sup>10</sup> and several federal lawsuits were filed,<sup>11</sup> thus pushing the issues inevitably toward the Supreme Court. Through all of this, in the United States and all over the world, the debate about same-sex marriage reached all levels of society, introducing a plethora of arguments both for and against.

This article examines the debate from the perspective of conflicts of law analysis and comparative law. It argues that U.S. courts and lawmakers must consider what is happening in the rest of the world as they formulate decisions about same-sex marriage. The article is organized into four main sections. First, the article addresses the importance of the institution of marriage: to married people, to people excluded from that institution, and to society in general. Next, the article provides a current and comprehensive summary of the state of same-sex marriage in the United States, looking at what is allowed and what the debate is surrounding legalization and recognition of same-sex marriages. The article then examines same-sex marriages throughout the world and demonstrates how such marriages are rising to the level of a norm of customary international law as the result of international protections and national justifications. Following this, the article reviews the use of customary law in the United States generally and argues that international custom should be part of the United States’ legal system. Finally, this article details how U.S. federal and state courts can use international custom to inform their decisions regarding same-sex marriage in the future.

The author harbors no illusion that either premise—that same-sex marriage is customary international law, or that the U.S. courts should use such law—is an easy or uncontroversial position. However, whether or not the U.S. is ready, the debate about same-sex marriage continues to escalate and is heading to legislatures and the highest courts throughout the world. This article hopes to make a contribution to that debate.

## I. LAWS ABOUT MARRIAGE MATTER

*Marriage: Personal Commitment. Pillar of Civilization. Spiritual convention. Legal bond. Political football. Source of social status. Site of gender inequality. Tool of sexual regulation. Dying institution. Partnership for*

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<http://www.hrw.org/en/news/2009/01/26/nigeria-reject-same-gender-marriage-ban>.

<sup>7</sup> Letter to Nigerian President Yar’Adua Regarding the “Same Gender Marriage Bill,” HUM. RTS. WATCH, Jan. 23, 2009, <http://www.hrw.org/en/news/2009/01/23/letter-nigerian-president-yaradua-regarding-same-gender-marriage-bill>.

<sup>8</sup> Kevin Miller & Judy Harrison, *Gay Marriage Repealed in Maine*, BANGOR DAILY NEWS, Nov. 4, 2009, <http://www.bangordailynews.com/detail/128048.html>.

<sup>9</sup> *New Hampshire Now 5th State to Allow Same-Sex Marriage*, CNN.COM, Jan. 1, 2010, <http://www.cnn.com/2010/POLITICS/01/01/new.hampshire.same.sex/index.html>.

<sup>10</sup> Respect for Marriage Act of 2009, H.R. 3567, 111th Cong. (2009).

<sup>11</sup> See, e.g., Complaint, *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. Mar. 3, 2009) (No. 1:09-cv-10309), available at <http://www.glad.org/uploads/docs/cases/gill-complaint-03-03-09.pdf>; Complaint, *Massachusetts v. United States Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 23 (D. Mass. July 8, 2009) (No. 1:09-CV-11156-JLT), 2009 WL 1995808; Complaint, *Smelt v. United States* (C.D. Cal. Mar. 9, 2009) (No. 8:09-CV-00286-DOC-MLG), available at <http://www.scribd.com/doc/15097245/Smelt-v-United-States-of-America-Notice-of-Removal>.

*reproduction and childbearing. Path to material gain. Reflection of divine love. Legalized prostitution.*<sup>12</sup>

This article begins with the premise that marriage is important. There has been much debate about marriage: what is the significance of the term, what is the importance of the status, and what is marriage generally. In reality, marriage is many things. It is a social construct, a religious ideal, a celebration, and a declaration of love.<sup>13</sup>

It should be noted that the gay and lesbian communities do not unanimously endorse marriage: in fact, some argue strongly that imposing marriage on same-sex couples would assimilate the “queer” culture into the heterosexual community, thereby diminishing valuable differences that distinguish the two groups.<sup>14</sup> One law professor made the following critique of the struggle for marriage: “[T]he desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.”<sup>15</sup> At the same time, others have argued that same-sex marriage would actually change and improve the institution of marriage by discarding traditionally oppressive gender roles.<sup>16</sup>

While recognizing that views are not uniformly pro-marriage and that there are strong and heartfelt arguments on both sides, this article will not address that particular debate. For purposes of this article, the author will address why marriage is important as a status so that the later sections about why same-sex marriage<sup>17</sup> is important will be in context.

Marriage affects many aspects of society, and informs social relations and governmental privileges and responsibilities. The federal government has identified 1,138 “federal statutory provisions . . . in which marital status is a factor in determining or receiving benefits, rights, and privileges.”<sup>18</sup> In the end, marriage is a legal construct and matters in a variety of ways.

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<sup>12</sup> KATHLEEN E. HULL, *SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW* 1 (2006) [hereinafter HULL, *SAME-SEX MARRIAGE*].

<sup>13</sup> Society often pushes this norm on all people, gay or straight or unsure, from the moments they first hear about love. One gay man interviewed for a book about marriage stated, “I’d always wanted to be in a marriage and I wanted to have a wedding. I never dreamed growing up that I wanted to have a union ceremony. I didn’t want to have a commitment ceremony, I wanted to have a wedding.” *Id.* at 37. Wolfson notes the denial of that dream in his book:

One night—I couldn’t have been more than eleven or twelve . . . I remember saying to mom, in what might have seemed an out-of-the-blue declaration, “I don’t think I’ll get married.” I don’t remember if, or how, my mom responded. But I do remember that I realized I might be excluded from the joys of married life, and felt there was something in the picture society showed me that I didn’t fit into, before I could tell me my mom or even fully understand that I was gay.

WOLFSON, *WHY MARRIAGE MATTERS*, *supra* note 1, at 15-16.

<sup>14</sup> See HULL, *SAME-SEX MARRIAGE*, *supra* note 12, at 78-84.

<sup>15</sup> Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay And Lesbian Marriage Will Not Dismantle The Legal Structure Of Gender In Every Marriage*, 79 VA. L. REV. 1535, 1536 (1993).

<sup>16</sup> See Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 17 (1991).

<sup>17</sup> The terms used in this article are meant to simplify discussion. This article uses “gay marriage” and “same-sex marriage” interchangeably, and the use of the term “gay” includes gay men, lesbians and bisexuals. “Heterosexual” and “opposite-sex” are used interchangeably as well.

<sup>18</sup> Letter from Dayna K. Shah, Associate General Counsel, U.S. General Accounting Office, to Senator Bill Frist, GAO-04-353R DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (Jan. 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

Many summaries have been done on the significance of marriage,<sup>19</sup> but Evan Wolfson's aptly titled book *Why Marriage Matters*<sup>20</sup> contains a very comprehensive one. Here are some of the key areas where marriage matters.<sup>21</sup>

#### Debts

Unmarried partners are usually not responsible for each other's debt,<sup>22</sup> thus society favors marriage as a way of ensuring fewer unanswered debts for legal and financial obligations.

#### Death

Married couples have easier access to bereavement leave, social security claims, and inheritance of real and personal property.<sup>23</sup> Additionally, wrongful death claims can be brought for the benefit of married persons, but not for unmarried partners.<sup>24</sup> Pensions, recoverable by married persons upon the death of one partner, are often unavailable even to long-term same-sex partners.<sup>25</sup>

#### Divorce

Couples who are not legally married do not have access to the courts for divorce.<sup>26</sup> While on the surface this may seem like an odd reason for endorsing marriage, formal dissolution of relationships can be critical when it comes to property, spousal support, and child support.<sup>27</sup> In addition, in terms of divorce, the Supreme Court has established that traditional divorces must be recognized across state lines, while same-sex couples, not able to obtain traditional divorces, are not guaranteed this recognition.<sup>28</sup> Additionally, the Parental Kidnapping Prevention Act ("PKPA")<sup>29</sup> "mandates full faith and credit for child custody orders for the purpose of preventing parental kidnapping—the taking, retention or concealment of a child by a parent . . . in derogation of the custody rights . . . of another parent or family member . . . [with intent to] keep the children indefinitely or to have custody changed."<sup>30</sup> However, there is concern that the Defense of Marriage Act,<sup>31</sup> which notes that recognition need not be given to "a right or claim

<sup>19</sup> Some courts have even listed all the areas in which marriage status is significant. *See, e.g.,* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954-57 (Mass. 2003); Baker v. State, 744 A.2d 864, 883-84 (Vt. 1999).

<sup>20</sup> WOLFSON, WHY MARRIAGE MATTERS, *supra* note 1, at 13-15. *See also* Evan Wolfson, *For Richer, For Poorer: Same-Sex Couples and the Freedom to Marry as a Civil Right*, FREEDOMTOMARRY.ORG, June 2003, [http://www.freedomtomarry.org/resources\\_new.asp?node=58](http://www.freedomtomarry.org/resources_new.asp?node=58); fact sheets from Freedom to Marry partner organizations, [www.freedomtomarry.org/national\\_partners.asp?doc\\_id=1025](http://www.freedomtomarry.org/national_partners.asp?doc_id=1025) (last visited February 25, 2010).

<sup>21</sup> *See* WOLFSON, WHY MARRIAGE MATTERS, *supra* note 1, at 13-15.

<sup>22</sup> *Id.* at 13.

<sup>23</sup> *Id.*

<sup>24</sup> *See, e.g.,* 740 ILL. COMP. STAT. 180/2 §2 (2008) (providing that any recovery in a wrongful death action shall be "for the exclusive benefit of the surviving spouse and next of kin" of the decedent).

<sup>25</sup> *See, e.g.,* Jane A. Marquardt, *A Will—Not A Wish—Makes It So*, 20 SUM. FAM. ADVOC. 34 (1997) (listing other significant estate planning issues that are uniquely problematic for same-sex couples).

<sup>26</sup> *See* WOLFSON, WHY MARRIAGE MATTERS, *supra* note 1, at 13-15.

<sup>27</sup> *Id.*

<sup>28</sup> *Williams v. North Carolina*, 317 U.S. 287, 303-04 (1942).

<sup>29</sup> 28 U.S.C.A. § 1738A (West 2010).

<sup>30</sup> Kathryn J. Harvey, *The Rights Of Divorced Lesbians: Interstate Recognition Of Child Custody Judgments In The Context Of Same-Sex Divorce*, 78 FORDHAM L. REV. 1379, 1408 (2009) [hereinafter Harvey, *The Rights Of Divorced Lesbians*] (citing Patricia M. Hoff, *Parental Kidnapping: Prevention and Remedies*, 2000 A.B.A. Ctr. on Children and the Law, 1, available at <http://www.abanet.org/child/pkprevrem.pdf>).

<sup>31</sup> 28 U.S.C.A. § 1738(c) (West 2010), discussed *infra* at notes 86-92 and accompanying text.

arising from [a same-sex] relationship,"<sup>32</sup> could also mean that the PKPA does not protect children of divorced same-sex couples.<sup>33</sup>

#### Family Leave

Couples who are not married do not necessarily have a legal right for leave to care for a sick partner or child.<sup>34</sup>

#### Health

Unmarried partners do not have the same rights to hospital visitation or emergency medical decisions.<sup>35</sup> Health coverage and Medicare/Medicaid coverage is often much harder, if not impossible, for unmarried couples to obtain.<sup>36</sup>

#### Housing

Same-sex couples may be discriminated against with regard to applications for public housing and may suffer other housing-related forms of discrimination.<sup>37</sup>

#### Immigration

Unmarried same-sex partners cannot use the laws about family unification to obtain legal status in the United States.<sup>38</sup>

#### Inheritance

Unmarried couples do not automatically inherit and they do not get legal protections for inheritance or have the ability to avoid probate court.<sup>39</sup>

#### Insurance

It may be hard for unmarried couples to sign up for joint insurance plans.<sup>40</sup> Because laws do not require coverage of unmarried couples, many employers do not offer protections for same-sex couples or non-biological children.<sup>41</sup> In fact, the Michigan Supreme Court recently ruled that the state's constitutional amendment providing that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose," *prohibits* public employers from providing health-insurance benefits to their employees' qualified same-sex domestic partners.<sup>42</sup>

<sup>32</sup> *Id.*

<sup>33</sup> Harvey, *The Rights Of Divorced Lesbians*, *supra* note 30, at 1420-22.

<sup>34</sup> See WOLFSON, WHY MARRIAGE MATTERS, *supra* note 1, at 13-15.

<sup>35</sup> *Id.* Some of this can be cured through contracts, but as noted *infra* at note 69 and accompanying text, this is an imperfect and often expensive solution.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> See *id.* at 13. On this issue, see also, *Adams v. Howerton*, 486 F. Supp. 1119, 1122 (C.D. Cal. 1980) (holding that marriage between an American man and an Australian man did not confer citizenship to the Australian partner because the marriage was of no legal effect due to fact that marriage only occurs between a man and a woman under both state and federal law).

<sup>39</sup> WOLFSON, WHY MARRIAGE MATTERS, *supra* note 1, at 14.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Nat'l Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524, 543 (Mich. 2008) (citing MICH. CONST. 1963, art. 1, § 25) (emphasis added); *Recent Case: State Constitutional Law—Same-Sex Relations—Supreme Court of Michigan Holds that Public Employers May Not Provide Healthcare Benefits to Same-Sex Domestic Partners of Employees—National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008), 122 HARV. L. REV. 1263, 1264 (2009).

### Litigation

Same-sex couples may not have the same right to loss of consortium claims as married couples.<sup>43</sup>

### Parentage

Unmarried couples find it much harder to have their adopted children recognized as their own or for the children to have a legal relationship to both parents.<sup>44</sup> They lack the automatic rights to joint adoption and foster care, and because of the lack of formal divorce proceedings, when a couple with children ends its relationship, the partners may find it very difficult to get child support and visitation.<sup>45</sup> Additionally, there is some evidence that same-sex unmarried couples find it more difficult to get access to assisted reproductive technologies.<sup>46</sup> And, even when they do, their status as unmarried partners can create complications with regard to establishing legal relationships with children conceived through such technologies.<sup>47</sup> It is important to note that in some countries, even the grant of same-sex marriage does not automatically confer permission to adopt: recent legislation in Portugal allows marriage but surprisingly, and disappointingly, prohibits adoption by same-sex couples.<sup>48</sup>

### Portability and Recognition

One of the most important aspects of marriage in a peripatetic society is the knowledge that the relationship will be honored when the couple moves. Unmarried couples lack that security.<sup>49</sup> The conflicts of law issues regarding same-sex marriage arise because this is exactly an area—in fact, is *the* modern area—where laws differ by jurisdiction.

Wolfson describes it succinctly: “Marriage uniquely permits couples to travel and deal with others in business or across borders without playing a game of ‘now you’re legally next of kin; now you’re legally not.’”<sup>50</sup>

<sup>43</sup> See, e.g., *Charron v. Amaral*, 889 N.E.2d 946 (Mass. 2008); see also *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (holding that denying same-sex couples the right to marry violated State Constitution and identifying the right to bring a loss of consortium claim as among the many rights available to married couples from which same-sex couples were excluded).

<sup>44</sup> See WOLFSON, *WHY MARRIAGE MATTERS*, *supra* note 1, at 14. See also, *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005) (denying custody of a child to same-sex partner); *Lofton v. Sec’y of the Dep’t of Children and Family Serv.*, 358 F.3d 804, 823 (11th Cir. 2004) (holding that a Florida statute prohibiting homosexuals from adopting children did not violate equal protection).

<sup>45</sup> See WOLFSON, *WHY MARRIAGE MATTERS*, *supra* note 1, at 14.

<sup>46</sup> See generally John A. Robertson, *Gay And Lesbian Access To Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323 (2004).

<sup>47</sup> See, e.g., *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006), *aff’d*, 661 S.E.2d 822 (Va. 2008). See also *A.K. v. N.B.*, No. 2070086, 2008 WL 2154098, at \*5 (Ala. Civ. App. May 23, 2008) (finding that Alabama would not reconsider a California judgment in which a natural mother tried to appeal a decision that had granted visitation rights with a child conceived through ART to her former lesbian partner). On assisted reproduction generally, see Sonia Bychkov Green, *Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge The Traditional Realm Of Conflicts Of Law*, 24 WIS. J.L. GENDER & SOC’Y 25 (2009) (describing the legal status of ART and the challenges it poses to traditional legal norms).

<sup>48</sup> See Portugal’s Parliament Approves Same-Sex Marriage Law, <http://www.rttnews.com/ArticleView.aspx?id=1175163&SMap=1> (last visited on February 25, 2010) [hereinafter Portugal’s Parliament Approves Same-Sex Marriage Law].

<sup>49</sup> WOLFSON, *WHY MARRIAGE MATTERS*, *supra* note 1, at 13-15.

<sup>50</sup> WOLFSON, *WHY MARRIAGE MATTERS*, *supra* note 1, at 5.



The problems that couples face because of these inconsistencies can be seen on both a national and an international level. Within the U.S., differences in marriage laws create a great deal of confusion for same-sex couples. While ordinarily marriages are recognized across state lines, same-sex marriages do not get the same protection.<sup>51</sup> Thus, a couple considered legally married in Massachusetts might choose to—or need to—move to Kansas, only to find that their entire legal relationship is not valid: they no longer have the same expectations about any of the crucial issues noted in this section.

In the United States, marriages have traditionally been recognized across state lines.<sup>52</sup> Some argue that the Full Faith and Credit Clause either explicitly or, more likely through longstanding tradition, has protected married couples from this problem.<sup>53</sup> In the case of same-sex marriage, however, such protections are absent.<sup>54</sup> Although some have argued that the Full Faith and Credit Clause does not apply to marriage, there may be a counter-argument that if marriages were not protected by the Clause or the Full Faith and Credit Act then there would not have been a need for Section Two of the Defense of Marriage Act.

Outside the U.S., differences in national—and regional—laws about same-sex marriage create the same types of problems.<sup>55</sup> For example, a British court refused to recognize as a valid “marriage” the marriage between two Canadian law professors, which they entered into in British Columbia.<sup>56</sup> In a case simply between two men from different countries, a Spanish court refused

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<sup>51</sup> See *infra* Appendix I for details about all of the states that do not recognize same-sex marriages from other states.

<sup>52</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 284 (1971) (“A state usually gives the same incidents to a foreign marriage, which is valid under the principles stated in § 283, that it gives to a marriage contracted within its territory.”).

<sup>53</sup> The Full Faith and Credit Clause reads as follows:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1. The question of whether the Full Faith and Credit Clause protects marriage has been debated. Some have stated that marriages are recognized across state lines through a common-law rule and tradition rather than a constitutional mandate. See, e.g., Andrew Koppelman, *Dumb And DOMA: Why The Defense Of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 10 (arguing that DOMA is unconstitutional because it discriminates against homosexuals). Others, however—and this author as well—would argue that “[t]he Full Faith and Credit Clause . . . allows people to have some certainty as to their legal status and responsibilities.” Leslie Dubois-Need & Amber Kingery, *Transgendered In Alaska: Navigating The Changing Legal Landscape For Change Of Gender Petitions*, 26 ALASKA L. REV. 239, 267 (2009).

<sup>54</sup> The federal Defense of Marriage Act allows states to refuse to recognize same-sex marriages from other state jurisdictions. See *infra* notes 86-92 and accompanying text.

<sup>55</sup> One of the justifications for approving more European Union recognition and allowing of same sex marriages is seen here: ILGA-Europe Executive Director Ailsa Spindler said:

As more and more EU citizens have their same-sex partnerships and marriages legally recognized at home, they will expect the same recognition when they move around Europe. Any refusal to recognize such partnerships by other member states is a barrier to free movement and as such runs contrary to the founding principles of the EU [European Union].

Same-sex (homosexual) Marriage in Belgium, [http://www.religioustolerance.org/hom\\_mar10.htm](http://www.religioustolerance.org/hom_mar10.htm) (last visited Feb. 23, 2010).

<sup>56</sup> See England and Wales High Court (Family Division) Decisions, <http://www.bailii.org/ew/cases>

to allow the marriage of a Spanish man to his Indian partner because even though same-sex marriages were legal in Spain, they were not in India, and the court held that the limitation should control.<sup>57</sup>

#### Privilege

A sometimes unmentioned aspect of marriage pertains not to the social aspects of the relationship, but to the judicial implications thereof: unmarried couples do not have the privilege of refusing to testify against each other.<sup>58</sup> Additionally, unmarried couples are “usually denied the coverage in crime-victims counseling and protection programs afforded married couples.”<sup>59</sup>

#### Property

Unmarried couples do not benefit from any privileges that married couples have under rules that grant more favorable conditions for joint property ownership.<sup>60</sup> They lack protection in shared property and, as mentioned early, if one partner dies, they do not have automatic inheritance rights of personal or real property.<sup>61</sup> For some couples, this could mean that the home they have been living in for years, and in which they raised their children, could be lost.<sup>62</sup>

#### Retirement

Spouses have benefits through Social Security and Medicare (and other such programs) that may not be available to same-sex unmarried couples.<sup>63</sup>

#### Taxes

There is some debate over whether marriage is a benefit or a burden where income taxes are concerned.<sup>64</sup> However, the income tax laws certainly make many distinctions based on marital status, and to the extent that married couples have advantages and options, unmarried couples do not.<sup>65</sup>

#### Marriage: Not Civil Unions

One argument that has been made is that a civil union, or comparable status is just as good. Courts in Vermont and New Jersey have allowed state legislatures to remedy equal protection concerns through civil union statutes.<sup>66</sup> However, most recently, the Iowa Supreme Court held that such a distinction would be equally suspect under the Iowa Constitution.<sup>67</sup>

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/EWHC/Fam/2006/2022.html (last visited on Feb. 23, 2010).

<sup>57</sup> David Shucosky, *New Spanish Gay Marriage Law Runs Into Judicial Roadblock*, JURIST (July 6, 2005), <http://jurist.law.pitt.edu/paperchase/2005/07/new-spanish-gay-marriage-law-runs-into.php>.

<sup>58</sup> 735 ILL. COMP. STAT. 5/8-801; *see also* WOLFSON, WHY MARRIAGE MATTERS, *supra* note 1, at 14.

<sup>59</sup> WOLFSON, WHY MARRIAGE MATTERS, *supra* note 1, at 14.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> If title to the home were in the name of the partner who died intestate, title would pass to his or her heirs at law—children (if any), parents, siblings and their descendants, and possibly more distant “blood” relatives—but not to the same-sex partner. *See, e.g.*, 755 ILL. COMP. STAT. 5/2-1 (defining Illinois’ law of intestate succession, which provides for inheritance only for those related to the deceased by blood or marriage.).

<sup>63</sup> WOLFSON, WHY MARRIAGE MATTERS, *supra* note 1, at 13-15.

<sup>64</sup> *See, e.g.*, Frederick J. Bradshaw, IV, *The Earned Income Tax Credit and the Marriage Penalty: New Proposals in Light of the Economic Growth and Tax Relief Reconciliation Act of 2001*, 54 TAX LAW. 701 (2001).

<sup>65</sup> *Id.*

<sup>66</sup> Baker, 744 A.2d at 886-87; Lewis v. Harris, 908 A.2d 196, 221-24 (N.J. 2006).

<sup>67</sup> Varnum v. Brien, 763 N.W.2d 862, 906-07 (Iowa 2009). *See also* Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 418 (Conn. 2008) (rejecting the trial court’s finding that equal protection was not implicated if civil unions

Ultimately, same-sex couples may, through contracts, arrange for some of the protections and privileges that married couples enjoy, but it is costly.<sup>68</sup> One article described the following:

If Howard Wax and Robert Pooley Jr. were a heterosexual couple, they could've gone to their nearest Cook County Clerk's office, paid \$40 for a marriage license and been wed.

That would have provided them an array of legal protections—the right to make medical decisions for one another, the ability for one to inherit the other's property.

Instead, the couple paid \$10,000 for an attorney to help them roughly simulate—using wills, trusts, and powers of attorney—the protections that marriage affords. It was a price the men, parents of 3-year-old twins, were willing to pay for peace of mind, though they admit it's far from perfect.<sup>69</sup>

## II. THE DEBATE OVER SAME-SEX MARRIAGE IN THE UNITED STATES

*Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.*<sup>70</sup>

The battle over the creation of same-sex marriage in the United States started in earnest in the 1970s, with the earliest cases before the state courts and one case dismissed by the U.S. Supreme Court.<sup>71</sup> The current status of same-sex marriages is one of the most confusing situations in United States law and probably *the* leading conflicts of law issue of today. To properly understand the confusion, it is important to break down the creation of same-sex marriage by both what the laws are, and what the arguments are on both sides of the debate.

Laws regarding same-sex marriage, civil unions, and prohibitions of both, exist at both state and federal levels.<sup>72</sup> States have passed amendments that prohibit same-sex couples from marrying.<sup>73</sup> Additionally, same-sex marriage, and other legal arrangements approximating marriage, are regulated and evaluated at all levels and across various institutions: legislative, judicial, and administrative.

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were available).

<sup>68</sup> Rex W. Huppke, 'Marriage' Benefits Costly for Gay Couples, CHI. TRIB., Jan. 18, 2010, available at <http://www.chicagotribune.com/news/chi-gays-pay-more-18-jan18,0,2205178.story>.

<sup>69</sup> *Id.*

<sup>70</sup> Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

<sup>71</sup> See Baker v. Nelson, 409 U.S. 810 (1972) (dismissing case for lack of a substantial federal questions); Baker v. Nelson, 291 Minn. 310 (1971) (holding that state marriage statute did not authorize same-sex marriage).

<sup>72</sup> See *infra* Appendix I for a table with a comprehensive, current description of the laws.

<sup>73</sup> See HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS (2008), [http://www.hrc.org/documents/marriage\\_prohibitions.pdf](http://www.hrc.org/documents/marriage_prohibitions.pdf).

Judicial decisions at the state levels, recent federal decisions, and new federal cases have added some unique arguments to the debate. This section outlines some laws, which are expanded in Appendix I, and then examines some of the leading cases about same-sex marriage before concluding with a summary of the key legal issues. Those issues, the article will argue later, can be analyzed through the prism of customary international law.

*A. Laws Regarding Same-Sex Marriage in the United States Vary Greatly.*<sup>74</sup>

Five states allow same-sex marriage: Massachusetts,<sup>75</sup> Connecticut,<sup>76</sup> Iowa,<sup>77</sup> Vermont,<sup>78</sup> and New Hampshire (beginning in January, 2010).<sup>79</sup> A handful of other states allow same-sex couples to enter into legal relationships that confer some or all of the same state-level benefits of marriage, but using terms such as “civil union” or “domestic partnership” to distinguish those relationships from heterosexual “marriage.”

Two states—Rhode Island<sup>80</sup> and New York<sup>81</sup>—and the District of Columbia<sup>82</sup> recognize same-sex marriages from other states. California recognizes same-sex marriages entered into in other jurisdictions for the purpose of affording the couple benefits, but without calling it a “marriage.”<sup>83</sup>

On the other hand, thirty-nine states have laws that define marriage as between a man and a woman; thirty states have constitutional amendments with the same definition.<sup>84</sup> Some opponents of same-sex marriage have advocated for a federal constitutional amendment to define marriage as between a man and woman, but that measure has failed to gain significant support.<sup>85</sup>

However, there is a crucial current federal statute at issue. The Federal Defense of

<sup>74</sup> See *infra* Appendix I for a thorough list of the laws of each state.

<sup>75</sup> *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941, 969 (Mass. 2003).

<sup>76</sup> *Kerrigan v. Comm’r of Public Health*, 957 A.2d 407, 480-82 (Conn. 2008).

<sup>77</sup> *Varnum v. Brien*, 763 N.W.2d 862, 906-07 (Iowa 2009).

<sup>78</sup> VT. STAT. ANN. tit. 15, § 8 (2010) (amended in 2009 to change the definition of marriage from “the legally recognized union of one man and one woman” to “the legally recognized union of two people”).

<sup>79</sup> N.H. REV. STAT. ANN. § 457:1-a (2010). Interestingly, New Hampshire still distinguishes between same-sex and opposite-sex marriages, but in the age of consent. In an opposite-sex marriage, the age of consent is fourteen for males and thirteen for females; in same-sex marriages, the age of consent is eighteen for both sexes. N.H. REV. STAT. ANN. § 457:4 (2010).

<sup>80</sup> RELIGIOUS TOLERANCE.ORG, Same-Sex Marriage (SSM) & Civil Unions in Rhode Island: 2007: Attorney General Issues Statement on SSM Recognition, available at <http://www.religioustolerance.org/hommarri2.htm> (last visited Feb. 24, 2010). See also Katic Zezima, *Rhode Island Steps Toward Recognizing Same-Sex Marriage*, N.Y. TIMES, Feb. 22, 2007, available at <http://www.nytimes.com/2007/02/22/us/22rhode.html> (last visited Feb. 24, 2010).

<sup>81</sup> *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 743 (N.Y. App. Div. 2008) *leave to appeal dismissed*, 889 N.E.2d 496 (N.Y. 2008). See also Memorandum from David Nocenti, legal counsel to Gov. Patterson, to all New York State Agency Counsel (May 14, 2008), [http://www.state.ny.us/governor/reports/pdf/Nocenti\\_memo.pdf](http://www.state.ny.us/governor/reports/pdf/Nocenti_memo.pdf) (directing all New York administrative agencies to review and alter their policy statements and regulations to accommodate same-sex marriages performed in other states).

<sup>82</sup> D.C. CODE § 46-405.01 (2009).

<sup>83</sup> CAL. FAM. CODE § 308 (West 2010).

<sup>84</sup> See *infra* Appendix I.

<sup>85</sup> GOP Renews Fight Against Same Sex Marriage, CNN.COM (June 6, 2006), <http://www.cnn.com/2006/POLITICS/06/06/same.sex.marriage/index.html>.

Marriage Act (“DOMA”) has two important components: first, it provides that states do not have to recognize same-sex marriages even under the Full Faith & Credit Clause;<sup>86</sup> second, it defines marriage as that between a man and woman for federal purposes.<sup>87</sup>

DOMA, Section 2:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>88</sup>

DOMA, Section 3:

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.<sup>89</sup>

Recently, there has been a movement to eliminate this statute. In Congress, U.S. Rep. Jerry Nadler (D-NY), along with Tammy Baldwin (D-Wis.), Jared Polis (D-CO), John Lewis (D-GA) and Nydia Velazquez (D-NY), introduced the Respect for Marriage Act, which would fully repeal the federal DOMA law.<sup>90</sup> President Obama has stated that his “administration believes [DOMA] is discriminatory and should be repealed by Congress.”<sup>91</sup> However, the trend in the United States is currently against same-sex marriage, especially in states where the question has been put to a popular vote.<sup>92</sup> Appendix I details the current status of same-sex marriage in each state.

### B. *Judicial Decisions and Pending Cases Underscore the Importance of the Debate.*<sup>93</sup>

The current status of same-sex marriage in the United States has been affected just as

<sup>86</sup> This has been attacked in the California litigation. See *infra* notes 215-235 and accompanying text.

<sup>87</sup> This has been attacked in the Massachusetts litigation. See *infra* notes 196-215 and accompanying text.

<sup>88</sup> 28 U.S.C. § 1738C (1996).

<sup>89</sup> 1 U.S.C. § 7 (1996).

<sup>90</sup> Unite the Fight: BREAKING NEWS: Full Repeal of DOMA Introduced to U.S. House Called “Respect for Marriage Act” (Sept. 15, 2009), <http://unitethefight.blogspot.com/2009/09/breaking-news-full-repeal-of-doma.html> (last visited Feb. 24, 2010).

<sup>91</sup> Scott Wilson, *Obama Makes Explicit His Objections to DOMA*, WASH. POST, Aug. 17, 2009, available at [http://voices.washingtonpost.com/44/2009/08/17/obama\\_makes\\_explicit\\_his\\_objec.html](http://voices.washingtonpost.com/44/2009/08/17/obama_makes_explicit_his_objec.html) (last visited Feb. 24, 2010) [hereinafter Wilson, *Obama Makes Explicit His Objections to DOMA*].

<sup>92</sup> Mike O’Sullivan, *San Francisco Gay Marriage Court Case Could Have National Impact*, VOICE OF AMERICA, January 13, 2010.

<sup>93</sup> See *infra* Appendix I listing additional details on relevant judicial activity.

much, if not more, by judicial activity as it has been by legislation.<sup>94</sup> In order to place customary international law into the context of the current debate, it is important to understand what the courts have done—and are doing—to date.

#### California

Perhaps more than any other state, California has vacillated on the issue of same-sex marriage.

In 2004, the California Supreme Court held that local officials in the city and county of San Francisco could not refuse to enforce provisions of California's marriage laws that limited the granting of a marriage license and marriage certificate to opposite-sex couples.<sup>95</sup> The case was triggered in February 2004, when San Francisco Mayor Gavin Newsom sent a letter to the county clerk, "requesting that she determine whether changes should be made to the documents used to apply for and issue marriage licenses" in order to provide them regardless of sexual orientation.<sup>96</sup> The mayor expressed his view that the California Constitution required this.<sup>97</sup> The county clerk responded by developing gender-neutral marriage documents and printing a warning on the applications explaining that a same-sex marriage performed in San Francisco may not be recognized anywhere else.<sup>98</sup> Approximately 4,000 such marriages were performed.<sup>99</sup>

The state's attorney general, Bill Lockyer, sought a writ in the state supreme court asking that local officials stop the marriages, and that any marriages already performed be declared void.<sup>100</sup> The case was consolidated with another case brought by residents and taxpayers also seeking to compel the San Francisco officials to stop the marriages.<sup>101</sup>

Importantly, in this case, the California Supreme Court began by determining that the legal issue was not the right of same-sex couples to marry, but rather the right of local officials to refuse to carry out a law they deem unconstitutional. The court found that local officials simply do not possess that kind of authority.<sup>102</sup> The ruling emphasized separation of powers principles, stating that the job of the legislature is to enact statutes, the job of the judiciary is to determine their constitutionality, and the job of the executive is to carry out the laws.<sup>103</sup> As such, the court issued a mandate directing officials to carry out the laws unless and until they were determined to be unconstitutional.<sup>104</sup>

Soon thereafter, the California Supreme Court did address the substantive question avoided in *Lockyer*.<sup>105</sup> In 2008, the court squarely faced the question of whether statutes limiting

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<sup>94</sup> It should be noted that although historically same-sex marriage has been an issue brought to and taken up by the courts, not all agree that this is the best way to achieve reform. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* pt. 4 (2d ed. 2008).

<sup>95</sup> *Lockyer v. City and County of San Francisco*, 95 P.3d 459, 464 (Cal. 2004).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 465.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Lockyer*, 95 P.3d at 461, 466.

<sup>101</sup> *Id.* at 466-67.

<sup>102</sup> *Id.* at 464.

<sup>103</sup> *Id.* at 463.

<sup>104</sup> *Id.* at 464.

<sup>105</sup> See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

marriage to opposite-sex couples were unconstitutional.<sup>106</sup> On one side were groups supporting gay marriage, including San Francisco officials, same-sex couples, and organizations representing them.<sup>107</sup> On the other were supporters of retaining the traditional definition, including backers of Proposition 22, a ballot question under which voters approved a statute explicitly defining marriage as between a man and a woman, as well as the state's attorney general.<sup>108</sup>

The court noted at the outset that this case was somewhat different than previous cases addressing same-sex marriage bans, because California's domestic partnership statutes granted virtually all of the legal rights and responsibilities of marriage under state law.<sup>109</sup> Nonetheless, in a 4-3 vote, the court found the marriage laws unconstitutional.<sup>110</sup>

First, the Court held that the right to marry was an integral part of an individual's interest in personal autonomy, as protected by the *privacy* and *due process* provisions of the California Constitution.<sup>111</sup> The court rejected the argument that there was no fundamental right to *same-sex marriage*, noting that the same distinction had been unsuccessfully made by those who opposed interracial marriage and argued that marriage had been traditionally limited to those of the same race.<sup>112</sup>

The court next held that the marriage laws raised equal protection concerns.<sup>113</sup> It held that the applicable standard of review of the marriage laws was strict scrutiny, given that the statutes discriminated on the basis of sexual orientation and impinged on same-sex couples' fundamental interest in having their family relationships accorded the same respect enjoyed by opposite-sex couples.<sup>114</sup> The court noted that in light of historical discrimination against gay people, there was a significant risk that retaining a distinction in nomenclature between "marriage" for heterosexuals and "a separate and distinct designation" for homosexuals would mark homosexuals as second-class citizens.<sup>115</sup>

Because the court applied strict scrutiny, the state was required to show a compelling interest as well as show that the differential treatment was necessary to serve that compelling interest.<sup>116</sup> The state failed.<sup>117</sup> The court held that the state's purpose to retain the traditional definition of marriage by differentiating marriage between a man and a woman and a union between two same-sex persons was not compelling or necessary.<sup>118</sup> The court acknowledged that the majority of states, *and the majority of countries around the world*, do not recognize gay marriage,<sup>119</sup> and noted that this was not surprising given historical discrimination against

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<sup>106</sup> *Id.* at 397. At this time, the California Constitution had no language defining or limiting marriage to between a man and a woman.

<sup>107</sup> *Id.* at 402-03.

<sup>108</sup> *Id.* at 402.

<sup>109</sup> *Id.* at 397-99.

<sup>110</sup> *Id.* at 397-99, 402.

<sup>111</sup> *In re Marriage Cases*, 183 P.3d at 419.

<sup>112</sup> *Id.* at 429-30.

<sup>113</sup> *Id.* at 435.

<sup>114</sup> *Id.* at 441-42.

<sup>115</sup> *Id.* at 401-02.

<sup>116</sup> *Id.* at 446.

<sup>117</sup> *In re Marriage Cases*, 183 P.3d at 451.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 450. At the time, only Canada, South Africa, the Netherlands, Belgium, and Spain allowed same-

homosexuals.<sup>120</sup> The court found that permitting same-sex couples to marry would not “alter the substantive nature of the legal institution of marriage,” nor would any religious institution be forced to “solemnize” such marriages.<sup>121</sup> The court also found that excluding same-sex couples from the definition of marriage harmed the children of those relationships by validating the notion that it is permissible for families headed by gay couples to be treated differently than those headed by heterosexual couples.<sup>122</sup> The court held that the unconstitutional language be stricken from the statutes and directed the appropriate state officials to enforce the marriage statutes equally.<sup>123</sup>

Between June 16, 2008 and November 5, 2008, an estimated 18,000 same-sex couples were married in California.<sup>124</sup> On November 4, 2008, however, the voters of California passed Proposition 8, an amendment to California’s constitution that provided: “Only marriage between a man and a woman is valid or recognized in California.”<sup>125</sup>

Legal challenges followed; and in May 2009, the California Supreme Court, in *Strauss v. Horton*, found that the same-sex marriages performed before November 5, 2008, were still valid, but effectively terminated any future same-sex marriages.<sup>126</sup> The *Strauss* Court did not determine the constitutionality of same-sex marriage, but rather held that the question at issue was the right of the people to change the state’s constitution through the initiative process to limit marriage to opposite-sex couples.<sup>127</sup> The California Constitution allows for amendments to be proposed by “two-thirds of the membership of each house of the Legislature . . . or by an initiative petition signed by voters numbering at least 8 percent of the total votes cast for all candidates for Governor in the last gubernatorial election.”<sup>128</sup> Once proposed, an amendment by initiative becomes part of the California Constitution “if it is approved by a simple majority of voters,”<sup>129</sup> but that procedure cannot be used to *revise* the state’s constitution, only to *amend* it.<sup>130</sup>

Prior California case law provides that substantial changes, either quantitative or qualitative, amount to revisions.<sup>131</sup> The court noted that Proposition 8 was not a revision from a quantitative standpoint, given that it was only fourteen words.<sup>132</sup> In finding that the initiative was not a qualitative change, the court noted that it usually deemed revisions to be those that make

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sex couples to marry, and Massachusetts was the only state in the United States that allowed same-sex marriage. *Id.* at 450 n.70.

<sup>120</sup> *Id.* at 451.

<sup>121</sup> *Id.* at 451-52.

<sup>122</sup> *Id.* at 401.

<sup>123</sup> *In re Marriage Cases*, 193 P.3d at 453.

<sup>124</sup> *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009). See also *18,000 Couples*, NATIONAL CENTER FOR LESBIAN RIGHTS, [http://www.nclrights.org/site/PageServer?pagename=issuc\\_marriage\\_18000Couples](http://www.nclrights.org/site/PageServer?pagename=issuc_marriage_18000Couples) (last visited February 25, 2010).

<sup>125</sup> *Strauss*, 207 P.3d at 59 (quoting CAL. CONST. art I, § 7.5). Proposition 8 went into effect on November 5, 2008. *Id.* at 59. Proposition 8 was approved by 52.3 percent of the voters. *Id.* at 68.

<sup>126</sup> *Id.* at 122.

<sup>127</sup> *Id.* at 60.

<sup>128</sup> *Id.* at 60 (emphasis deleted) (citing CAL. CONST. art. XVIII, §§ 1, 3; *Id.* art. II, § 8).

<sup>129</sup> *Strauss*, 207 P.3d at 60 (emphasis omitted) (citing CAL. CONST. art. XVIII, § 4).

<sup>130</sup> *Id.* at 60.

<sup>131</sup> *Id.* at 61.

<sup>132</sup> *Id.* at 98. Proposition 8 states: “Only marriage between a man and a woman is valid or recognized in California.” CAL. CONST. art. I, § 7.5.



“far reaching changes in the nature of our basic governmental plan.”<sup>133</sup>

The court also rejected the petitioners’ argument that separation of powers principles prohibited the amendment because of the high court’s ruling in *In re Marriage Cases*.<sup>134</sup> The court held that the Marriage Protection Act did not re-adjudicate the issues decided in that case, but created a new constitutional rule that took effect upon approval of Proposition 8.<sup>135</sup>

As for the issue of whether Proposition 8 should be retroactive, the court held that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is clear from extrinsic sources that the legislature or voters intended a retroactive application.<sup>136</sup> There was no express retroactivity provision in Proposition 8, and the ballot pamphlet did not say it was retroactive.<sup>137</sup> Further, applying the law retroactively would raise due process concerns by depriving more than 18,000 couples of vested rights, including employment benefits, interests in property, and inheritances.<sup>138</sup>

The federal challenges to Proposition 8 are an important part of this debate and are discussed in the section that follows.<sup>139</sup>

### Hawaii

The Hawaii Supreme Court issued an important decision in 1993,<sup>140</sup> which set the stage for the rights of same-sex couples and, ultimately, precipitated the Defense of Marriage Act.<sup>141</sup> In that case, three same-sex couples filed suit against the state’s Department of Health after it denied their applications for marriage licenses.<sup>142</sup> The plaintiffs alleged that the Department of Health’s interpretation violated their right to privacy and guarantee of equal protection under the Hawaii Constitution.<sup>143</sup> The trial court dismissed the plaintiffs’ complaint, but, on appeal, the Hawaii

<sup>133</sup> *Strauss*, 207 P.3d at 98-99 (emphasis deleted) (citations omitted). Judge Moreno, dissenting in part, argued that Proposition 8 effected a fundamental change in the core values of the state constitution, and as such was a revision to the state constitution. *Id.* at 129 (Moreno, J., concurring and dissenting). He said that the ruling placed in jeopardy the rights of all disfavored minorities. *Id.* He would have held that any initiative that denies a fundamental right to a group that has historically been subject to discrimination on the basis of a suspect classification violates the essence of the equal protection clause and fundamentally alters its scope. *Id.* at 140.

<sup>134</sup> *Id.* at 63 (citing *In re Marriage Cases*, 183 P.3d 384, 449 (Cal. 2009)).

<sup>135</sup> *Id.*

<sup>136</sup> *Strauss*, 207 P.3d. at 120-21.

<sup>137</sup> *Id.* at 121.

<sup>138</sup> *Id.* at 121-22.

<sup>139</sup> See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) [hereinafter *Perry I*], 702 F. Supp. 2d 1132 (N.D. Cal. 2010) [hereinafter *Perry II*] (denying stay), 2010 WL 3212786 (9th Cir. Aug. 16, 2010) [hereinafter *Perry III*] (granting stay) [collectively hereinafter “Perry Cases”]. See also AMERICAN CIVIL LIBERTIES UNION, *ACLU Urges Court to Strike Down Prop 8* (Feb. 3, 2010), <http://www.aclu.org/lgbt-rights/aclu-urges-court-strike-down-prop-8> (last visited Feb. 24, 2010) (discussing the filing of a federal lawsuit challenging proposition 8); Margaret Talbot, *A Risky Proposal*, THE NEW YORKER (Jan. 18, 2010), [http://www.newyorker.com/reporting/2010/01/18/100118fa\\_fact\\_talbot](http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot) (last visited Feb. 24, 2010) (discussing the possibility of the case *Perry v. Schwarzenegger* challenging the constitutionality of Proposition 8 and arguing for same-sex marriage as a fundamental right being brought before the United States Supreme Court).

<sup>140</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *vacated*, *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (holding unconstitutional the restriction of marriage to opposite-sex couples because the state had not shown a compelling governmental interest), *aff’d*, 950 P.2d 1234 (Haw. 1997).

<sup>141</sup> Defense of Marriage Act, 1 U.S.C §7 (1996).

<sup>142</sup> *Baehr*, 852 P.2d at 48-49.

<sup>143</sup> *Id.* at 50.

Supreme Court reversed, holding that the law restricting marriage to opposite-sex couples was a classification based on sex, and thus subject to strict scrutiny under the Equal Protection Clause of Hawaii's Constitution.<sup>144</sup> As such, the law was presumed to be unconstitutional unless the state could show that it was justified by compelling state interests and narrowly drawn to avoid unnecessary abridgements of the plaintiffs' constitutional rights.<sup>145</sup>

The Hawaii decision prompted a national reaction.<sup>146</sup> The federal Defense of Marriage Act and many state laws defining marriage as between a man and a woman were passed in response to this case.<sup>147</sup> Voters in Hawaii passed a constitutional amendment giving the legislature the right to restrict marriage to opposite sex couples.<sup>148</sup> Based on this constitutional amendment, the Hawaii Supreme Court vacated its prior holding and reversed the judgment, thus effectively ending the attempt to legalize same-sex marriage in Hawaii.<sup>149</sup>

#### Massachusetts

In the leading case *Goodridge v. Department of Public Health*,<sup>150</sup> seven long-term, same-sex couples from five Massachusetts counties, all of whom wanted to marry, brought suit.<sup>151</sup> In March and April of 2001, all attempted to obtain a marriage license from a city or town clerk's office and were turned away.<sup>152</sup> The Supreme Judicial Court agreed with the couples' argument that the denial of the benefits of marriage to them violated several provisions of the Massachusetts Constitution, and overruled the trial court's ruling in favor of the Commonwealth.<sup>153</sup> At issue in *Goodridge*, was the state's marriage licensing statute.<sup>154</sup> Nothing in the law specifically addressed same-sex couples.<sup>155</sup> However, the court rejected the argument that it could interpret the statute as permitting same-sex marriage, because it held that the statute incorporated the common-law definition of marriage.<sup>156</sup> Instead, the court held, 4-3, that to forbid same-sex couples from marrying violated state equal-protection and due process guarantees.<sup>157</sup>

The court noted that in Massachusetts, marriage has always been a secular institution, with no religious ceremony required.<sup>158</sup> It also noted that marriage confers significant benefits

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<sup>144</sup> *Id.* at 59-60, 68.

<sup>145</sup> *Id.* at 67.

<sup>146</sup> See David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning And Fate*, 22 U. HAW. L. REV. 19 (2000).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Bachr v. Miike*, No. 20371, summary disposition order at 1 (Haw. S. Ct. Dec. 9, 1999), <http://hawaii.gov/jud/20371.htm> (last visited Feb. 24, 2010) (dismissing the appeal and reversing the trial court's holding that the Hawai'i marriage statute was unconstitutional because it was in violation of the equal protection clause of the Hawai'i Constitution due to the subsequent ratification of the marriage amendment).

<sup>150</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>151</sup> *Id.* at 949.

<sup>152</sup> *Id.* at 949-50.

<sup>153</sup> *Id.* at 969.

<sup>154</sup> *Id.* at 951.

<sup>155</sup> *Id.* at 952-53.

<sup>156</sup> *Goodridge*, 798 N.E.2d at 952.

<sup>157</sup> *Id.* at 961.

<sup>158</sup> *Id.* at 954.

and obligations on couples.<sup>159</sup> The Department of Public Health noted that hundreds of state laws were related to marriage and marital benefits: joint income tax filing, tenancy by the entirety, homestead protection, inheritance rights, access to veteran's spousal benefits, etc.<sup>160</sup> Children of married couples also benefit through greater access to state and federal benefits.<sup>161</sup>

The court held that the Massachusetts Constitution protects personal liberty to a greater degree than the U.S. Constitution.<sup>162</sup> The court applied a rational-basis review for both due process and equal protection, and found that the statute forbidding same-sex marriage could not survive either test.<sup>163</sup> The Department of Public Health argued that the prohibition of same-sex marriage was supportable because it: (1) provided a favorable setting for procreation; (2) ensured an optimal setting for child-rearing; and (3) preserved scarce state and private resources.<sup>164</sup> The court rejected these arguments.<sup>165</sup>

The court held that the distinguishing feature of marriage is the exclusive commitment of one person to another, not the ability to have and raise children.<sup>166</sup> The court noted that fertility is not a requirement for marriage, and that there was no evidence that a heterosexual marriage provides the "optimal" setting for raising children, or that forbidding same-sex marriage would increase the number of couples choosing to enter into opposite-sex marriage in order to raise children.<sup>167</sup> The court also noted that many same-sex couples are excellent parents, including several of the plaintiffs in this case.<sup>168</sup>

The dissent argued, among other things, that it was the proper role of the legislature, and not the courts, to define marriage.<sup>169</sup> The dissent also argued that there was no fundamental right to same-sex marriage, given the history of marriage as the union of one man and one woman.<sup>170</sup> The dissenters also acknowledged that *Lawrence v. Texas*,<sup>171</sup> which struck down anti-sodomy laws, expressly noted that the case did not involve the formal recognition of same-sex relationships.<sup>172</sup> And they argued that the majority gave short shrift to the traditional role of marriage as providing a forum for procreation and the raising of children.<sup>173</sup>

#### Federal Cases

A number of federal cases have struggled with the issue of same-sex marriage. The

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<sup>159</sup> *Id.* at 948.

<sup>160</sup> *Id.* at 955.

<sup>161</sup> *Id.* at 956-57.

<sup>162</sup> *Goodridge*, 798 N.E.2d at 959. This idea also supports the use of international law as a prism for evaluating freedoms.

<sup>163</sup> *Id.* at 961.

<sup>164</sup> *Id.* at 961. These are some of the same arguments being used in the Proposition 8 trial as well. See *infra* notes 215-235 and accompanying text.

<sup>165</sup> *Id.* at 961-64.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 963. These exact arguments, rejected by the *Goodridge* court, are also currently at issue in the Proposition 8 case. See *infra* notes 215-235 and accompanying text.

<sup>168</sup> *Goodridge*, 798 N.E.2d at 963.

<sup>169</sup> *Id.* at 974 (Spina, J., dissenting).

<sup>170</sup> *Id.* at 976-77.

<sup>171</sup> 539 U.S. 558 (2003).

<sup>172</sup> *Goodridge*, 798 N.E.2d at 978.

<sup>173</sup> *Id.* at 1003.

federal courts have focused on issues of equal protection and immigration, and generally, the federal courts have not found a right to same-sex marriage on the federal level.<sup>174</sup> Most of the cases have ruled against the same-sex couples, finding that no discrimination existed.<sup>175</sup>

One case, however, found that that a deputy federal public defender, Levenson, who had legally wed his partner in California when such marriages were allowed, was entitled to have his spouse made a beneficiary of his health insurance under the Federal Employee Health Benefits Act.<sup>176</sup> His request had been denied based on DOMA's definition of a spouse.<sup>177</sup> The Ninth Circuit's Judicial Council determined that he was entitled to such benefits because the denial of benefits violated the Ninth Circuit's employment dispute resolution plan, which prohibits discrimination on the basis of sex and sexual orientation.<sup>178</sup> The court concluded that the application of DOMA to the Federal Employees Health Benefits program violated Levenson's Fifth Amendment due process rights.<sup>179</sup>

Additionally, while saying that some form of heightened scrutiny probably applied, the court concluded that the denial of benefits to the public defender's husband could not survive even rational basis review.<sup>180</sup> The court noted that the denial of federal benefits to same-sex couples could not be justified by animus against homosexuals as a group,<sup>181</sup> nor were the justifications given by Congress for DOMA sufficient.<sup>182</sup> Finally, although the government's interest in preserving its scarce resources had been given as a justification for DOMA, the opinion noted that said any savings would be insignificant and founded on an arbitrary ground.<sup>183</sup> As such, the Judicial Council of the Ninth Circuit ordered the Administrative Office of the United States Courts to ensure that the spouse would be covered under the health plan, and to process any

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<sup>174</sup> See, e.g., *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980) (holding that for immigration purposes, the definition of marriage is governed by federal intent, so even if the state law recognized same-sex marriage, if it offended federal policy, federal policy would prevail); *Largess v. Supreme Judicial Court for the State of Massachusetts*, 373 F.3d 219 (1st Cir. 2004) (declining to review the district court's ruling that *Goodridge* was consistent with the Massachusetts Constitution, and finding that the alleged state constitutional violations did not amount to a violation of the federal Guarantee Clause); *McConnell v. Nooner*, 547 F.2d 54 (8th Cir. 1976) (finding that the Veterans Administration was not required to grant spousal benefits to a same-sex couple because *Baker v. Nelson* was dispositive of the issue of the validity of same-sex marriage, and because the couple in this case were the plaintiffs in that case, they were collaterally estopped from re-litigating the issue of whether they had the right to marry). See also *McConnell v. United States*, 188 F. App'x 540 (8th Cir. 2006) (finding that issue preclusion barred a similar suit); *Singer v. U.S. Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976) (upholding the firing of an openly gay man, finding that it was not a result of him merely being a homosexual, but because he "openly and publicly flaunt[ed]" his lifestyle while identifying himself as working for a federal agency); *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (affirming a finding that a foreign male married to another male was not a spouse for immigration law purposes and that this did not violate equal protection); *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006) (finding that a couple did not have standing to challenge Section 2 of the federal Defense of Marriage Act, which provides that no state shall be required to recognize records or judicial proceedings from other states involving a same-sex marriage).

<sup>175</sup> *Id.*

<sup>176</sup> *In re Levenson*, 560 F.3d 1145 (9th Cir. Jud. C. 2009), *enforced*, 587 F.3d 925 (9th Cir. 2009).

<sup>177</sup> *Levenson*, 587 F.3d at 928.

<sup>178</sup> *Id.* at 929.

<sup>179</sup> *Id.* at 929, 931.

<sup>180</sup> *Id.* at 931.

<sup>181</sup> *Id.* at 931-32 (citing *Romer v. Evans*, 517 U.S. 620 (1996)).

<sup>182</sup> *Levenson*, 587 F.3d at 932-33.

<sup>183</sup> *Id.* at 933.

future beneficiary addition requests without regard to the sex of the spouse.<sup>184</sup>

#### Current Cases

Recently, four federal cases have been filed to challenge various provisions of DOMA. One of them has already been dismissed,<sup>185</sup> and the rest are pending. The three current cases are discussed below, to illustrate the issues that are being presented to the courts and may very likely reach the Supreme Court within the next few years.

#### *Gill v. Office of Personnel Management*<sup>186</sup>

In March 2009, Massachusetts-based group GLAD (Gay and Lesbian Advocates and Defenders) brought a suit, alleging that same-sex spouses are denied specific monetary benefits from public programs like social security under DOMA.<sup>187</sup> Brought on behalf of several Massachusetts same-sex married couples, the lawsuit challenged Section 3 of DOMA, which codifies “marriage” for federal purposes as that between a man and a woman.<sup>188</sup> The GLAD description of it is as follows:

Overall, [Defense of Marriage Act] Section 3 deprives tax-paying American families of the federally-created economic safety nets for married families, to the detriment of those couples and their children or other dependents. In addition, it creates a system of first- and second-class marriages, where [the former] receive all federal legal protections, but [the latter] are denied them across the board, even while taking on the commitment and duties of their legal marriage vow.<sup>189</sup>

The lawsuit alleged that DOMA violates the Fifth Amendment equal protection component of the Due Process Clause.<sup>190</sup> Plaintiffs argued that heightened scrutiny applied because “(1) [DOMA] represents an unprecedented intrusion upon a domain traditionally reserved to the States; (2) it burdens the core liberty interest in the integrity of one’s family; and (3) it unfairly discriminates against gay men and lesbians.”<sup>191</sup> GLAD argued that DOMA fails under

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<sup>184</sup> *Levenson*, 560 F.3d at 1151.

<sup>185</sup> The case was dismissed for lack of standing. See Joel Zand, *Federal Court Dismisses Prop. 8 Challenge Against State: “Don’t Worry, You’re Married,”* FINDLAW, July 17, 2009, <http://blogs.findlaw.com/courtside/2009/07/federal-court-dismisses-prop-8-challenge-against-state-dont-worry-youre-married.html>. President Obama received heavy criticism for allowing the Justice Department to defend the constitutionality of DOMA. Defendant’s Motion to Dismiss, *Smelt v. United States*, No. SACV09-00286 (C.D. Cal. Aug. 3, 2009), available at <http://www.scribd.com/doc/16355867/Obamas-Motion-to-Dismiss-Marriage-case>. However, it has been noted that even the brief filed supporting dismissal reaffirms Obama’s position that DOMA should be repealed. Wilson, *Obama Makes Explicit His Objections to DOMA*, *supra* note 91.

<sup>186</sup> *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010).

<sup>187</sup> Gay & Lesbian Advocates & Defenders, “*DOMA*” Means Federal Discrimination Against Married Same-Sex Couples, at 1-7, <http://www.glad.org/doma/lawsuit/> (last visited Feb. 24, 2010) [hereinafter GLAD, “*DOMA*” Means Federal Discrimination].

<sup>188</sup> 1 U.S.C. §7 (1996). See discussion *infra* at notes 86-91 and accompanying text.

<sup>189</sup> GLAD, “*DOMA*” Means Federal Discrimination, *supra* note 187, at 3.

<sup>190</sup> Memorandum of Law in Opposition to Defendants’ Motion to Dismiss and in Support of Plaintiffs’ Motion for Summary Judgment at 1, *Gill v. Office of Personnel Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2009) (No. 1:09-cv-10309).

<sup>191</sup> *Id.* at 11.

heightened scrutiny analysis, but even if a lesser standard were applicable, that it would fail even a rational basis review because the justification of DOMA is insubstantial.<sup>192</sup>

On July 8, 2010, District Court Judge Joseph Tauro found that “DOMA . . . violates core constitutional principles of equal protection” because “there exists no fairly conceivable set of facts that could ground a rational relationship” between DOMA and a legitimate government objective.<sup>193</sup> Even using a low, rational basis standard of review, the court found that the law failed to make sense or satisfy any governmental purpose.<sup>194</sup>

Discussing the *Gill* case, Laurence Tribe noted, “the case is a strong candidate for review by the U.S. Supreme Court for two reasons—(1) the Court has long held that the equality principles of the 5th and 14th Amendments apply to the states, and (2) DOMA is an unprecedented break from the Court’s view that marriage is a state matter.”<sup>195</sup>

*Commonwealth of Massachusetts v. Department of Health & Human Services*<sup>196</sup>

In a groundbreaking lawsuit brought in March 2009, the Commonwealth of Massachusetts sued the federal government, alleging that section 3 of the Defense of Marriage Act (DOMA)<sup>197</sup> is unconstitutional.<sup>198</sup> The suit was brought by Massachusetts through its Attorney General, Martha Coakley, and names the Department of Health and Human Services and its secretary, the Department of Veteran Affairs and its secretary, and the United States because the suit involves the constitutionality of an act of Congress.<sup>199</sup>

The suit alleges that DOMA violates the Spending Clause<sup>200</sup> by conditioning federal funding on the violation of citizens’ constitutional rights.<sup>201</sup> Because of DOMA’s Section 3, married same-sex couples in Massachusetts are denied rights including “federal income tax credits, employment and retirement benefits, health insurance coverage and Social Security payments.”<sup>202</sup> According to the complaint, the General Accounting Office has identified 1,138 statutory provisions in which marital status is a factor in determining eligibility for federal benefits rights and privileges.<sup>203</sup> In addition, the complaint alleges that DOMA violates the Tenth Amendment,<sup>204</sup> arguing that until DOMA, the federal government had recognized that defining

<sup>192</sup> *Id.* at 11-12.

<sup>193</sup> *Gill*, 699 F. Supp. 2d at 387 (citing *Medeiros v. Vincent*, 431 F.3d 25, 29 (1st Cir. 2005)).

<sup>194</sup> *Id.* at 388.

<sup>195</sup> Kelvin Lynch, *DOMA Case Could go to US Supreme Court*, INTERNATIONAL LGBT ISSUES EXAMINER, Apr. 1, 2009, <http://www.examiner.com/x-4107-SF-Gay-Lesbian-Examiner~y2009m4d1-DOMA-case-could-go-to-US-Supreme-Court>; see also Margaret Talbot, *A Risky Proposal*, THE NEW YORKER, Jan. 18, 2010, [http://www.newyorker.com/reporting/2010/01/18/100118fa\\_fact\\_talbot](http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot); Michael Kirkland, *U.S. Supreme Court: Will Justices Catch the Gay Marriage Bouquet?*, UPI.COM, Feb. 7, 2010, [http://www.upi.com/Top\\_News/US/2010/02/07/US-Supreme-Court-Will-justices-catch-the-gay-marriage-bouquet/UPI-46901265531400/](http://www.upi.com/Top_News/US/2010/02/07/US-Supreme-Court-Will-justices-catch-the-gay-marriage-bouquet/UPI-46901265531400/).

<sup>196</sup> See Complaint, *Massachusetts v. United States Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 23 (D. Mass. July 8, 2009) (No. 1:09-CV-11156-JLT), 2009 WL 1995808.

<sup>197</sup> 1 U.S.C. § 7 (2006).

<sup>198</sup> Complaint at 1, *Massachusetts v. United States Dep’t of Health and Human Servs.*, 2009 WL 1995808.

<sup>199</sup> *Id.*

<sup>200</sup> U.S. CONST. art. I, § 8.

<sup>201</sup> Complaint at 2, *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 2009 WL 1995808.

<sup>202</sup> *Id.*

<sup>203</sup> Complaint at 11, *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 2009 WL 1995808.

<sup>204</sup> U.S. CONST. amend. X.

marital status was the “exclusive prerogative of the states and an essential aspect of each state’s sovereignty.”<sup>205</sup>

The suit alleges that DOMA creates two classes of married persons in Massachusetts.<sup>206</sup> For example, employees of the Commonwealth have the option of including their spouses on their health insurance.<sup>207</sup> But, “because DOMA restricts the meaning of “spouse” under the Internal Revenue Code, the Commonwealth must treat health benefits provided to same-sex spouses as taxable income for the purpose of federal income and Medicare tax withholding,” when it is not required to do this for opposite-sex spouses.<sup>208</sup> Collecting those taxes is a multi-step, burdensome process, the complaint alleges.<sup>209</sup>

Further, the Commonwealth contends that it faces an unconstitutional dilemma because any time it implements a federally funded program covered by DOMA, it has to choose either to forego recognition of otherwise valid marriages in order to keep the funding, or to honor all valid marriages and risk losing the funding.<sup>210</sup> In particular, the Commonwealth recounts problems with the administration of its state health insurance program, which is jointly funded with the federal government, and with burials in its veterans’ cemeteries, which were built and improved with federal funds.<sup>211</sup>

The suit alleges that DOMA codifies animus toward gays and lesbians.<sup>212</sup> And it contends that the federal budget would actually benefit by the recognition of same-sex marriage in all fifty states by \$500 million to \$900 million annually, citing an estimate from the Congressional Budget Office. Increased revenue through income and estate taxes and decreased expenditures for Supplement Security Income, Medicaid, and Medicare would bring about this benefit.<sup>213</sup>

Briefs have been filed and the case is currently pending in District Court in Massachusetts.<sup>214</sup>

*Perry v. Schwarzenegger*<sup>215</sup>

Immediately after the California Supreme Court upheld Proposition 8 in May 2009,<sup>216</sup> two prominent attorneys filed a federal suit in the Northern District of California to challenge the

<sup>205</sup> Complaint at 2, *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 2009 WL 1995808.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 13.

<sup>208</sup> Complaint at 13, *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 2009 WL 1995808.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 14.

<sup>211</sup> *Id.* at 14-21.

<sup>212</sup> *Id.* at 2.

<sup>213</sup> Complaint at 11, *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 2009 WL 1995808.

<sup>214</sup> See Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss, *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 23 (D. Mass. Oct. 10, 2009) (No. 1:09-cv-11156-JLT), 2009 WL 3794375; Complaint, *Massachusetts v. United States Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 23 (D. Mass. July 8, 2009) (No. 1:09-CV-11156-JLT), 2009 WL 1995808; Response from the Commonwealth of Massachusetts to the Motion of Mark A. Thomas for Intervener Status or to File an Amicus Curiae Brief, *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 23 (D. Mass. Oct. 1, 2009) (No. 1:09-11156-JLT), 2009 WL 3169897; Memorandum of Points and Authorities in Opposition to Motion for Permissive Intervention or, in the Alternative, for Leave to File Amicus Curiae Brief, *Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 698 F. Supp. 2d 23 (D. Mass. Oct. 1, 2009) (No. 1:09-11156-JLT), 2009 WL 3169898.

<sup>215</sup> See *Perry Cases*, *supra* note 139.

<sup>216</sup> *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

constitutionality of Proposition 8.<sup>217</sup> The plaintiffs were all California residents.<sup>218</sup> The defendants were the key California officials responsible for enforcing the new law, including Governor Schwarzenegger and Jerry Brown, California's Attorney General.<sup>219</sup> The lawsuit alleged violations of the Due Process and Equal Protection clauses, while the proponents of Proposition 8 argued that it "1. Maintains California's definition of marriage as excluding same-sex couples; 2. Affirms the will of California citizens to exclude same-sex couples from marriage; 3. Promotes stability in relationships between a man and a woman because they naturally (and at times unintentionally) produce children; and 4. Promotes 'statistically optimal' child-rearing households; that is, households in which children . . . raised by a man and a woman married to each other."<sup>220</sup>

The trial itself lasted just over two weeks and included witnesses on both sides testifying about same-sex marriage.<sup>221</sup> The witnesses on the plaintiffs' side supported the arguments that Proposition 8 is harmful and gave "dramatic and emotional testimony that banning same-sex marriage harms gay couples, their children and even society."<sup>222</sup> On the other side, the defenders of Proposition 8 argued that "the only question the court needs to address is the legal issue of whether voters acted rationally, not whether same-sex marriage is beneficial or harmful to society."<sup>223</sup>

On August 4, 2010, Judge Vaughn Walker issued his groundbreaking opinion.<sup>224</sup> In a well-developed opinion, Judge Walker reviewed the history of Prop 8 and all of the facts submitted at trial.<sup>225</sup> After a thorough review of the facts and the law, the court agreed with the plaintiffs that California's Proposition 8 violated *both* due process *and* equal protection: "[e]ach challenge is independently meritorious, as Proposition 8 both unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation."<sup>226</sup> The significance of this is that either of these is an independent reason to find California's ban unconstitutional: to prevail, the defendants will have to convince the Ninth Circuit to overturn *both* holdings.

The court found first that Prop 8 violated due process because it deprives same-sex

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<sup>217</sup> The attorneys are Ted Olson, former U.S. Solicitor General, and David Boies, a trial attorney. Both men became well known through their roles in the *Bush v. Gore* litigation. John W. Dean, *The Olson/Boies Challenge to California's Proposition 8: A High-Risk Effort*, FINDLAW, <http://writ.news.findlaw.com/dean/20090529.html> (last visited Sept. 30, 2010).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* Note, however, "Gov. Schwarzenegger, however, did not challenge the Foundation's position against Proposition 8, and Attorney General Brown went so far as to file papers with the court agreeing that Proposition 8 is unconstitutional. Accordingly, Proposition 8 is being defended by the group that led the campaign to pass it." *Perry v. Schwarzenegger*, AMERICAN FOUNDATION FOR EQUAL RIGHTS, <http://www.equalrightsfoundation.org/our-work/perry-v-schwarzenegger/> (last visited Feb. 24, 2010).

<sup>220</sup> See *Perry I*, *supra* note 139, at 131.

<sup>221</sup> Valeric Richardson, *Prop 8 Trial Stirs Up Questions, Emotions; Gay-Marriage Allies Optimistic*, WASH. TIMES, Feb. 2, 2010, at A01.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> See *Perry I*, *supra* note 139.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 991.



couples of the fundamental right to marry.<sup>227</sup> The court made the important point that the right of same-sex couples to marry *is* the right to marry: it is not some new right different from that provided to heterosexual couples.<sup>228</sup> Given that, the court applied a strict scrutiny analysis and found that the government had failed to advance an argument to show how Prop 8 survives such analysis: as such, the law was found unconstitutional.<sup>229</sup>

The court also found that Prop 8 violated Equal Protection because it creates a differentiation between heterosexual and same-sex couples without any justification.<sup>230</sup> For the equal protection analysis, the court tested Prop 8 under the weakest test: whether there is a rational basis for the law.<sup>231</sup> The court found that there was none.<sup>232</sup>

Although Judge Walker denied the defendants' motion for a stay, the Ninth Circuit allowed it.<sup>233</sup> Importantly, the Ninth Circuit noted that the defendants must address why "this appeal should not be dismissed for lack of Article III standing."<sup>234</sup>

As everyone waits for the Ninth Circuit's decision on the appeal, the commentators and press are convinced that this case eventually "could end up before the U.S. Supreme Court."<sup>235</sup>

### C. *The Debate to Date Has Not Included International Custom*

Challenges and defenses to same-sex marriage, domestic partnerships and civil unions have been made on a variety of points. Scholars have argued some of these points in various recent articles.<sup>236</sup> Additionally, judges have been asked to interpret state constitutional amendments that prevent same-sex couples from getting married.<sup>237</sup> This article proposes another argument that could be added to the challenges raised so far: that same-sex marriage should also be allowed under customary international law. The following is a brief explanation of some of the main arguments.

#### Due Process and Equal Protection

The argument that refusal to allow same-sex marriage violates the Equal Protection Clause is based on the premise that such refusal is essentially discrimination based on sexual orientation. Often coupled with an argument about a violation of due process, the equal

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*Id.*

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*See Perry I, supra* note 139, at 993.

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*Id.* at 995.

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*Id.* at 995-96.

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*Id.*

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*Id.*

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*See generally Perry II and Perry III, supra* note 139.

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*See generally Perry III, supra* note 139.

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*Id.*

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*See generally supra* note 2.

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*See, e.g., Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005) (construing Alaska's marriage amendment); *State v. Carswell*, 871 N.E.2d 547 (Ohio 2007) (construing Ohio's marriage amendment). For a good discussion of recent Michigan interpretation of such an amendment, *see Harvard Law Review, State Constitutional Law—Same-Sex Relations—Supreme Court Of Michigan Holds That Public Employers May Not Provide Healthcare Benefits To Same-Sex Domestic Partners Of Employees—National Pride At Work, Inc. v. Governor Of Michigan*, 748 N.W.2D 524 (Mich. 2008), 122 HARV. L. REV. 1263 (2009) (arguing that the Michigan Supreme Court erred in concluding that the state's constitutional amendment banning gay marriage also prohibited public employers from providing health-care benefits to same-sex partners).

protection argument has been raised frequently at all levels. In fact, several courts have noted that the issues of the same-sex marriage debate create a convergence of the two constitutional provisions.<sup>238</sup> In *Goodridge*, the Massachusetts Supreme Court noted, “[i]n matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts frequently overlap.”<sup>239</sup>

The Supreme Court in *Lawrence v. Texas* held that criminal sodomy statutes are unconstitutional because they violate the Due Process Clause.<sup>240</sup> However, in her concurrence, Justice O’Connor noted that she would have found the law unconstitutional under Equal Protection analysis:

This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.<sup>241</sup>

Even courts that have agreed that some part of equal protection was triggered have differed on whether gays and lesbians fall into a suspect class and, thereby, whether laws about same-sex marriage warrant strict scrutiny: Massachusetts did not find that the issue warranted strict scrutiny,<sup>242</sup> but California did.<sup>243</sup> Both courts, however, found that refusal to allow same-sex marriage violated equal protection.<sup>244</sup>

In 2008, Connecticut became the third state to allow same-sex marriage.<sup>245</sup> In an important decision, the Connecticut Supreme Court focused on equal protection as a reason to invalidate the state laws that prohibited same-sex marriage.<sup>246</sup> Eight same-sex couples denied marriage licenses sued state and local officials seeking a declaration that laws precluding same-sex marriage violated the state constitution.<sup>247</sup> The trial court ruled in favor of the defendants, finding that because same-sex couples in the state could enter into civil unions, they had not suffered a constitutionally cognizable harm.<sup>248</sup> The high court disagreed, invalidating the

<sup>238</sup> See generally Landers, *A Marriage of Principles*, *supra* note 2, at 697-98.

<sup>239</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 953 (Mass. 2003); see also *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (“Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”).

<sup>240</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>241</sup> *Id.* at 582 (O’Connor, J., concurring) (citations omitted).

<sup>242</sup> *Goodridge*, 798 N.E.2d at 960.

<sup>243</sup> The California Supreme Court found same-sex marriage warranted strict scrutiny in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

<sup>244</sup> *Id.* at 399; *Goodridge*, 798 N.E.2d at 968.

<sup>245</sup> *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

<sup>246</sup> *Id.* at 412.

<sup>247</sup> *Id.* at 411.

<sup>248</sup> *Id.* at 411-12.

marriage laws on equal protection grounds.<sup>249</sup> The court held that sexual orientation was a quasi-suspect class, and reviewed the laws on an intermediate scrutiny basis: it held that laws restricting civil marriage to opposite-sex couples were not substantially related to an important government interest in the regulation of marriage.<sup>250</sup>

Importantly, the court held that it was not enough that the civil union statute gave gay couples the same rights as opposite-sex married couples, because they still were not allowed to marry, and that status had a unique importance.<sup>251</sup> In holding that gay people were a quasi-suspect class, the court noted the history of discrimination they have faced and the fact that their distinguishing characteristic bears no relation to their ability to contribute to society.<sup>252</sup> The court also considered the immutability of a person's sexual preference and the relative lack of political power of gay people.<sup>253</sup> The court deemed the first of these two factors the most important, but said all of them applied to homosexuals as a class.<sup>254</sup>

Applying heightened scrutiny, the court considered the state's justifications for the prohibition on gay marriage, which were (1) to promote uniformity with the laws of other jurisdictions; and (2) to preserve the traditional definition of marriage as between a man and a woman.<sup>255</sup> The court said the mere assertion that uniformity with other jurisdictions was important could not save the law, nor could legislators' deeply held beliefs that marriage should be defined as it has been traditionally.<sup>256</sup> Tradition alone cannot justify discrimination against a protected class, the majority said, and concluded that upholding the law against gay marriage would be tantamount to applying one set of constitutional principles to gay people and another to heterosexual people.<sup>257</sup>

In the most recent relevant state supreme court decision, the Iowa Supreme Court held that Iowa's marriage statute, akin to the federal DOMA law because it defined "marriage" as solely between a man and a woman, violated the fundamental right of same-sex couples to marry and unconstitutionally discriminated against them on the basis of sexual orientation.<sup>258</sup> Using Iowa's equal protection clause, the court held that intermediate—and not strict—scrutiny applied, looking at these factors: (1) the history of discrimination against the class burdened by the statutory classification; (2) whether the characteristics that distinguish the class have anything to do with the class members' ability to contribute to society; (3) whether the distinguishing characteristic of the class is immutable or beyond the class members' control; and (4) the political power of the class.<sup>259</sup> The court found the first two factors were met because of the history of discrimination against gays and lesbians, and because their sexual orientation has nothing to do with their ability to contribute to society.<sup>260</sup>

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<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 431-32.

<sup>251</sup> *Kerrigan*, 957 A.2d at 419.

<sup>252</sup> *Id.* at 432.

<sup>253</sup> *Id.* at 427-28.

<sup>254</sup> *Id.* at 429.

<sup>255</sup> *Id.* at 476-77.

<sup>256</sup> *Id.* at 477.

<sup>257</sup> *Kerrigan*, 957 A.2d at 479.

<sup>258</sup> *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

<sup>259</sup> *Id.* at 887-88.

<sup>260</sup> *Id.* at 889.

Notably, the court found that regardless of whether homosexuals can change their orientation, the immutability analysis is not determined by whether the characteristic is impossible to change, but rather whether the trait is so central to a person's identity that it would be unfair to ask the person to change: this is the case with homosexuality, the court found.<sup>261</sup> While homosexuals are not politically powerless, the court noted that women also had some measure of political power when the U.S. Supreme Court first began applying heightened scrutiny to them.<sup>262</sup> The key factor, according to the court, is whether the group has sufficient political power to end the discrimination against it promptly: in the realm of civil marriage, the court noted, gays and lesbians have gained little ground.<sup>263</sup>

The Iowa court found that the statute did not withstand intermediate scrutiny because it was not substantially related to an important government objective.<sup>264</sup> The court ordered the language limiting marriage to between a man and a woman to be stricken from the law and for same-sex couples to be allowed to marry.<sup>265</sup>

One court considered the intriguing argument that a state's Equal Rights Amendment can implicate equal protection analysis.<sup>266</sup>

Appellees assert that, because [the Maryland restriction against same-sex marriage] excludes same-sex couples from marriage, the statute draws an impermissible classification on the basis of sex, in violation of Article 46 of the ERA. Specifically, Appellees reason that “[a] man who seeks to marry a woman can marry, but a woman who seeks to marry a woman cannot. Similarly, a woman who seeks to marry a man can marry, but a man who seeks to marry a man cannot.” Thus, because [the statute] allows opposite-sex couples to marry but, at the same time, necessarily prohibits same-sex couples from doing so, the statute “makes sex a factor in the enjoyment and the determination of one’s right to marry,” and is therefore subject to strict scrutiny.<sup>267</sup>

In that case, however, the Maryland Supreme Court held that the state's equal rights amendment was meant to prevent discrimination between men and women as classes: because equality between sexes was the point of the statute, a law that treated them equally, in that neither could marry a partner of the same sex, did not amount to sex discrimination, and did not warrant strict scrutiny.<sup>268</sup>

The analogy to race-based classifications—along with the argument that sexual orientation discrimination is as invidious as racial discrimination<sup>269</sup>—raises the potential

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<sup>261</sup> *Id.* at 893.

<sup>262</sup> *Id.* at 894.

<sup>263</sup> *Id.*

<sup>264</sup> *Varnum*, 763 N.W.2d at 906-07.

<sup>265</sup> *Id.* at 907.

<sup>266</sup> See *Conaway v. Deanc*, 932 A.2d 571 (Md. 2007).

<sup>267</sup> *Id.* at 585-86.

<sup>268</sup> *Id.* at 586.

<sup>269</sup> See generally James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93 (1993) (comparing the legalization of interracial marriages to the fight to legalize same-sex marriages).

argument that same-sex marriage prohibitions violate equal protection just like the miscegenation statutes that the Supreme Court struck down in *Loving v. Virginia*.<sup>270</sup>

#### Right to Marriage<sup>271</sup>

Another strong argument is that there is a constitutionally protected right to marriage. In *Goodridge*, the Massachusetts high court noted that the U.S. Supreme Court has described the right to marry as part of the fundamental right of privacy implicit in the Fourteenth Amendment's Due Process Clause.<sup>272</sup> The court cited *Loving v. Virginia*,<sup>273</sup> the case that held that barring interracial marriage violated the Fourteenth Amendment, for the proposition that the right to marry means little if a person cannot marry the person of his or her choice. The Vermont Supreme Court also found that marriage has long been considered a personal right.<sup>274</sup>

As one scholar has noted:

Given that the state already recognizes a right to marry for opposite-sex couples, if this is not a sufficient basis to extend that right to same-sex couples, I do not know what would be. It is then almost a self-evident truth that same-sex couples ought to be afforded the same legal right to marry in the name of human dignity that is afforded to opposite-sex couples.<sup>275</sup>

#### Right to Privacy

The right to privacy has been raised in support of same-sex marriage as well.<sup>276</sup> The argument here is that the right to marry is part of an individual's interest in personal autonomy, and as such, is protected. One article argues that the right to privacy requires the legalization of same-sex marriage.<sup>277</sup> Because marriage itself does not exist independently from the law, "the law itself must create the 'thing' to which one has a right. As a result, the right to marry necessarily imposes an *affirmative obligation* on the state to establish this legal framework."<sup>278</sup> The California Supreme Court found that same-sex marriages were protected under this right.<sup>279</sup>

#### Full Faith and Credit

Two independent issues arise under full faith and credit analysis of this issue: first, whether a state can ignore a marriage entered into in another state, and second, whether absent

<sup>270</sup> *Loving v. Virginia*, 388 U.S. 1 (1966); see ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE, *supra* note 2, at 127-33.

<sup>271</sup> See Samar, *Throwing Down the International Gauntlet*, *supra* note 2, at 12-15 for a very good discussion; see also Vincent J. Samar, *Privacy and Same-Sex Marriage: The Case for Treating Same-Sex Marriage as a Human Right*, 68 MONT. L. REV. 335 (2007) [hereinafter Samar, *Privacy and Same-Sex Marriage*].

<sup>272</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d at 941, 957 (Mass. 2003), which cites *Zablocki v. Redhail*, 434 U.S. 374 (1978) (invalidating a Wisconsin law requiring that those with minor children they were obligated to support may not re-marry without court approval).

<sup>273</sup> *Loving*, 388 U.S. at 1.

<sup>274</sup> *Baker v. State*, 744 A.2d 864, 883 (Vt. 1999) (citing *Loving*, 388 U.S. at 1).

<sup>275</sup> Samar, *Privacy and Same-Sex Marriage*, *supra* note 271, at 360-61.

<sup>276</sup> See, e.g., William M. Hohengarten, *Same-Sex Marriage and the Right to Privacy*, 103 YALE L.J. 1495 (1994).

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 1496.

<sup>279</sup> *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

DOMA, states can use their own laws to decide whether a marriage entered into a foreign state is “valid.”

On the first issue, the argument might turn on whether marriages are “judgments” and as such, are protected by the Full Faith and Credit Clause.<sup>280</sup> This is a valuable argument, if accepted, because the Supreme Court has clearly stated (albeit in another context) that there is no “public policy” exception to full faith and credit.<sup>281</sup>

On the second issue, the answer is more clearly against same-sex marriage. The standard for whether a court’s use of its own law violates full faith and credit was established in the 1930s in a string of Supreme Court cases.<sup>282</sup> The end result was that a state can use its own law in a case as long as it has a “legitimate interest”: this is a low standard, requiring just some factual connection between the facts of the case and the state that is seeking to apply its law.<sup>283</sup>

#### Free Exercise and Establishment Clauses

Arguments have also been made that state and federal DOMA statutes may violate the Free Exercise and Establishment Clauses of the First Amendment.<sup>284</sup>

#### Federalism

The federal DOMA law has been challenged on classic federalism grounds as well: the argument is that the federal government cannot dictate to states any rules about marriage. This, the argument goes, is strictly the province of state power.<sup>285</sup>

#### Spending Clause

Massachusetts’ DOMA litigation against the federal government alleges that the federal DOMA statute violates the Spending Clause.<sup>286</sup> As discussed in the previous section<sup>287</sup>, the argument is this: the Spending Clause<sup>288</sup> prevents Congress from exercising its spending power in a way that induces any state to violate its citizens’ constitutional rights.<sup>289</sup> Massachusetts has granted same-sex couples constitutional protection, but DOMA would have Massachusetts treat same-sex couples differently from married couples when it comes to a number of state run federal programs.<sup>290</sup> This, then, violates the spending clause.<sup>291</sup>

#### Other Attacks on the Federal DOMA Statute

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<sup>280</sup> U.S. CONST. art. IV, § 1; *see also supra* note 53 and accompanying text.

<sup>281</sup> *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 224 (1998).

<sup>282</sup> *Pac. Employers Ins. Co. v. Indus. Accident Comm’n of Cal.*, 306 U.S. 493, 504-05 (1939); *Ala. Packers Ass’n v. Indus. Accident Comm’n*, 294 U.S. 532, 550 (1935); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145, 164 (1932).

<sup>283</sup> *Pac. Employers Ins. Co.*, 306 U.S. at 502-04.

<sup>284</sup> *See, e.g., Ben Schuman, Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO. L.J. 2103, 2106 (2008) [hereinafter Schuman, *Gods & Gays*].

<sup>285</sup> *See, e.g., Complaint at 1, Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 2009 WL 1995808; *see generally Ann Laquer Estin, Sharing Governance: Family Law In Congress And The States*, 18 CORNELL J.L. & PUB. POL’Y 267, 311 (2009).

<sup>286</sup> *Complaint at 2, Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 2009 WL 1995808.

<sup>287</sup> *See supra* notes 200-214 and accompanying text.

<sup>288</sup> U.S. CONST. art. I, § 8.

<sup>289</sup> *Complaint at 88, Massachusetts v. U.S. Dep’t of Health and Human Servs.*, 2009 WL 1995808.

<sup>290</sup> Programs listed include MassHealth, Medicaid, State Cemetery grants, etc. *Id.* at 90-91, 94.

<sup>291</sup> *Id.*

In addition to the recent lawsuits<sup>292</sup>, a number of articles have argued against the constitutionality of DOMA.<sup>293</sup> One article argues that Congress didn't have the power to enact DOMA in the first place and "tramples" state sovereignty over family law.<sup>294</sup> Since DOMA is legislation in an area that is typically state controlled, the federal government should have to show a "substantial federal interest" before federal law is allowed to conflict with state family law, and it fails to do so.<sup>295</sup> No explicit delegation of power enables Congress to "'restrict, abrogate or dilute,' the mandates of the FFCC."<sup>296</sup> This author stresses that DOMA is impermissibly unique because it explicitly gives states permission to ignore the constitutional requirements of the Full Faith and Credit Clause.<sup>297</sup>

#### Unique Solutions

It should also be noted that some of the articles in favor of same-sex marriage have offered solutions for how such marriages can be allowed and still be accepted by many people.<sup>298</sup>

#### Arguments Against

Arguments against same-sex marriage have gained much national attention, and are oftentimes-heartfelt moral and religious objections.<sup>299</sup> One note offered a legal response to the religious concerns:

While one may personally support same-sex marriage, that does not give one the right to denigrate the sincerely held religious beliefs of another who does

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<sup>292</sup> See *supra* notes 196-214 and accompanying text.

<sup>293</sup> See, e.g., Jon-Peter Kelly, Note, *Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution*, 7 CORNELL J. L. & PUB. POL'Y 203 (1997) (arguing that the Defense of Marriage Act is a departure by the federal government from the traditional deference given to state marriage laws).

<sup>294</sup> Melissa A. Provost, *Disregarding the Constitution in the Name of Defending Marriage: The Unconstitutionality of the Defense of Marriage Act*, 8 SETON HALL CONST. L.J. 157, 196 (1997).

<sup>295</sup> *Id.* at 197-98.

<sup>296</sup> *Id.* at 200.

<sup>297</sup> *Id.* at 201; see also Kafahni Nkrumah, *The Defense of Marriage Act: Congress Re-Writes the Constitution to Pacify its Fears*, 23 T. MARSHALL L. REV. 513, 519-20 (1998) (arguing that the Defense of Marriage Act contradicts the Full Faith and Credit Clause of the Constitution by allowing states to take away the state and federal marital rights of same-sex couples).

<sup>298</sup> See, e.g., James L. Musselman, *What's Love Got To Do With It? A Proposal For Elevating The Status Of Marriage By Narrowing Its Definition, While Universally Extending The Rights And Benefits Enjoyed By Married Couples*, 16 DUKE J. GENDER L. & POL'Y 37 (2009). Professor Musselman proposes opening up marriage to same-sex couples, while offering a more narrowly defined "covenant" marriage to those opposite-sex couples who want a more traditional marriage. *Id.* at 77-86. The relationships would confer the same rights and benefits, but "covenant marriage" would only be available to straight couples. *Id.* Musselman argues that this may solve the constitutional problem of prohibiting gay marriage because such a prohibition denies rights and benefits to classes of individuals based on their choice of a partner; he suggests that this would also elevate marriage to a more honored status in society, which would result in more stable relationships. *Id.* Interestingly, the Kansas legislature has just recently allowed covenant marriage for heterosexual couples. See Mary Sanchez, *Kansas marriages need more than covenants*, KansasCity.com, Feb, 21, 2010, available at <http://www.kansascity.com/2010/02/21/1764522/kansas-marriages-need-more-than.html>.

<sup>299</sup> See, e.g., Schuman, *Gods & Gays*, *supra* note 284, at 2108-12 (presenting a good description of the religious arguments against same-sex marriage, and a well reasoned response thereto). The author of the current article has no doubt of the sincerity of some strongly held religious beliefs, and credits her good friend, Jay Sultan, for explaining those with patience and heart, for consideration in this article.

not support same-sex marriage. And vice versa. Dividing civil marriage from religious marriage, keeping the church out of the state and the state out of the church, is the best method for preventing injustice to either side.<sup>300</sup>

Another book, focusing on Christian objections to same-sex marriage,<sup>301</sup> suggests that there needn't be a conflict between religion and same-sex marriage: "because marriage is inherently healthy, same-sex marriage will be healthier than its less permanent alternatives."<sup>302</sup>

Considering the other argument often made, that this will open a Pandora's Box of undesirable marriage options, the authors note, "[i]t will likely not accelerate us down a slippery slope to promiscuity and polygamy. . . . It can prompt heterosexual women and men to appreciate marriage in a new way."<sup>303</sup> Other sources have studied the effects of registered partnerships and same-sex marriages in Scandinavian countries and have proven that same-sex marriage does not undermine society, harm children or lead to the parade of horrors that opponents have suggested.<sup>304</sup>

Sometimes, the arguments against same-sex marriage are simply reasons for why a *ban* on such marriages *is* permissible. For example, in 2006, the Eighth Circuit found that Nebraska's constitutional amendment defining marriage as between a man and woman did not violate the federal constitution.<sup>305</sup> The court cited a long line of rulings finding that it is reasonable to confer the inducement of marriage on opposite-sex couples in order to ensure responsible procreation.<sup>306</sup> Without clear explanation as to its finding, the court noted that the Nebraska amendment was not similar to the one in *Romer*<sup>307</sup> because, unlike the amendment at issue there, the marriage amendment could be explained by reasons other than animus toward gays.<sup>308</sup>

Sometimes, however, judicial reasoning incorporates a moral stance against homosexuals. For example, in the early 1970s, the Eighth Circuit found that a university library's refusal to hire a man who had filed for a marriage with another man did not violate equal protection because the university had broad discretion in the administration of the college and had ample reason to conclude that McConnell's promotion would not be in the best interest of the school.<sup>309</sup> The court focused not on the fact that McConnell was a homosexual, but was actively seeking to "implement" his unconventional ideas "and, thereby, to foist tacit approval of this

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<sup>300</sup> *Id.* at 2141.

<sup>301</sup> Certainly, other faiths have objections as well. *See, e.g.,* Abdullah al-Ahsan, *Law, Religion And Human Dignity In The Muslim World Today: An Examination Of Oic's Cairo Declaration Of Human Rights*, 24 J.L. & RELIGION 569, 573 (2008-2009) (noting that "the demands for gay rights and the right of consensual sex outside of marriage are not popular demands in Muslim countries").

<sup>302</sup> DAVID G. MYERS & LETHA DAWSON SCANZONI, *WHAT GOD HAS JOINED TOGETHER: A CHRISTIAN CASE FOR GAY MARRIAGE* 130 (2005).

<sup>303</sup> *Id.*

<sup>304</sup> *See, e.g.,* WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE—WHAT WE'VE LEARNED FROM THE EVIDENCE* (2006).

<sup>305</sup> *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867 (8th Cir. 2006).

<sup>306</sup> *Id.* at 867 (citing *Hernandez v. Robles*, No. 86, 2006 N.Y. Slip Op 5239 at 5-6, 2006 WL 1835429 (N.Y. Ct. App. Jul. 6, 2006); *Morrison v. Sadler*, 821 N.E.2d 15, 24-26 (Ind. Ct. App. 2005)).

<sup>307</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>308</sup> *Citizens for Equal Protection*, 455 F. 3d at 867-68.

<sup>309</sup> *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971).



socially repugnant concept upon his employer.”<sup>310</sup>

One of the most common arguments for why same-sex marriage fails the *Loving* analogy is that definitional: marriage has been, and should be, defined as strictly between one man and one woman. In one instance, the Kentucky courts considered a case where two women wanted to be married, and alleged that the refusal of a county clerk to issue them a marriage license violated their right to marry, right to free association, and right to free exercise of religion.<sup>311</sup> They also contended that the refusal amounted to cruel and unusual punishment.<sup>312</sup> The Kentucky Court of Appeal’s “analysis” was this:

Kentucky statutes do not specifically prohibit marriage between persons of the same sex nor do they authorize the issuance of a marriage license to such persons. Marriage was a custom long before the state commenced to issue licenses for that purpose. For a time the records of marriage were kept by the church . . . . [M]arriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary . . . . 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.<sup>313</sup>

Eskridge provides a response to this argument:

Opponents are then left with only one definitional argument, that no official act of legislation or high court decision has ever sanctioned a same-sex marriage occurring in the United States. But this is a circular argument in a constitutional case, where the legitimacy of a state’s practice is questioned. Is it legitimate for the state to prohibit one class of people from getting married? To say that the state will not give marriage licenses to same-sex couples because they by “definition” cannot be married, and then to support that definition by reference to the state’s traditional refusal, is not only viciously circular but dissolves the line separating law from fiat.<sup>314</sup>

Finally, as has been discussed, sometime the argument is based on the tradition of what marriage has “always” been: the union of a man and woman. To this, the Connecticut Supreme Court offered the following response: “[t]radition alone never can provide sufficient cause to discriminate against a protected class. . . .”<sup>315</sup>

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<sup>310</sup> *Id.* at 196.

<sup>311</sup> *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973).

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 589 (emphasis added).

<sup>314</sup> William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1495 (1993).

<sup>315</sup> *Kerrigan*, 957 A.2d at 479.

### III. SAME-SEX MARRIAGE AS CUSTOMARY INTERNATIONAL LAW

*The right to marry whoever one wishes is an elementary human right compared to which “the right to attend an integrated school, the right to sit where one pleases on a bus, the right to go into any hotel or recreation area or place of amusement, regardless of one’s skin or color or race” are minor indeed. Even political rights, like the right to vote, and nearly all other rights enumerated in the Constitution, are secondary to the inalienable human rights to “life, liberty and the pursuit of happiness” proclaimed in the Declaration of Independence; and to this category the right to home and marriage unquestionably belongs.*<sup>316</sup>

Customary international law is the often-misunderstood arm of the international legal system. Less readily ascertainable than treaty law, but still integral to the laws of nations, custom holds a unique place for the international and domestic courts. One scholar describes it the following way: “For many modern international lawyers, customary international law is, alongside treaty law, one of the two central forms of international law. Indeed, until the twentieth century, custom was often viewed as the principal source of international law.”<sup>317</sup>

The current status of customary international law is a slight second to international treaty law. The Statute of the International Court of Justice (ICJ) states:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law.<sup>318</sup>

Like treaty law, custom is a consensual form of law.<sup>319</sup> It is distinguishable from treaties because the legal rules in custom are implied, rather than explicit.<sup>320</sup> Of course, it is unfair to introduce custom as a concept that is uncontroversial; some customary law may be viewed as being merely regional custom, and some states may expressly opt out of custom.<sup>321</sup> However, frequently custom is viewed as “general international law” and may be described as a “universal law of society.”<sup>322</sup>

<sup>316</sup> Hannah Arendt, *Reflections on Little Rock*, 6 DISSENT 45, 49 (1959).

<sup>317</sup> MARK WESTON JANIS, INTERNATIONAL LAW 44 (5th ed. 2008) [hereinafter JANIS, INTERNATIONAL LAW].

<sup>318</sup> Statute of the International Court of Justice, art. 38(1)(b), available at [http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER\\_II](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II) (last visited on February 25, 2010).

<sup>319</sup> See JANIS, INTERNATIONAL LAW, *supra* note 317, at 44-45.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 45 (discussing the *Asylum* case of 1950, 1950 I.C.J. Reports 266, where the ICJ held that Peru was not obligated to follow an arguably American regional custom regarding asylum because it had expressly rejected that custom); see also *id.* at 56-57.

<sup>322</sup> *Id.* at 45; see also *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820).

Customary international law may evolve from norms in international treaties, and may be based on the U.N. Charter or similar international documents.<sup>323</sup> Some have argued that because the United States has not ratified many human rights treaties, a special importance must be given to custom.<sup>324</sup> Since treaty law—analogueous to legislation in common law countries—cannot touch on every topic, custom is viewed as an important source of law that fills gaps.<sup>325</sup>

Much interesting analysis has been undertaken to assess exactly what rises to the level of a norm of customary international law, with much disagreement at every level.<sup>326</sup> This article argues that rights instruments that reflect custom and the modern trend, and the justifications of the countries that have allowed same-sex marriage, support this argument and may be used in the U.S. courts to bolster the position that same-sex marriages should be protected through customary international law.

#### *A. Same-Sex Marriages are Protected Under Some International Documents*

Treaties, declarations and resolutions passed by international organizations can serve as evidence of customary international law.<sup>327</sup> Although no document explicitly grants a right to same-sex marriage, several have provisions that could—and have—been read to extend similar rights. As one scholar noted, “Although the Universal Declaration of Human Rights and the other principal human rights instruments drafted by the United Nations do not explicitly mention sexual orientation or same-sex marriage, they have created a comprehensive body of human rights law that protects all people.”<sup>328</sup>

First, the Universal Declaration on Human Rights<sup>329</sup> has several provisions that can be read to protect same-sex marriage. Article 7 provides equal protection:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.<sup>330</sup>

Article 12 focuses on privacy:

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<sup>323</sup> See JANIS, INTERNATIONAL LAW, *supra* note 317, at 43-57.

<sup>324</sup> See Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 42 (1992) [hereinafter Bayefsky & Fitzpatrick, *International Human Rights Law in United States Courts*]. The recent ratification of major human rights treaties may, however, make U.S. courts less reluctant to apply customary international law.

<sup>325</sup> See JANIS, INTERNATIONAL LAW, *supra* note 317, at 44.

<sup>326</sup> See, e.g., Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119 (2007).

<sup>327</sup> See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (noting that “[i]nternational agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted”).

<sup>328</sup> Mary Patricia Bym, *Same-Sex Marriage in South Africa: A Constitutional Possibility*, 87 MINN. L. REV. 511, 537 (2002) [hereinafter Bym, *Same-Sex Marriage in South Africa*].

<sup>329</sup> Universal Declaration of Human Rights, G.A. Res. 217 A(III), art. 20(1), U.N. Doc. A/810 (Dec. 10, 1948).

<sup>330</sup> *Id.*

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.<sup>331</sup>

Article 16 guarantees a right to marry:

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.<sup>332</sup>

In addition to the Declaration, the International Covenant on Civil and Political Rights (ICCPR)<sup>333</sup> is the leading international document that can serve as evidence of customary international law in this area.<sup>334</sup> The U.N. Human Rights Committee (HRC) has found that some of the protections of the ICCPR encompass sexual orientation,<sup>335</sup> and some scholars have proposed that the HRC's holding supports the argument that same-sex marriage is a protected right under international law.<sup>336</sup> One article has gone so far as to state that, "the logical interpretation of the ICCPR itself arguably stands for the right of homosexuals to marry one another."<sup>337</sup> The ICCPR could, theoretically, be used as a *treaty-based* source of international law, enforceable through human rights organizations or in the U.S. courts.<sup>338</sup> However, this article would like to develop the less-discussed idea that the ICCPR could be used as evidence of customary international law and this is reason alone to consider its provisions as relevant to American jurisprudence.

While neither the ICCPR nor any internationally ratified document has recognized an explicit right to same-sex marriage,<sup>339</sup> several provisions in the ICCPR support at least a right to equality regardless of sexual orientation. Article 2 of the ICCPR provides:

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<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 173, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

<sup>334</sup> See Edward H. Sadtler, *A Right to Same-Sex Marriage Under International Law: Can it be Vindicated in the United States?* 40 VA. J. INT'L L. 405 (1999) [hereinafter Sadtler, *A Right to Same-Sex Marriage Under International Law*] for an excellent discussion of whether the ICCPR could also be usable in U.S. courts as a treaty.

<sup>335</sup> See Toonen v. Australia, Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 49th Sess., Supp. No. 40, vol. II, at 235, U.N. Doc. A/49/40 (Mar. 31, 1994).

<sup>336</sup> See, e.g., Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 70 (1996) ("By recognizing that sexual orientation discrimination may violate international human rights obligations, the Committee has opened the door to a wide range of challenges to laws and policies that disadvantage sexual minorities, including . . . limiting marriage exclusively to heterosexuals.").

<sup>337</sup> Anne M. Burton, *Gay Marriage—A Modern Proposal: Applying Baehr v. Lewin to the International Covenant on Civil and Political Rights*, 3 IND. J. GLOBAL LEGAL STUD. 177, 206 (1995).

<sup>338</sup> See Sadtler, *A Right to Same-Sex Marriage Under International Law*, *supra* note 334, at 431-45; see also Burton, *Gay Marriage—A Modern Proposal*, *supra* note 337, at 199-202.

<sup>339</sup> See Sadtler, *A Right to Same-Sex Marriage Under International Law*, *supra* note 334, at 418.

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>340</sup>

Article 26 of the ICCPR is its equal protection provision:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>341</sup>

In the important and interesting case of *Toonen v. Australia*, the HRC found that the gender protection in Article 26 protection also encompassed sexual orientation.<sup>342</sup> In that case, an Australian citizen alleged that Tasmania's anti-sodomy laws<sup>343</sup> violated his rights under the ICCPR. The Human Rights Commission found that the laws violated the equal protection provisions of Article 2 and the privacy protections of Article 17.<sup>344</sup> Australia urged Tasmania to repeal the offending laws, finally giving Tasmania a two-month deadline.<sup>345</sup> Importantly, the decision affirmed the importance of homosexual rights within international law and "was a watershed for gay and lesbian rights advocates."<sup>346</sup>

Additionally, Article 23 of the ICCPR recognizes a right to marry: "The right of men and women of marriageable age to marry and to found a family shall be recognized."<sup>347</sup>

<sup>340</sup> See ICCPR, *supra* note 333, at 173.

<sup>341</sup> *Id.* at 179.

<sup>342</sup> *Toonen v. Australia*, Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 49th Sess., Supp. No. 40, vol. II, at 226, U.N. Doc. A/49/40 (1994); *see generally*, Sadtler, *A Right to Same-Sex Marriage Under International Law*, *supra* note 334; Burton, *Gay Marriage—A Modern Proposal*, *supra* note 337.

<sup>343</sup> Tas. Stat. R. §§ 122(a), (c) and 123.

<sup>344</sup> *Toonen v. Australia*, Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 49th Sess., Supp. No. 40, vol. II, at 234, U.N. Doc. A/49/40 (1994). The HRC was established under the ICCPR to ensure compliance with the provisions of the Covenant. ICCPR, *supra* note 333, arts. 28, 40. Under the Optional Protocol to the ICCPR, even individuals can bring complaints of alleged violations, thereby allowing the HRC to act in a quasi-judicial capacity; *see* ICCPR, *supra* note 333.

<sup>345</sup> Deutsche Presse-Agentur, *United Nations Panel Attacks Tasmania Law Against Homosexuality*, SAN DIEGO UNION-TRIB., May 13, 1994, at A-32, available at LEXIS, News Library, NEWS File.

<sup>346</sup> Sadtler, *A Right to Same-Sex Marriage Under International Law*, *supra* note 334, at 419.

<sup>347</sup> ICCPR, *supra* note 333, at 179. *See also* discussion in Sadtler, *A Right to Same-Sex Marriage Under International Law*, *supra* note 334, at 424 on the use of the terms "men" and "women." While arguably, these could be read to mean that the Covenant only protects the right to marriage when it is a man and a woman getting married, the better understanding is that no such restriction should be superimposed on the drafters' design. *See* Sadtler, *A Right to Same-Sex Marriage Under International Law*, *supra* note 334, at 424 n. 100 ("Other international treaties use similar language. The American Convention on Human Rights provides: 'The right of men and women of marriageable age to marry and to raise a family shall be recognized . . . .'"; Organization of American States, American Convention on Human Rights, art. 17(2), Nov. 22, 1969, 1144 U.N.T.S. 123, 999 U.N.T.S. 150. The European Convention for the Protection of

One article examined the Hawaii Supreme Court's reasoning in *Baehr v. Lewin*<sup>348</sup> and found that it supported a reading of the ICCPR to protect same sex marriage:

The *Baehr* court held that if a man can marry a woman the state cannot prohibit a woman from exercising the same right. Thus, under the equal protection clause of the Hawaiian constitution, a woman may marry a woman; a man may marry a man. Because of the similarities between Hawaii's constitution and Articles 23 and 26 of the ICCPR, *Baehr*'s reasoning could successfully be applied to the ICCPR resulting in the same conclusion that the *Baehr* court reached.<sup>349</sup>

In 1994, the European Parliament called for an end to discrimination against gays and lesbians by passing the "Resolution on equal rights for homosexuals and lesbians in the EC".<sup>350</sup> This resolution calls upon member states to end "the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework"<sup>351</sup> and states that instead they "should guarantee the full rights and benefits of marriage, allowing the registration of partnerships."<sup>352</sup> It reaffirmed this stance in 1998.<sup>353</sup> In 2006, the European Parliament expressed concern about nations banning same-sex unions and called on member states to end discrimination and homophobia.<sup>354</sup>

Finally, most recently, in December 2008, the United Nations General Assembly issued a Statement on Human Rights, Sexual Orientation and Gender Identity:

We reaffirm the principle of universality of human rights . . . . We reaffirm that everyone is entitled to the enjoyment of human rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, as set out in article 2 of the Universal Declaration of Human Rights and article 2 of the International Covenants on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, as well as in article 26 of the International Covenant on Civil and Political Rights.<sup>355</sup>

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Human Rights and Fundamental Freedoms provides: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 12, Nov. 4, 1950, 213 U.N.T.S. 221.").

<sup>348</sup> *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), discussed *infra* at notes 140-149 and accompanying text.

<sup>349</sup> Burton, *Gay Marriage—A Modern Proposal*, *supra* note 337, at 206.

<sup>350</sup> Resolution on Equal Rights for Homosexuals and Lesbians in the EC, 1994 O.J. (C 61/40) 40, available at <http://www.france.qrd.org/assocs/ilga/euroletter/63.html>.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> Resolution on equal rights for gays and lesbians in the EC, [http://www.europarl.europa.eu/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=980917&LANGUAGE=EN&TPV=DEF&SDOCTA=10&TXTLST=7&Type\\_Doc=RESOL&POS=1](http://www.europarl.europa.eu/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=980917&LANGUAGE=EN&TPV=DEF&SDOCTA=10&TXTLST=7&Type_Doc=RESOL&POS=1) (last visited Feb. 24, 2010).

<sup>354</sup> European Parliament Resolution on Homophobia in Europe, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0018&language=EN&ring=P6-RC-2006-0025>.

<sup>355</sup> United Nations General Assembly Statement on Human Rights, Sexual Orientation and Gender Identity,

The General Assembly Statement, though not a treaty, is an expression of state positions and thus an integral component of customary international law. Together, these various documents indicate that there may well be a level of protection in customary international law for same sex-marriage.

*B. Same-Sex Marriages Are a Modern Trend.*<sup>356</sup>

The status of same-sex couples in the world varies greatly,<sup>357</sup> but this article argues, *inter alia*, that the current trend<sup>358</sup> seems to be in favor of same-sex marriage.<sup>359</sup> This section describes some of the key laws at issue; Appendix II details the status of couples in many parts of the world.

European countries, and Scandinavian countries in particular, have led the way in allowing and recognizing such unions. Both the first and most recent countries to have a nationwide law allowing same-sex marriage are in Europe: Netherlands, in 2001,<sup>360</sup> and Sweden, in 2009.<sup>361</sup> The seven countries that have legalized same-sex marriage are Netherlands (2001),<sup>362</sup> Belgium (2003),<sup>363</sup> Spain (2005),<sup>364</sup> Canada (2005),<sup>365</sup> South Africa (2006),<sup>366</sup> Norway (2009),<sup>367</sup>

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U.N. Doc. A/63/635 (Dec. 18, 2008).

<sup>356</sup> See *infra* Appendix II, which details the rights available (or not available) in many countries.

<sup>357</sup> *Id.*

<sup>358</sup> Admittedly, there is excellent scholarship arguing just the opposite. See, e.g., Fellmeth, *State Regulation of Sexuality*, *supra* note 2, at 928 for a comprehensive evaluation of worldwide rights of sexual minorities and concluding that, “beyond parts of Europe and a few isolated states elsewhere, the trend toward recognition” of sexual privacy rights “remains an aspiration goal for international law.”

<sup>359</sup> There is also some end-directed-research and writing on this issue. See Melissa Durand, Note, *From Political Questions to Human Rights: The Global Debate on Same-Sex Marriage and its Implications for U.S. Law*, 5 REGENT J. INT’L L. 269 (2007) (recognizing that same-sex marriage has gained acceptance in international law, but observing that marriages are in decline in the countries that lack “religiosity” and allow same-sex marriage—though acknowledging that there is no causal connection between same-sex marriage and divorce or out-of-wedlock children). The paper obviously opposes same-sex marriage but its real danger is that in arguing that courts should resist same-sex marriage—*because society is ready to embrace it*—it puts the courts in the undemocratic role of gatekeepers of a certain, approved type of social norm: “as laws liberalize globally, it will become more difficult for even conservative courts to resist the waves of cultural change.” *Id.* at 298.

<sup>360</sup> See Hope Lozano-Biclat & David Masci, *Same-Sex Marriage: Redefining Legal Unions Around the World*, Pew Research Center Publications (Sept. 15, 2010) <http://pewresearch.org/pubs/541/gay-marriage> [hereinafter Lozano-Biclat & Masci, *Same-Sex Marriage*].

<sup>361</sup> See Per Nyberg, *Sweden Passes Same-Sex Marriage Law*, CNN.COM (Sept. 17, 2010) <http://edition.cnn.com/2009/WORLD/europe/04/01/sweden.samesex/index.html> [hereinafter Nyberg, *Sweden Passes Same-Sex Marriage Law*].

<sup>362</sup> Lozano-Biclat & Masci, *Same-Sex Marriage*, *supra* note 360.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*; see also *Country-by-Country: Spain*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/spain](http://www.ilga-europe.org/europe/guide/country_by_country/spain) (last visited Feb. 21, 2010) [hereinafter *Country-by-Country: Spain*].

<sup>365</sup> Lozano-Biclat & Masci, *Same-Sex Marriage*, *supra* note 360.

<sup>366</sup> THE PEW FORUM ON RELIGION AND PUBLIC LIFE, SAME-SEX MARRIAGE: REDEFINING MARRIAGE AROUND THE WORLD (2009) [hereinafter PEW FORUM, SAME-SEX MARRIAGE: REDEFINING MARRIAGE], <http://pewforum.org/docs/?DocID=235>. The South African statute is available at: South African Government Information, Government Gazette, <http://www.info.gov.za/view/DownloadFileAction?id=67843> (last visited Feb. 21, 2010) [hereinafter South African Government Information, Government Gazette]; see also Byrn, *Same-Sex Marriage in South Africa*, *supra*

and Sweden (2009).<sup>368</sup>

Portugal has allowed same-sex marriage: its Parliament has passed a law that will allow it, which the President signed in May, 2010.<sup>369</sup>

Argentina held the first same-sex marriage in Latin America in December 2009<sup>370</sup>, and became the first Latin American country to legalize same-sex marriage in July 2010.<sup>371</sup>

In Mexico City, legislators made another striking move for same-sex marriage when they passed a law giving same-sex couples full access to marriage.<sup>372</sup> The Supreme Court of Mexico upheld this law,<sup>373</sup> and, in August 2010, “issued a 9-2 decision . . . that gay marriages performed in the capital—a federal district like Washington, D.C.—must be recognized by all 31 states in the republic.”<sup>374</sup>

Recently, other countries have allowed for recognition of same sex-couples through judicial decisions. For example, a judicial decision in Nepal in November 2008 made news:

In a landmark verdict, the apex court in Nepal has given its consent to same-sex marriages, a move that beats off social taboos in the conservative valley. The apex court on Monday directed the Maoist-led government in Nepal to formulate necessary laws to guarantee full rights to gays, including right to same-sex marriage.<sup>375</sup>

The legislation to realize that directive may come as soon as 2010.<sup>376</sup>

note 328, at 511 (predicting accurately that South Africa would allow same-sex marriages *before the law was passed*).

<sup>367</sup> The Marriage Act, <http://www.regjeringen.no/en/doc/Laws/Acts/the-marriage-act.html?id=448401>. A 2008 amendment to The Marriage Act repealed The Partnership Act, allowing two persons of the same sex to contract a marriage. The Partnership Act allowed for same-sex civil unions and almost all of the same rights that heterosexual married couples received—except full adoption rights. The amendment effectively abolishes civil unions and makes marriage laws gender neutral. See Ministry of Children, Equality and Social Inclusion, A Marriage Act for All, <http://www.regjeringen.no/en/dcp/bld/Topics/Homosexuality/a-marriage-act-for-all-entering-into-fo.html?id=509376>.

<sup>368</sup> Gender-Neutral Marriage and Marriage Ceremonies, <http://www.sweden.gov.se/sb/d/574/a/125584>. See also *infra* Appendix II, which details the laws in many countries.

<sup>369</sup> Matthew Cullinan Hoffman, *President of Portugal Signs Gay “Marriage” Law*, Lifesitenews.com, May 19, 2010, <http://www.lifesitenews.com/ldn/2010/may/10051902.html>.

<sup>370</sup> Michael Warren, *Argentina Gay Marriage Law: First Country In Latin America To Approve Same Sex Marriage*, THE HUFFINGTON POST, July 15, 2010 [hereinafter Warren, *Argentina Gay Marriage Law*], [http://www.huffingtonpost.com/2010/07/15/argentina-gay-marriage-la\\_n\\_647129.html](http://www.huffingtonpost.com/2010/07/15/argentina-gay-marriage-la_n_647129.html).

<sup>371</sup> *Argentina president signs same-sex marriage legislation*, <http://jurist.org/paperchase/2010/07/argentina-president-signs-same-sex-marriage-legislation.php>.

<sup>372</sup> Miguel Angel Gutierrez, *Mexico City Allows Gay Marriage with Landmark Law*, REUTERS, Dec. 22, 2009 [hereinafter Gutierrez, *Mexico City Allows Gay Marriage with Landmark Law*], <http://www.reuters.com/article/idUSTRE5BK47420091222>.

<sup>373</sup> *Mexico Supreme Court upholds gay marriage law*, L.A. TIMES, LA PLAZA, Aug. 6, 2010, <http://latimesblogs.latimes.com/laplaza/2010/08/supreme-court-mexico-gay-marriage.html>.

<sup>374</sup> *Latin America Ahead of US on Same-sex Marriage*, L.A. TIMES, Aug. 13, 2010, <http://articles.latimes.com/2010/aug/13/opinion/la-ed-mexico-20100813>.

<sup>375</sup> *Nepal SC Approves Same-Sex Marriage*, HINDUSTAN TIMES, Nov. 19, 2008, <http://www.hindustantimes.com/News-Feed/nepal/Nepal-SC-approves-same-sex-marriage/Article1-352722.aspx>.

<sup>376</sup> *Some Do, Some Don't*, WEST AUSTRALIAN NEWSPAPERS, Nov. 21, 2009, available at



Some countries do not allow same-sex marriage, but offer other protections. For example, recognition of same-sex marriages from other jurisdictions is required in Israel, Aruba, the Netherlands Antilles; and, recently, France and Japan have required recognition as well.<sup>377</sup> As Appendix II details, civil unions and registered partnerships are allowed in a number of nations as well.<sup>378</sup>

However, in much of the world, there is no recognition for same-sex marriage, or civil unions; in the worst situations, there is either no protection for same-sex couples or, at the most extreme, government sponsored persecution.<sup>379</sup> Certainly, there is a strong argument to be made that since most of the countries of the world do not yet allow same-sex marriage, it has not risen to the level of an international norm.<sup>380</sup> This article suggests that the trend is in favor of same-sex marriage and that international documents and state justifications evidence a sense of obligation, and together, this establishes the possibility that the norm already exists.

It is important to note that this article in no way intends to detract from the seriousness of the discrimination imposed on homosexuals throughout the world. There is also a counter-argument that can be made that could actually benefit same-sex couples: if the trend is away from same-sex marriage and protection of such relationships, then the world should pay more attention to the problems that gay and lesbian citizens of various countries are facing and should address those problems.

Looking just at same-sex marriage, however, the most current trend seems to be in the direction of allowing such unions. Consider this statement from a Dutch legal expert:

The Belgian law shows that the Dutch were not acting peculiarly insular[ly], when they opened up marriage to same-sex couples in 2001. There is a continuous trend in the law of many countries to recognize same-sex love as equal to different-sex love. And there is no reason why some of the core institutions of family law should be excluded from this utterly just trend. After Belgium, one would expect Sweden, South Africa, or Canada to be the next jurisdiction to legislate for full equality in family law.<sup>381</sup>

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2009 WLNR 23583346.

<sup>377</sup> THE PEW FORUM ON RELIGION AND PUBLIC LIFE, GAY MARRIAGE AROUND THE WORLD (2009) [hereinafter PEW FORUM, GAY MARRIAGE AROUND THE WORLD], <http://pewforum.org/Gay-Marriage-and-Homosexuality/Gay-Marriage-Around-the-World.aspx>

<sup>378</sup> See *infra* Appendix II. See also LGBT World Legal Wrap-Up Survey, November 2006, pdf available at [www.lsvd.dc/756.0.html](http://www.lsvd.dc/756.0.html) (noting that some 20 countries have civil unions, domestic partnerships or other legal protections).

<sup>379</sup> In Jamaica, for example, “[o]penly gay people must contend with the constant fear of violence . . . . Many attacks [on homosexuals] go unreported.” *A Vicious Intolerance*, ECONOMIST, Sept. 19, 2009, at 49. The Washington Post reported in 2006—when South Africa legalized same-sex marriage—that “[h]omosexuality is still largely taboo in Africa. It is illegal in Zimbabwe, Kenya, Uganda, Nigeria, Tanzania, Ghana and most other sub-Saharan countries.” *Same-Sex Marriage Law Takes Effect in S. Africa*, WASH. POST, Dec. 1, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/30/AR2006113001370.html>.

<sup>380</sup> See Fellmeth, *State Regulation of Sexuality*, *supra* note 2.

<sup>381</sup> Equal Marriage for Same-Sex Couples, Marriage Equality in our World, <http://www.samescxmarriage.ca/equality/bel013003.htm> (noting the statement by Dutch legal expert, Kees Waaldijk). Douglas Elliott, president of the International Lesbian and Gay Law Association, made a similar statement:

*C. State Justifications for Allowing Same-Sex Marriage Show a Sense of Legal Obligation.*

Another tool for assessing what falls under “custom” is to review the practice of nations and—crucially—their reasons for the practice. The Restatement of Foreign Relations states that “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>382</sup>

The next question then becomes: how does one know *what* states are doing and how does one know *why* states are doing what they are doing? State practice “includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy.”<sup>383</sup> Luckily, the internationalization of legal research has made it possible to determine what the laws and practices are in many, if not all, states of the world.<sup>384</sup>

It can be difficult to determine why a state is doing what it is doing. Thus, the relevant question to ask is not just *whether* certain states allow same-sex marriage, but *why* the states that allow same-sex marriages have done so. Evidence of custom and reasons for adoption of laws can be found in official statements of the governments.<sup>385</sup>

Interestingly, many of the countries that have allowed same-sex marriage have either justified the decision by relying on international law, or have at least referred to international law in the explanation of why same-sex marriages were allowed. Note the following examples from the countries that have allowed same-sex marriage, organized alphabetically below:

Argentina

Argentina became the first Latin American nation to legalize gay marriage Thursday, granting same-sex couples all the legal rights, responsibilities and protections that marriage brings to heterosexuals.

The law’s passage—a priority for President Cristina Fernandez’s government—has inspired activists to push for similar laws in other countries, and a wave of gay weddings are expected in Buenos Aires

...

“Argentina’s political class has provided a lesson to the rest of Latin America,” said Rolando Jimenez in the Chilean capital, Santiago. “We hope our own

Belgium’s action is a tremendous step forward. It is the second country in the world to have its government legally recognize same sex marriage. It is in a country with a majority of Catholics, too, that has historically been far more conservative than the Netherlands. Rather than Holland being the odd man out, a trend is being created. As a former resident of that other delightful bilingual kingdom, I can only say, “*Vive Verhofstadt et vive la Belgique!*”

*Id.*

<sup>382</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

<sup>383</sup> *Id.* § 102, cmt. B.

<sup>384</sup> See *infra* Appendix II for a summary of the laws.

<sup>385</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. B, “Practice of states”: “Subsection (2), includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states . . . .”

countries and political parties will learn that the human rights of sexual minorities are undeniable.”<sup>386</sup>

### Belgium

Justice Minister Marc Verwilghen said: “Mentalities have changed. There is no longer any reason not to open marriage to people of the same sex.”<sup>387</sup>

### Canada

Commenting on Canada’s 2005 legislation authorizing same-sex marriage, then-Prime Minister Paul Martin stated, “In a nation of minorities, it is important that you don’t cherry-pick rights. A right is a right.”<sup>388</sup> In ruling on the constitutionality of this legislation, Canada’s Supreme Court noted that “recognition of same-sex marriage in several Canadian jurisdictions as well as two European countries belies the assertion that” marriage is understood as only available to opposite-sex couples.<sup>389</sup>

### Netherlands

The first country to legalize same-sex marriage, the Netherlands’ position is, as it should be, one of a trailblazer in this area. The Mayor of Amsterdam, who officiated at the first same-sex marriage ceremonies said, “In the Netherlands, we have gained the insight that an institution as important as marriage should be open to everyone.”<sup>390</sup> The Mayor also “said he believed the Dutch law would be a stimulus for other countries to reassess their views on gay marriages.”<sup>391</sup>

### Norway

During the debate on passage of Norway’s 2008 law allowing same-sex marriage, Labour Party rapporteur Gunn Karin Gjøl described the proposed bill as “of an importance comparable to universal suffrage.”<sup>392</sup>

### Portugal

In his address to the parliament before the recent vote to allow same-sex marriage, Portuguese Prime Minister Jose Socrates described the proposed bill as “a small change in the law, but a very important and symbolic step to fully realize *values that are pillars of open,*

<sup>386</sup> Warren, *Argentina Gay Marriage Law*, *supra* note 370. See also *Gay Argentine couple’s wedding plans divide an entire continent*, THE OBSERVER, Nov. 29, 2009, <http://www.guardian.co.uk/world/2009/nov/29/latin-america-first-gay-wedding>.

<sup>387</sup> Same-Sex Marriage (SSM) in Belgium, [http://www.religioustolerance.org/hom\\_mar10.htm](http://www.religioustolerance.org/hom_mar10.htm) (last visited on Feb. 24, 2010).

Kurt Krickler, Co-chair of the European Region of the International Lesbian and Gay Association (ILGA-Europe) said: “Throughout the world there are positive moves to recognize the rights of lesbians, gay men, bisexuals and transgender people. There are now eight EU Member States where same-sex partnerships have some legal recognition, and two that allow same-sex marriage. We hope and expect this trend to continue.”

*Id.*

<sup>388</sup> *Reasonable Rights*, L.A. TIMES, July 6, 2005 at 12, available at 2005 WLNR 23329237.

<sup>389</sup> Same-Sex Marriage, *Re.*, [2004] 3 S.C.R. 698 (Can.).

<sup>390</sup> *Amsterdam Holds First Legal Gay Marriages*, INDEPENDENT (United Kingdom), Apr. 2, 2001, available on Westlaw at 2001 WLNR 7076913.

<sup>391</sup> *Id.*

<sup>392</sup> Norway adopts gay marriage law, AFP, June 11, 2008, available at [http://afp.google.com/article/ALcqm5jko\\_BIHizUFFqUtmEaUrAEoPXFww](http://afp.google.com/article/ALcqm5jko_BIHizUFFqUtmEaUrAEoPXFww).

*tolerant and democratic societies; freedom, equality and non-discrimination.*"<sup>393</sup>

#### South Africa

"The government said the law represented a wider commitment to battling discrimination. 'We are hopeful this act will level the playing field by ensuring equality and restoring the dignity of this marginalised minority in South Africa,' said home affairs department spokesman Jacky Mashapu."<sup>394</sup>

#### Spain

From the law legalizing same-sex marriage:

This constitutional guarantee of marriage has meant that the legislature cannot ignore the institution, or fail to regulate in accordance with the higher values of law, and its legal character of the person on the basis of the Constitution . . . . The regulation of marriage in contemporary civil law has reflected the dominant standards and values and Western European societies . . . . But it is not in any way the legislature to ignore the obvious: that society is moving in the way of forming and recognize the various models of coexistence, and therefore the legislature may, indeed must, act accordingly and avoid any bankruptcy between law and values of society which was to regulate relations . . . . This perception is not only produced in Spanish society, but also in broader areas, as reflected in the European Parliament resolution of 8 February 1994, which expressly calls on the Commission to submit a draft recommendation for the purposes of ending the prohibition of marriage to same-sex couples, and guarantee the full rights and benefits of marriage.<sup>395</sup>

Prime Minister José Luis Rodríguez Zapatero, who signed the new law, stated: "We are not the first to adopt such a law but I am sure we will not be the last; many other countries will come after, pushed by two unstoppable forces, liberty and equality."<sup>396</sup>

#### Sweden

The Minister for Integration and Gender Equality (whose very post suggests the Swedish government's support of same-sex couples) noted in a speech: "The universal declaration includes all people, no matter sexual orientation."<sup>397</sup>

<sup>393</sup> Portugal's Parliament Approves Same-Sex Marriage Law, *supra* note 48 (emphasis added).

<sup>394</sup> Maricette le Roux, *Final Seal of Approval For South Africa Gay Marriage Law*, Agence Fr.-Presse, Nov. 30, 2006.

<sup>395</sup> Ley 13/2005 por la que se modifica el Código Civil en materia de derecho a contraer matrimonio (Law 13/2005 amending the Civil Code concerning the right to marry) (Google translation available at [http://translate.google.com/translate?hl=en&sl=es&u=http://www.boe.es/aeboe/consultas/bases\\_datos/doc.php%3Fcoleccion%3Diberlex%26id%3D2005/11364&ei=jqDHSbq3NZawMsLV0fQH&sa=X&oi=translate&resnum=1&ct=result&prev=/search%3Fq%3Dhttp://www.boe.es/aeboe/consultas/bases\\_datos/doc.php%253Fcoleccion%253Diberlex%2526id%253D2005/11364%26hl%3Den%26client%3Dfirefox-a%26channel%3Ds%26rls%3Dorg.mozilla:en-US:official%26hs%3DAil%26sa%3Dg](http://translate.google.com/translate?hl=en&sl=es&u=http://www.boe.es/aeboe/consultas/bases_datos/doc.php%3Fcoleccion%3Diberlex%26id%3D2005/11364&ei=jqDHSbq3NZawMsLV0fQH&sa=X&oi=translate&resnum=1&ct=result&prev=/search%3Fq%3Dhttp://www.boe.es/aeboe/consultas/bases_datos/doc.php%253Fcoleccion%253Diberlex%2526id%253D2005/11364%26hl%3Den%26client%3Dfirefox-a%26channel%3Ds%26rls%3Dorg.mozilla:en-US:official%26hs%3DAil%26sa%3Dg)).

<sup>396</sup> Edward M. Gomez, *Spain Reacts to New Gay Marriage Law*, S.F. CHRON., July 6, 2005, 2005 WLNR 11015580.

<sup>397</sup> Nyamko Sabuni, Minister for Integration and Gender Equality, Speech at the Baltic Pride Festival in Riga (May 15, 2009) (transcript available at <http://www.regeringen.se/sb/d/8811/a/127052>).

## IV. CUSTOMARY INTERNATIONAL LAW MATTERS IN THE UNITED STATES.

*“Customary international law informs the construction of domestic law, and, at least in the absence of any superseding positive law, is controlling.”*<sup>398</sup>

First, it is important to establish why international law is even presumptively part of the U.S. legal system. The answer comes from the Supremacy Clause of the Constitution, which establishes that treaties are part of U.S. law. Not only is the treaty arm of international law part of our legal system, but treaties can actually trump inconsistent statutes.<sup>399</sup> Customary international law, however, is harder to place, though scholars have argued that there was no need to include custom in the Constitution because it was already presumptively part of the legal system. Louis Henkin notes, “The law of nations of the time was not seen as something imposed on the states by the new U.S. government; it had been binding on and accepted by the states before the U.S. government was even established.”<sup>400</sup>

The Restatement of Foreign Relations Law of the United States lists customary law as a clear source of international law:

§ 102. Sources of International Law

(1) A rule of international law is one that has been accepted as such by the international community of states

- (a) in the form of customary law;
- (b) by international agreement; or
- (c) by derivation from general principles common to the major legal systems of the world.<sup>401</sup>

Courts and scholars have differed on how customary law should be used,<sup>402</sup> but it is certainly safe to say that from this nation’s origins to modern times, custom has played a role in our jurisprudence.

*A. Customary International Law Is an Historical Part of Our Legal System.*

Chief Justice John Jay writing in *Chisholm v. Georgia* said that the United States, “by

<sup>398</sup> Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 40 (1994).

<sup>399</sup> See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 16 (4th ed. 2007) (explaining that the “last-in-time” principle holds that “a federal statute supersedes prior inconsistent treaties, and conversely, a treaty supersedes prior inconsistent federal statutes”).

<sup>400</sup> Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1566 (1984).

<sup>401</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

<sup>402</sup> Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law as Federal Common Law*] (arguing that customary international law is not common law), with F. Giba-Matthews, *Customary International Law Acts as Federal Common Law in U.S. Courts*, 20 FORDHAM INT’L L.J. 1839, 1854 (1997) (arguing that international law is common law).

taking a place among the nations of the earth, bec[a]me amenable to the laws of nations."<sup>403</sup> In another case, Chief Justice Jay stated that the laws of the United States could be fit into three classes: treaties, the laws of nations, and the Constitution and statutes of the United States.<sup>404</sup>

For the founders, being a nation made one subject to the laws of nations without further action. Daniel Farber argues that the Framers viewed international law as part of the legal system, and the legal system as part of U.S. law.<sup>405</sup> Farber suggests that this generation had an even more robust view of international law than our generation and that they assumed that international principles were integral to the laws of the United States.<sup>406</sup>

Early Supreme Court cases discuss the use of international law as means of constitutional interpretation. The "Charming Betsy" presumption is a canon of statutory construction found in an historic case.<sup>407</sup> The presumption is that whenever possible the Court should interpret statutes of Congress so as not to conflict with the laws of nations.<sup>408</sup> Ten years later, the Court extended this rule to Constitutional interpretation in *Brown v. United States*, a case in which the Court interpreted the War Clause of the Constitution.<sup>409</sup> The Court determined that merely declaring war did not authorize the President to seize enemy property, but instead that Congress would have to give separate authorization.<sup>410</sup> Chief Justice John Marshall, after examining various sources of international law, much to his surprise, concluded that the "modern" rule in international law was that enemy property would not be automatically seized when war is declared.<sup>411</sup> While Justice Story dissented, he did so based on the premise that the Chief Justice was wrong about the modern rule, and not that international law was irrelevant.<sup>412</sup> A year later, Chief Justice Marshall made the more general statement that absent an act directing otherwise, "the Court is bound by the law of nation which is part of the law of the land."<sup>413</sup>

More than any other case cited herein, *The Paquete Habana*<sup>414</sup> is an unambiguous

<sup>403</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793), *superseded by* constitutional amendment, U.S. CONST. amend. XI. Justice Wilson makes a similar statement to the one in *Chisholm* in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796). Additionally, the nation's first Attorney General Edmund Randolph wrote that the "law of nations, although not specially adopted by the [C]onstitution or any municipal act, is essentially a part of the law of the land." 1 Op. Att'y Gen. 26, 27 (1792). See also *Ker v. Illinois*, 119 U.S. 436, 443 (1886) (describing the laws of nations as binding upon the Court).

<sup>404</sup> *Henfield's Case*, 11 F. Cas. 1099, 1100-01 (C.C. Pa. 1793).

<sup>405</sup> DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE SILENT NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON'T KNOW THEY HAVE* 6 (2007) [hereinafter FARBER, *RETAINED BY THE PEOPLE*].

<sup>406</sup> *Id.* (quoting John Locke, "[t]he law of Nature stands as an eternal rule to all men, legislators as well as others").

<sup>407</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). It should be noted that this rule first appeared in *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801).

<sup>408</sup> *Murray*, 6 U.S. (2 Cranch) at 118. However, this is not to say that international law is a bar to a statute. The presumption only means that Congress must unambiguously display its intent to make a law contrary to international law.

<sup>409</sup> *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814).

<sup>410</sup> *Id.* at 126.

<sup>411</sup> *Id.* at 125.

<sup>412</sup> *Id.* at 132-35 (Story, J., dissenting).

<sup>413</sup> *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

<sup>414</sup> *The Paquete Habana*, 175 U.S. 677 (1900).

endorsement of customary international law applied in the United States. This case, which addressed whether a fishing boat flying the Spanish flag could be captured as a war prize during the Spanish-American War, was decided entirely on the basis of customary international law.<sup>415</sup> The Supreme Court's strong language established the importance of customary international law in the U.S. legal system:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.<sup>416</sup>

Dean Harold Koh stated that *The Paquete Habana* implied that the courts from now forward should take the advice of the Declaration of Independence and pay "a decent respect to the opinions of mankind."<sup>417</sup> Similarly, Justice Blackmun stated that the obvious significance of *The Paquete Habana* was that "[c]ustomary international law informs the construction of domestic law, and, at least in the absence of any superseding positive law, is controlling."<sup>418</sup>

Historically, the Court has used international law to assist in the interpretation of ambiguous or contradictory phrases or laws.<sup>419</sup> The Court has also used international law as support for its positions.<sup>420</sup>

Both historically and in modern times, international law has been used as a "gap filler." Throughout the Court's history, it has used international law to fill gaps when there was not another piece of positive law.<sup>421</sup> Chief Justice Marshall in *The Nereide*, states that absent an act directing otherwise, "the Court is bound by the law of nation which is part of the law of the land."<sup>422</sup> This use of international law as a default position is common. A more recent case cited *The Paquete Habana* for the proposition that "[w]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of

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<sup>415</sup> *Id.*

<sup>416</sup> *Id.* at 700.

<sup>417</sup> Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 44 (2004) (quoting the Declaration of Independence).

<sup>418</sup> Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 49 (1994).

<sup>419</sup> See *The Rapid*, 12 U.S. (8 Cranch) 155, 162 (1814); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

<sup>420</sup> See Justice Story's use of Roman law in *Colum. Ins. Co. of Alexandria v. Ashby*, 38 U.S. (13 Pet.) 331, 340-42 (1839).

<sup>421</sup> See *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808) (relying on English cases in deciding that it had jurisdiction to review cases from other jurisdictions); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (holding that Congress could define piracy by reference to law of nations); *Ashby*, 38 U.S. (13 Pet.) at 340-42 (filling in gaps in the U.S. Admiralty law).

<sup>422</sup> *The Nereide*, 13 U.S. (9 Cranch) at 423.

civilized nations.”<sup>423</sup>

*B. Customary International Law Is Used Currently as Well.*

A variety of sources indicate that customary international law continues to be a robust and important aspect of the United States’ legal system. Several federal statutes utilize the term “customary international law,” which indicates the federal legal system’s recognition of customary international law as a source of law.<sup>424</sup> Beyond the Court, the State Department makes pronouncements about whether a particular practice is customary international law, which also shows that the U.S. recognizes customary international law.<sup>425</sup>

The U.S. has noted, and the Supreme Court recognized, that even without ratification of a convention, its provisions can reflect custom, and the Supreme Court can apply the Convention to its analysis.<sup>426</sup>

Several other developments indicate the importance of customary international law.

Custom as a Source of Empirical Evidence

Both Chief Justice Rehnquist and Justice Souter cited abuses of the Dutch assisted suicide law as proof of the government’s legitimate interest in regulating suicide.<sup>427</sup> In *Printz v. the United States*, Justice Breyer cited the experience of other federal systems in Switzerland, and Germany to question the concerns of the majority.<sup>428</sup> Even Justice Scalia has joined in this practice.<sup>429</sup> Moreover, this is not a new practice; Justice Harlan, for example, cited the average hours of work in other countries in his *Lochner* dissent.<sup>430</sup>

The Importance of *Filartiga*<sup>431</sup>

In 1980 the Second Circuit took a broad view of international law.<sup>432</sup> The court decided

<sup>423</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004).

<sup>424</sup> See 46 U.S.C. § 3715 (2006) (governing Lightering); 42 U.S.C. § 9111 (2006) (requiring the license for the ownership, construction, and operation of ocean thermal energy conversion facilities or plantships); 33 U.S.C. § 1902 (2006) (describing ships subject to preventive measures); 33 U.S.C. § 1503 (2006) (requiring the license for ownership, construction, and operation of deepwater port).

<sup>425</sup> See David S. Bogen, *Mr. Justice Miller’s Clause: The Privileges or Immunities of Citizens of the United States Internationally*, 56 DRAKE L. REV. 1051, 1088 n.171 (2008).

<sup>426</sup> See *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992) (applying the Convention on the Law of the Sea despite the U.S.’s refusal to sign because it reflected customary international law).

<sup>427</sup> *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997).

<sup>428</sup> *Printz v. United States*, 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting).

<sup>429</sup> *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334, 381–82 (1995) (Scalia, J., dissenting).

<sup>430</sup> *Lochner v. New York*, 198 U.S. 45, 66 (1905) (Harlan, J., dissenting).

<sup>431</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); see also Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 820-24 (1990) [hereinafter Strossen, *Recent U.S. and International Judicial Protection of Individual Rights*] (providing an excellent discussion of *Filartiga*).

<sup>432</sup> *Filartiga*, 630 F.2d at 876. *But see Adamu v. Pfizer, Inc.*, 399 F. Supp. 2d 495 (S.D.N.Y. 2005) (holding that that the law of nations does not itself create right of action because it does not prescribe a remedy.) Thus where Nigerian minors and their guardians sued a pharmaceutical company, their claim that its non-consensual medical experimentation violated the law of nations did not provide an independent source of subject matter jurisdiction under 28 U.S.C.S. § 1350 because the company was not alleged to have violated any treaty and there was no showing that the company violated clear and unambiguous rule of customary international law. *Adamu* 399 F.Supp. 2d at 500.



in that case that the Alien Tort Statute<sup>433</sup> created a cause of action for a violation of international law.<sup>434</sup> The court also recognized that the “law of nations” is a dynamic concept that should be construed in accordance with the current customs and usages of civilized nations, as articulated by jurists and commentators. It held specifically that U.S. law directly incorporated customary international law principles prohibiting deliberate government torture.<sup>435</sup>

Post *Filartiga*, a series of ATCA cases “in U.S. federal courts ha[ve] successfully challenged gross human rights abuses committed abroad.”<sup>436</sup> Some scholars had higher hopes for *Filartiga*<sup>437</sup> than have yet been realized, but it is certainly fair to say that, at least within its context, *Filartiga* represented a willingness toward a more expansive view of the influence of international custom on U.S. law.<sup>438</sup>

#### The Importance of *Sosa*<sup>439</sup>

In 2004, the Supreme Court reached a significant decision in the this field: the Court allowed customary international law to be a part of U.S. law, at least for the purposes of interpreting the Alien Tort Statute.<sup>440</sup> In *Sosa*, the Supreme Court established that the laws of nations have three elements. First, the laws of nations cover the general rights and obligations between states.<sup>441</sup> Second, the laws of nations cover the body of law that regulates “the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor.”<sup>442</sup> Third, the laws of nations cover the “sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships.”<sup>443</sup> This hybrid area of law refers to phenomena such as piracy and protection of ambassadors. In a more contemporary arena, this may refer to crimes against humanity, and perhaps human rights granted in treaties.

<sup>433</sup> 28 U.S.C. § 1350 (1982) (codifying the Judiciary Act of 1789, ch. 20, sec. 9b, 1 Stat. 73, 77 (1789) and stating that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”).

<sup>434</sup> *Filartiga*, 630 F.2d at 886.

<sup>435</sup> Strossen, *Recent U.S. and International Judicial Protection of Individual Rights*, *supra* note 431, at 881 (citing *Filartiga*, 630 F.2d at 884-85).

<sup>436</sup> See Beth Stephens, *Litigating Customary International Human Rights Norms*, 25 GA. J. INT’L & COMP. L. 191, 193 (1996).

<sup>437</sup> See Steven M. Schneckbaum, *Recent Judicial Developments in Human Rights Law*, L. Group Docket 1, 7 (Spring 1981) (noting “the effect of *Filartiga* is to direct American lawyers and judges to international sources of the rights of litigants”).

<sup>438</sup> See, e.g., Richard B. Lillich, *The Constitution And International Human Rights*, 83 AM. J. INT’L L. 851, 857 (1989) (noting “[a]ll these sources of customary international law [state practice, human rights treaties, resolutions, scholarly opinions and judicial and arbitral decision] were drawn upon by the U.S. Court of Appeals for the Second Circuit to support its eloquent and path-breaking decision in *Filartiga v. Pena-Irala* which has done as much to advance the development of international human rights law in the United States as the infamous *Sei Fujii v. California* did to retard it.”) (citing *Filartiga*, 630 F.2d 876 and *Sei Fujii v. California*, 38 Cal.2d 718, 722-25 (1952)).

<sup>439</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>440</sup> *Id.* See also William S. Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System After Sosa v. Alvarez-Machain*, 12 TULSA J. COMP. & INT’L L. 87 (2004) [hereinafter Dodge, *Bridging Erie*] (providing an excellent discussion of the importance of *Sosa*).

<sup>441</sup> *Sosa*, 542 U.S. at 714.

<sup>442</sup> *Sosa*, 542 U.S. at 715.

<sup>443</sup> *Id.*

One scholar describes the importance of *Sosa* in the following way:

In sum, *Sosa*'s methodology attempts to bridge a gap not just between the international and the domestic, but between the past and the present. In determining the relationship between customary international law and a particular legal provision, both the original understanding of those who enacted the provision and modern developments in the U.S. legal system are relevant, but neither is determinative. In building a bridge to link the past and the present, the Court works from both sides.<sup>444</sup>

### C. Customary International Law Can Be Used to Interpret Issues of Human Rights.

As the following categories illustrate, customary international law can be, and has been, used by the courts to define various issues relating to rights and freedoms; this is crucial for establishing a precedent that can be used in the debate regarding same-sex marriage.

#### Custom and Marriage

In 1878, Chief Justice Waite wrote, “[p]olygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”<sup>445</sup> Additionally, Chief Justice Waite refers to an 1868 British decision.<sup>446</sup>

More recently, and more relevant to the issue at hand, in the context of same-sex marriages, the highest Massachusetts court in *Goodridge* cited a ruling by the Court of Appeal for Ontario, defining the common-law meaning of marriage as a remedy.<sup>447</sup> The Massachusetts court concurred, and redefined marriage “to mean the voluntary union of two persons as spouses, to the exclusion of all others.”<sup>448</sup>

#### Custom and Substantive Due Process

The Supreme Court has invoked customary international law in cases involving substantive due process. One of the earliest examples of this is *Dred Scott v. Sanford*.<sup>449</sup> Six of the nine Justices, including the two dissenting Justices, relied on foreign cases, opinions of foreign jurists, and even Roman law.<sup>450</sup> Another early example is *Reynolds v. United States*.<sup>451</sup> Moreover, this practice has continued in modern jurisprudence as well.<sup>452</sup>

A highly relevant example of U.S. judges using foreign precedent in a discussion of

<sup>444</sup> Dodge, *Bridging Erie*, *supra* note 440, at 100.

<sup>445</sup> *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

<sup>446</sup> *Id.* at 167.

<sup>447</sup> *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (citing *Halpern v. Toronto*, [2003] 172 O.A.C. 276 (Can.)).

<sup>448</sup> *Id.*

<sup>449</sup> *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 462, 533 (1857).

<sup>450</sup> *Id.*

<sup>451</sup> *Reynolds*, 98 U.S. 145 at 164.

<sup>452</sup> See, e.g., *Hurtado v. California*, 110 U.S. 516, 531 (1884); *Palko v. Connecticut*, 302 U.S. 319, 326 (1937); *Wolf v. Colorado*, 338 U.S. 25, 30 (1949); *Miranda v. Arizona*, 384 U.S. 436, 488-89 (1966) (citing international case law in support of expanding rights).

substantive due process is *Lawrence v. Texas*.<sup>453</sup> In striking down a Texas sodomy law, Justice Kennedy relied on a European Court of Human Rights decision, *Dudgeon v. United Kingdom*.<sup>454</sup> While *Dudgeon* relied on the European Human Rights Convention and not customary international law, Justice Kennedy's use of the case is closer to customary international law because it refuted Justice White's reliance on the traditional values of western civilization.<sup>455</sup> Overruling *Bowers v. Hardwick*, the court criticized that case for not considering the history of sodomy statutes, noting that "[t]o the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere."<sup>456</sup> The *Lawrence* court considered not only the European Court of Human Rights decision, but also additional sources of custom—including an amicus brief that detailed the status of the law throughout the world, and other cases by the European Court.<sup>457</sup>

#### Custom for Defining Unenumerated Rights

Numerous commentators see international law playing an important role in defining unenumerated rights.<sup>458</sup> Laurence Tribe begins his discussion of foreign law and its role in unenumerated rights with Chief Justice Rehnquist's dissent in *Planned Parenthood v. Casey*,<sup>459</sup> which cited a 1975 West German Constitutional Court decision about the right to life.<sup>460</sup> However, international law had long been part of constitutional interpretation before Rehnquist's citation in *Casey*. Nor was the use of customary international law limited to defining clauses of the Constitution such as the War Powers clause<sup>461</sup> or the Offenses clause.<sup>462</sup> In fact, by the time of *Casey*, some foreign law had even been used to help define the boundaries of the liberty of citizens and the government's authority to regulate.<sup>463</sup>

#### Custom and Other Constitutional Protections

Concerns over international practices have been key in courts' analyses of the Eighth Amendment.<sup>464</sup> For example, *Trop v. Dulles* cited a U.N. survey of law in order to determine the evolving standards of decency that should be used to evaluate what punishments are cruel and unusual under the Eighth Amendment.<sup>465</sup> Similarly, in *Coker v. Georgia* the Court determined that international practice was relevant in analyzing the "evolving standards" regarding the death

<sup>453</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>454</sup> *Id.* at 573 (citing *Dudgeon v. United Kingdom*, [1981] 45 Eur. Ct. H.R. (ser. A) ¶ 52).

<sup>455</sup> *Id.* at 560.

<sup>456</sup> *Id.*

<sup>457</sup> *Id.* at 576 (citing *P.G. & J.H. v. United Kingdom*, [2001] 550 Eur. Ct. H.R.; *Modinos v. Cyprus*, [1993] 259 Eur. Ct. H.R. and *Norris v. Ireland*, [1988] 142 Eur. Ct. H.R.).

<sup>458</sup> LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 181 (2008) [hereinafter TRIBE, *THE INVISIBLE CONSTITUTION*]; FARBER, *RETAINED BY THE PEOPLE*, *supra* note 405, at 183.

<sup>459</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 945 (1992).

<sup>460</sup> TRIBE, *THE INVISIBLE CONSTITUTION*, *supra* note 458, at 180. Tribe also quotes Chief Justice Rehnquist stating that "constitutional law is [now] firmly grounded in so many countries that it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process." *Id.*

<sup>461</sup> *See, e.g., Brown v. United States*, 12 U.S. (8 Cranch) 110, 115 (1814) (citing international common law precedent to support the decision).

<sup>462</sup> *United States v. Smith*, 18 U.S. (5 Wheat) 153, 188 (1820).

<sup>463</sup> TRIBE, *THE INVISIBLE CONSTITUTION*, *supra* note 458.

<sup>464</sup> *See, e.g., Roper v. Simmons*, 543 U.S. 551, 554 (2005).

<sup>465</sup> *Trop v. Dulles*, 356 U.S. 85, 103 (1958).

penalty for rape.<sup>466</sup> Looking at state practice as evidence of custom, the Court in *Enmund v. Florida* noted that the felony murder doctrine has been abolished in countries like England and India, and has been restricted in other Commonwealth Countries like Canada.<sup>467</sup> Finally, in *Thompson v. Oklahoma* the Court judged the constitutionality of the juvenile death penalty by examining human rights treaties and the practices in the Soviet Union and Western Europe.<sup>468</sup> All of these show analysis similar to *The Paquete Habana*,<sup>469</sup> and support the use of customary international law.

The Supreme Court has relied on similar analyses in deciding the reasonableness of the Fourth Amendment. In *Adamson v. California*, the Court talked about “notions of justice of English-speaking peoples.”<sup>470</sup>

Additionally, in cases involving the due process and habeas corpus rights of alleged terrorists, the courts have turned to a consideration of international law.<sup>471</sup>

More recently, in *Roper v. Simmons* the Supreme Court held that the Eighth and Fourteenth Amendments prohibit the execution of minors under the age of eighteen.<sup>472</sup> The Court noted that while the Constitution is essential to American self-identity, “[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”<sup>473</sup>

These decisions and numerous other cases all show the willingness of U.S. courts to consider customary international law.<sup>474</sup>

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<sup>466</sup> *Coker v. Georgia*, 433 U.S. 584, 596 (1977).

<sup>467</sup> *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

<sup>468</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988).

<sup>469</sup> *The Paquete Habana*, 175 U.S. 677 (1900).

<sup>470</sup> *Adamson v. California*, 332 U.S. 46, 67-68 (1947).

<sup>471</sup> See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 561-63 (2006) (considering whether the Geneva Conventions are enforceable in U.S. courts).

<sup>472</sup> *Roper*, 543 U.S. at 578.

<sup>473</sup> *Id.* at 578.

<sup>474</sup> The following cases are cited in Strossen, *Recent U.S. and International Judicial Protection of Individual Rights*, *supra* note 431, at 822 n.81:

*United States v. Romano*, 706 F.2d 370, 375 [ ] n.1 (2d Cir. 1983) (suggest[ing] that alien may assert denial of justice in U.S. criminal justice process if that process does not comply with ICCPR); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 710 (N.D. Cal. 1988) (recogniz[ing] customary international law norm against “disappearance,” citing UDHR and ICCPR); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987) (recogniz[ing] customary international law norm proscribing summary execution or murder by government, citing UDHR, ICCPR, and American Convention); *Fernandez-Roque v. Smith*, 567 F. Supp. 1115, 1122 n.2 (N.D. Ga. 1983) ([noting] customary international law principles prohibiting prolonged detention are binding on U.S., citing UDHR, ICCPR, and American Convention) (dictum); *Lareau v. Manson*, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980) ([noting] customary international law, as evidenced by U.N. Charter and U.N. Standard Minimum Rules for the Treatment of Prisoners, are part of U.S. law) (dictum); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 795 (D. Kan. 1980) ([noting that] customary international law, as reflected in U.N. treaties and American Convention, secures to excluded alien the right to be free of arbitrary detention even though U.S. Constitution and statutes have been interpreted as affording no protection to such individuals), *aff’d sub. nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382

## V. CONCLUSION: CUSTOMARY INTERNATIONAL LAW SUPPORTS LEGALIZATION AND RECOGNITION OF SAME-SEX MARRIAGE IN THE UNITED STATES.

The last issue to tackle is how, precisely, the legislature and courts should use customary international law to allow same-sex marriage. How can it be used to support an appeal to a legislature or a case brought before a court?

These question must be answered and understood because there have been strong arguments raised that customary international law is a distant second to treaty law, and that there is no longer a place for custom in the US legal system.<sup>475</sup> Professors Goldsmith and Bradley, in their well-known critique of the “modern position,”<sup>476</sup> argue that customary international law does not have the status of federal common law.<sup>477</sup> However, even they agree that custom does and should still continue to play an important role in our legal system, noting, “even if it were not viewed as federal common law, [customary international law] would continue to play an important role in the United States.”<sup>478</sup>

Justice Scalia has spoken out several times against the incorporation or even consideration of foreign law. For example, in his dissent in *Lawrence*, Justice Scalia noted:

Constitutional entitlements do not spring into existence . . . as the Court seems to believe, because *foreign nations* decriminalize conduct. . . . The Court’s discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since “this Court . . . should not impose foreign moods, fads, or fashions on Americans.”<sup>479</sup>

In a speech to a gathering of the American Society of International Law, Justice Scalia argued “that the discussion of foreign cases in U.S. constitutional opinions is ‘wrong,’ perhaps even unconstitutional,” but concluded that “there’s a difference between relying on alien cases and simply borrowing ideas from clever foreigners.”<sup>480</sup>

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(10th Cir. 1981); *Schneider v. Rusk*, 218 F. Supp. 302, 319 (D.D.C. 1963) (Fahy, J., dissenting) (citing UDHR, concludes that there is fundamental right to nationality).

<sup>475</sup> See, e.g., Bradley & Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, *supra* note 402 (1997) (challenging the recent consensus that customary international law has the status of federal common law).

<sup>476</sup> The “modern position” is defined as the proposition that customary international law has the status of federal common law. *Id.* at 816.

<sup>477</sup> See generally Bradley & Goldsmith, *Customary International Law as Federal Common Law*, *supra* note 402.

<sup>478</sup> *Id.* at 871.

<sup>479</sup> *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (emphasis in original) (citing *Foster v. Florida*, 537 U.S. 990, n. [sic] (2002) (Thomas, J., concurring in denial of certiorari)); see also Steven G. Calabresi & Stephanic Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 756 (2005) (“We thus substantially agree with the spirit, if not entirely all of the substance, of Justice Scalia’s warning against citing foreign law in most U.S. [C]onstitutional cases.”) (footnote omitted) (quoted in Landers, *A Marriage of Principles*, *supra* note 2, at 702 n.115).

<sup>480</sup> Tim Wu, *Foreign Exchange, Should the Supreme Court Care What Other Countries Think?*, SLATE (Apr. 9, 2004), <http://www.slate.com/id/2098559> (quoted in Landers, *A Marriage of Principles*, *supra* note 2, at 702 n.115).

Justice Scalia's criticism, especially tempered by his later remark, seems to be a disagreement with the sporadic use of foreign law *as precedent*. That is not what this article proposes. Customary international law is more than a haphazard use of miscellaneous foreign cases or the borrowing of ideas from clever foreign courts; instead, it is a system of law all its own, with guidelines for consideration, and it is an essential source of the body of law referred to as *international law*.<sup>481</sup>

If customary international law is, in fact, federal common law—about which, as noted, there has been some debate—then it would ordinarily trump state law under the Supremacy Clause.<sup>482</sup> The courts have relied on international treaties to assist in the interpretation of federal law “even when such treaties do not create an independent cause of action.”<sup>483</sup>

Some have argued that all international human rights instruments form a part of customary international law.<sup>484</sup> However, the courts have been reluctant to use customary international law,<sup>485</sup> and some scholars have warned against too much optimism in this area.<sup>486</sup>

However, as discussed above, the Supreme Court and other courts have already used international law principles to help them decide certain issues, and certainly the area of human rights is an area where customary international law can guide the courts on how to interpret U.S. constitutional norms, and on what rights must be protected.<sup>487</sup> Professor Strossen describes it the following way:

In contrast to U.S. courts' current reluctance to view themselves as bound directly by international human rights principles on substantive issues, they are much more willing to invoke such principles—whether embodied in treaties or in other manifestations of customary international law—to guide the interpretation of domestic legal norms.<sup>488</sup>

In fact, Strossen describes a “scholarly consensus supporting this interpretive use of

<sup>481</sup> And here, the author wants to underscore the distinction between “foreign law” (which is laws of other countries, individually) and “international law” (which is the body of law established according the principles of the International Court of Justice, and which draws upon the practices of many states).

<sup>482</sup> See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-26 (1964); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (1987); Sadtler, *A Right to Same-Sex Marriage Under International Law*, *supra* note 334, at 444 (footnote omitted).

<sup>483</sup> Sadtler, *A Right to Same-Sex Marriage Under International Law*, *supra* note 334, at 444 (footnote omitted); see also *id.* at 444 n.211.

<sup>484</sup> See Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 441-43 (1989) (arguing that all human rights norms are binding as customary international law); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Peña-Irala*, 22 HARV. INT'L L.J. 53, 69-70 n.75 (1981) (arguing that the Universal Declaration is binding as customary international law).

<sup>485</sup> See discussion in Bayefsky & Fitzpatrick, *International Human Rights Law in United States Courts*, *supra* note 324, at 23; see also Strossen, *Recent U.S. and International Judicial Protection of Individual Rights*, *supra* note 431, at 815-16.

<sup>486</sup> Strossen, *Recent U.S. and International Judicial Protection of Individual Rights*, *supra* note 431, at 816 (stating that customary international law “should not be expected to produce widespread practical results in the immediate future”).

<sup>487</sup> See generally *id.*

<sup>488</sup> *Id.* at 824.

international human rights norms in domestic litigation.”<sup>489</sup>

Another concern about customary international law is that due to its nature—a lack of codified and searchable principles—it can be hard to discern.<sup>490</sup> Professor Harold Koh, now legal advisor to the State Department, and arguably *the* leading scholar on the combination of international and national law,<sup>491</sup> refuted the idea that “[t]he growing codification and hence, accessibility of customary international law rules—through statutes, unratified treaties, and scholarly treatises—belied the claim that such rules were hopelessly beyond a domestic court’s law-finding capacities.”<sup>492</sup>

International law can be used as a source of law to help courts interpret constitutional norms,<sup>493</sup> which is particularly important when the courts—and eventually, the Supreme Court—are charged with deciding cases about same-sex marriage. And, importantly, custom is not limited to the federal courts; it may be used by state courts as well.<sup>494</sup> One article describes how federal and state courts may apply customary international human rights law:

Probably the most promising use of international human rights law is for guidance in interpreting federal and state civil liberties and civil rights laws. Courts may refer to international law in determining the intended content of federal and state laws in the same way that they refer to legislative history. . . . Second, under article VI of the United States Constitution, human rights provisions of treaties ratified by the United States have the same status and effect as federal law. . . . Third, human rights provisions that are internationally accepted as legally binding are part of the body of customary international law

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<sup>489</sup> *Id.* See also *id.* at 824-25 n.90 for citations.

<sup>490</sup> See e.g., Marilyn Raisch, *Codes And Hypertext: The Intertextuality of International and Comparative Law*, 35 SYRACUSE J. INT’L L. & COM. 309, 310-11 (2008)

<sup>491</sup> See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2348-49 (1991) (citations omitted). Professor Koh notes that in transnational public law litigation:

Private individuals, government officials, and nations sue one another directly, and are sued directly, in a variety of judicial fora, most prominently, domestic courts. In these fora, these actors invoke claims of right based not solely on domestic or international law, but rather, on a body of “transnational” law that blends the two. Moreover, contrary to “dualist” views of international jurisprudence, which see international law as binding only upon nations in their relations with one another, individual plaintiffs engaged in this mode of litigation usually claim rights arising directly from this body of transnational law.

<sup>492</sup> *Id.* at 2366; see also Hiram Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT’L L.J. 87, 89 (1991) (describing a set of rules of “declarative international law” as rules “that are declared as law by a majority of states,” usually in unratified treaties or other legal texts, “but not actually enforced by them, or rules that are both practiced and accepted as law, *but only by a minority of states*”) (emphasis added).

<sup>493</sup> See Jordan J. Paust, *Does Your Police Force Use Illegal Weapons? A Configurative Approach to Decision Integrating International and Domestic Law*, 18 HARV. INT’L L.J. 19, 42 (1977) (noting that the use of customary international norms for interpreting constitutional terms is especially useful “in this age of global interdependence which creates transnational patterns of subjectivity and a more detailed manifestation of uniform expectations about the content of basic human rights”).

<sup>494</sup> See, e.g., *Servin v. State*, 32 P.3d 1277, 1290 (Nev. 2001) (Agosti, Beker and Rose, JJ., concurring) (“I believe that an additional ground for ruling out the death penalty for this minor is that customary international law precludes the most extreme penalty for juvenile offenders.”).

that courts may apply as part of or in a manner analogous to United States common law.<sup>495</sup>

This article does not suggest that customary international law be used as an independent basis for federal question jurisdiction in a case challenging DOMA or a similarly discriminatory law. In the debate over same-sex marriage there are other, better ways for litigants to obtain jurisdiction.<sup>496</sup> Instead, customary international law can be used, as it has been, as a prism through which state and federal courts can assess whether there are violations of rights when same-sex marriage is prohibited. It can also be used to persuade the legislatures of the states, and even Congress, to pass laws that legalize same-sex marriage.

The title of this article, “Currency of Love,” though interestingly supported by a modern song,<sup>497</sup> actually originated from a phrase used in an interview with a protester speaking out in favor of same-sex marriage. The protester was asked why she favored marriage and not just civil unions; her response was that “marriage” was still the “currency of love” around the world.<sup>498</sup>

Indisputably, much of this is controversial and aspirational: others will argue that customary international law is unimportant or that same-sex marriages have not risen to the level of a norm of customary international law. There may be more work that needs to be done before either premise is bulletproof. However, given current trends and judicial activity, neither of these ideas is as far-fetched as they might appear. If nothing else, there is value in adding to the debate. This article argues that given the movement in the rest of the world, the U.S. is not—nor should it be—immune to international trends and “customs,” and that turning a blind eye to customary international law would be a terrible mistake—particularly right now, and especially when it comes to something as important as “the currency of love.”

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<sup>495</sup> Kathryn Burke, et al., *Application of International Human Rights Law in State and Federal Courts*, 292 TEX. INT’L L.J. 291, 295 (1983).

<sup>496</sup> Although, *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006), serves as a cautionary tale for litigants about the importance of standing.

<sup>497</sup> SILVERSUN PICKUPS song, fortuitously discovered by the author after settling on the title. SILVERSUN PICKUPS, *Currency of Love*, *supra* note 1.

<sup>498</sup> Despite the author’s best efforts, this interviewee is unidentifiable. Many thanks go out to her.



## APPENDIX I: STATE-BY-STATE SUMMARY OF THE STATUS OF SAME-SEX MARRIAGE

State	Law
Alabama	<p>State law and constitution ban same-sex marriage and recognition thereof.</p> <p>“(d) No marriage license shall be issued in the State of Alabama to parties of the same sex.”<sup>499</sup></p> <p>“(e) The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.”<sup>500</sup></p> <p>There also is a constitutional amendment called the “Sanctity of Marriage Amendment” passed in 2006, and providing much the same as the above law.<sup>501</sup></p>
Alaska	<p>State constitution bans same-sex marriage and recognition thereof.</p> <p>“To be valid or recognized in this State, a marriage may exist only between one man and one woman.”<sup>502</sup></p> <p>Same-sex partners of state employees are entitled to benefits under a court decision.<sup>503</sup></p>
Arizona	<p>State law and constitution ban same-sex marriage and the recognition thereof.</p> <p>“C. Marriage between persons of the same sex is void and prohibited.”<sup>504</sup> Constitutional amendment to same effect passed in 2008.<sup>505</sup></p> <p>Same-sex marriages from other states and countries are not recognized.<sup>506</sup></p>

<sup>499</sup> ALA. CODE § 30-1-19 (1975).

<sup>500</sup> ALA. CODE §30-1-19 (1975).

<sup>501</sup> ALA. CONST. art. I, § 36.03.

<sup>502</sup> ALASKA CONST. art. I, § 25.

<sup>503</sup> *State v. Alaska Civil Liberties Union*, 159 P.3d 513 (Alaska 2006).

<sup>504</sup> ARIZ. REV. STAT. ANN. § 25-101 (2010).

<sup>505</sup> ARIZ. CONST. art. XXX, § 1.

<sup>506</sup> ARIZ. REV. STAT. ANN. § 25-112 (2010).

<b>Arkansas</b>	<p>State law and constitution ban same-sex marriage and recognition thereof.</p> <p>(a) It shall be the declared public policy of the State of Arkansas to recognize the marital union only of man and woman. . . . (b) Marriages between persons of the same sex are prohibited in this state. . . . (c) However, nothing in this section shall prevent an employer from extending benefits to persons who are domestic partners of employees.<sup>507</sup></p> <p>Arkansas recognizes foreign marriages, but not same-sex marriages from other states.<sup>508</sup></p> <p>A constitutional amendment also provides that marriage is only between a man and a woman and that same-sex marriages from other states will not be recognized.<sup>509</sup></p>
<b>California</b>	<p>In May 2008, the California Supreme Court held that same sex partners should have the ability to marry, resulting in California performing same-sex marriages.<sup>510</sup></p> <p>A ballot initiative called Proposition 8, calling for marriage to be defined as between a man and a woman, passed in November 2008, bringing same-sex marriage to a halt in California.<sup>511</sup> Marriages performed between May and November 2008 are still valid.<sup>512</sup></p> <p>California has a domestic partnership registry, and a variety of rights and responsibilities have been extended to domestic partners.<sup>513</sup></p>
<b>Colorado</b>	<p>State law and constitution bans same-sex marriage and the recognition thereof.</p> <p>The law provides that marriage is between one man and one woman, and that same sex-marriages from other states shall not be recognized as valid.<sup>514</sup> Constitutional provision:</p> <p>"Only a union of one man and one woman shall be valid or recognized as a marriage in this state."<sup>515</sup></p>

<sup>507</sup> ARK. CODE ANN. § 9-11-208 (2009).

<sup>508</sup> ARK. CODE ANN. § 9-11-107 (2009).

<sup>509</sup> ARK. CONST. amend. LXXXIII, §1; § 2.

<sup>510</sup> In re Marriage Cases, 183 P.3d 384 (Cal. 2008) (holding that a statutory provision limiting marriage to heterosexual couples was unconstitutional), *superseded by* CAL. CONST. art. I, § 7.5, *superseded by* *Perry v. Schwarzenegger*, No. C 09-2292 (VRW), 2010 U.S. Dist. LEXIS 78817 (August 4, 2010) (stayed by 9th Cir. pending appeal).

<sup>511</sup> CAL. CONST. art. I, § 7.5 (which states "Only a marriage between a man and a woman is valid or recognized in California"). Proposition 8 withstood challenge in *Strauss v. Horton*, 207 P.3d 47 (Cal. 2009).

<sup>512</sup> *Strauss v. Horton*, 207 P.3d 48, 119 (Cal. 2009) (noting that Proposition 8 applies prospectively and does not "invalidate retroactively the marriages of same-sex couples performed prior to its effective date").

<sup>513</sup> CAL. FAM. CODE § 297- 297.5 (2009).

<sup>514</sup> COLO. REV. STAT. § 14-2-104 (2009).

<sup>515</sup> COLO. CONST. art. II, § 31.

<b>Connecticut</b>	<p><b>Allows same-sex marriage.</b></p> <p>The Connecticut Supreme Court ruled that a state statutory provision limiting marriage to heterosexual couples violated equal protection under the state constitution. (The state had allowed for civil unions for homosexual couples.)<sup>516</sup></p> <p>See also trial court order implementing the decision and ordering marriage licenses to issue.<sup>517</sup></p>
<b>Delaware</b>	<p>State law does not allow same-sex marriages. There is no constitutional provision.</p> <p>101(a). Void and voidable marriages:</p> <p>"A marriage is prohibited and void between a person and his or her ancestor, descendant, brother, sister, half brother, half sister, uncle, aunt, niece, nephew, first cousin or between persons of the same gender."<sup>518</sup></p>
<b>District of Columbia</b>	<p>Domestic partnership law and recognizes partnerships from other jurisdictions.</p> <p>The law has been amended several times since it went into effect in 2002, most recently in 2008.<sup>519</sup></p> <p>D.C. recognizes same-sex marriages entered into in other jurisdictions.<sup>520</sup></p> <p>On December 1, 2009, the D.C. Council voted 11 to 2 in favor of a bill that legalizes same-sex marriage ("Religious Freedom and Civil Marriage Equality Amendment Act of 2009").<sup>521</sup></p>
<b>Florida</b>	<p>State law and constitution ban same-sex marriage and recognition thereof.</p> <p>741.04. Marriage License Issued:</p> <p>"No county court judge or clerk of the circuit court in this state shall issue a license for the marriage of any person . . . unless one party is a male and the other party is a female."<sup>522</sup> Same-sex marriages are not recognized.<sup>523</sup> Marriage is defined as that between one man and one woman.<sup>524</sup></p> <p>Constitutional provision:</p> <p>"Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized."<sup>525</sup></p>

<sup>516</sup> Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008).

<sup>517</sup> Elizabeth Kerrigan & Joanne Mock v. State, No. NNH-CV 04-4001813, 2008 WL 5203867 (Conn. Super. Nov. 12, 2008) (order granting Plaintiff's motion for summary judgment).

<sup>518</sup> DEL. CODE ANN. tit. 13, § 101 (2010).

<sup>519</sup> D.C. CODE § 32-702 (2009).

<sup>520</sup> D.C. CODE § 46-405.01 (2009).

<sup>521</sup> 57 D.C. Reg. 27 (Jan. 1, 2010). See also <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/15/AR2009121500945.html>.

<sup>522</sup> FLA. STAT. § 741.04 (2009).

<sup>523</sup> FLA. STAT. § 741.212 (2009).

<sup>524</sup> *Id.*

<sup>525</sup> FLA. CONST. art. I, § 27.

<b>Georgia</b>	<p>State law and constitution ban same-sex marriage and recognition thereof.</p> <p>Same sex marriages are prohibited and foreign same-sex marriages are not recognized.<sup>526</sup></p> <p>Constitutional provision:          “This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state.”<sup>527</sup></p>
<b>Hawaii</b>	<p>Same-sex marriage not allowed under state law, but same-sex relationships are recognized under a reciprocal beneficiary statute.</p> <p>572-1. Requisites of valid marriage contract:          “[V]alid marriage contract . . . shall be only between a man and a woman.”<sup>528</sup></p> <p>572-1.6. Private solemnization not unlawful:          “Nothing in this chapter shall be construed to render unlawful, or otherwise affirmatively punishable at law, the solemnization of same-sex relationships by religious organizations; provided that nothing in this section shall be construed to confer any of the benefits, burdens, or obligations of marriage under the laws of Hawaii.”<sup>529</sup></p> <p>Constitutional provision:          “The legislature shall have the power to reserve marriage to opposite-sex couples.”<sup>530</sup></p> <p>The governor of Hawaii recently vetoed legislation that would have allowed civil unions.<sup>531</sup></p>
<b>Idaho</b>	<p>State law and constitution ban same-sex marriage and recognition thereof.</p> <p>32-209. Recognition of foreign or out of state marriages:</p> <p style="text-align: center;">All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state.<sup>532</sup></p> <p>Constitutional provision:          “A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.”<sup>533</sup></p>

<sup>526</sup> GA. CODE ANN. § 19-3-3.1 (2009).

<sup>527</sup> GA. CONST. art. I, § 4, ¶ 1.

<sup>528</sup> HAW. REV. STAT. § 572-1 (2009).

<sup>529</sup> HAW. REV. STAT. § 572-1.6 (2009); Reciprocal beneficiary law found under HAW. REV. STAT. § 572C-1 through C-7 (2009). This gives certain inheritance, health care and property rights.

<sup>530</sup> HAW. CONST. art. I, § 23.

<sup>531</sup> Herbert A. Sample, *Hawaii Governor Vetoes Civil Unions Bill After Weeks Of Stalling*, THE HUFFINGTON POST, July 6, 2010, [http://www.huffingtonpost.com/2010/07/06/hawaii-civil-unions-veto\\_n\\_637213.html](http://www.huffingtonpost.com/2010/07/06/hawaii-civil-unions-veto_n_637213.html).

<sup>532</sup> IDAHO CODE ANN. § 32-209 (2009).

<b>Illinois</b>	<p>Illinois law bans same-sex marriage and the recognition thereof. No constitutional provision.</p> <p>§ 201. Formalities:          "A marriage between a man and a woman licensed, solemnized and registered as provided in this Act is valid in this State."<sup>534</sup> Same-sex marriages are prohibited<sup>535</sup> and are contrary to the public policy of the state.<sup>536</sup></p> <p>A House Bill is pending which would allow civil unions.<sup>537</sup></p>
<b>Indiana</b>	<p>Law bans same-sex marriage and the recognition of such unions from other states.<sup>538</sup></p> <p>Note that this law was upheld against a state constitutional challenge.<sup>539</sup></p> <p>No constitutional amendment.</p> <p>A constitutional amendment to ban gay marriage was recently proposed, but that it is not likely to be voted on this year.<sup>540</sup></p>
<b>Iowa</b>	<p><b>Allows same-sex marriage.</b></p> <p>The Iowa Supreme court found unconstitutional Iowa's law providing that "only marriage between a man and a woman is valid."<sup>541</sup></p> <p>No constitutional amendment.</p>

<sup>533</sup> IDAHO CONST. art. III, § 28.

<sup>534</sup> 40 ILL. COMP. STAT. 750 / 5-201 (2010).

<sup>535</sup> 40 ILL. COMP. STAT. 750 / 5-212 (2010).

<sup>536</sup> 40 ILL. COMP. STAT. 750 / 5-213.1 (2010).

<sup>537</sup> H.B. 2234, 96th Gen. Assem., Reg. Sess. (Ill. 2009). There is also proposed legislation that would allow same-sex marriage, H.B. 178, 96th Gen. Assem., Reg. Sess. (Ill. 2009).

<sup>538</sup> IND. CODE § 31-11-1-1 (2009) ("Only a female may marry a male. Only a male may marry a female.").

<sup>539</sup> Morrison v. Sadler, 821 N.E.2d 15, 35 (Ind. App. 2005).

<sup>540</sup> See Indiana Senate Joint Resolution No. 13 (proposed Jan. 11, 2010), available at <http://www.in.gov/legislative/bills/2010/RES/SJ0013.1.html>.

<sup>541</sup> Varnum v. Brien, 763 N.W.2d 862, 907 (Iowa 2009) (overturning IOWA CODE § 595.20 (2008); see also Jeff Eckhoff & Grant Schulte, *Unanimous Ruling: Iowa Marriage no Longer Limited to One Man, One Woman*, DES MOINES REGISTER, Apr. 3, 2009, available at <http://www.desmoinesregister.com/article/20090403/NEWS/90403010/Unanimous-ruling--iowa-marriage-no-longer-limited-to-one-man--one-woman>).

<b>Kansas</b>	<p>State law and constitution ban same-sex marriage and the recognition thereof.</p> <p>Marriage is defined “a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void.”<sup>542</sup></p> <p>While marriages from other states are generally recognized, “[i]t is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman.”<sup>543</sup></p> <p>Constitutional provision:</p> <p>(a) The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void. (b) No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.<sup>544</sup></p>
<b>Kentucky</b>	<p>State law and constitution ban same-sex marriage and the recognition of thereof.</p> <p>“Marriage” is defined as “the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex.”<sup>545</sup></p> <p>Law also provides that marriages between people of same sex are void.<sup>546</sup></p> <p>Constitutional provision:  “Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”<sup>547</sup></p>
<b>Louisiana</b>	<p>Louisiana law and constitution ban same-sex marriage and recognition thereof.</p> <p>“Persons of the same sex may not contract marriage with each other. A purported marriage between persons of the same sex contracted in another state shall be governed by the provisions of Title II of Book IV of the Civil Code.”<sup>548</sup></p> <p>Same-sex marriages from foreign jurisdictions are not recognized because they are against a strong public policy of the state.<sup>549</sup></p> <p>Constitutional provision:  “Marriage in the state of Louisiana shall consist only of the union of one man and one woman.”<sup>550</sup></p>

<sup>542</sup> KAN. STAT. ANN. § 23-101 (2008).

<sup>543</sup> KAN. STAT. ANN. § 23-115 (2008).

<sup>544</sup> KAN. CONST. art. XV, § 16.

<sup>545</sup> KY. REV. STAT. ANN. § 402.005 (2010).

<sup>546</sup> KY. REV. STAT. ANN. § 402.020 (2010).

<sup>547</sup> KY. CONST. § 233A.

<sup>548</sup> LA. CIV. CODE ANN. art. 89 (2010).

<b>Maine</b>	<p>State law bans same-sex marriage and the recognition thereof, but there is a domestic partner registry.</p> <p>There is no constitutional amendment addressing same-sex marriage.</p> <p>Same-sex marriages are prohibited, and out-of-state same-sex marriages are not recognized.<sup>551</sup></p> <p>Additionally, “[w]hen residents of this State, with intent to evade this section and to return and reside here, go into another state or country to have their marriage solemnized there and afterwards return and reside here, that marriage is void in this State.”<sup>552</sup> The domestic partner registry allows certain benefits, including property rights and guardianship, if the partner becomes incapacitated.<sup>553</sup></p>
<b>Maryland</b>	<p>State law provides that marriage is between a man and a woman. A court challenge to that law was rejected in 2007. Domestic partnership benefits are available.</p> <p>The state has no constitutional amendment addressing same-sex marriage.</p> <p>“Only a marriage between a man and a woman is valid in this State.”<sup>554</sup> This was upheld by the Maryland Supreme Court in 2007.<sup>555</sup></p> <p>Maryland has just recently allowed recognition of same-sex marriages issued in other states.<sup>556</sup></p>
<b>Massachusetts</b>	<p><b>Allows same-sex marriage.</b></p> <p>This was the result of a court decision.<sup>557</sup></p> <p>State law does not explicitly address whether such unions from other jurisdictions are honored.</p>

<sup>549</sup> LA. CIV. CODE ANN. art. 3520 (2010).

<sup>550</sup> LA. CONST. art. XII, § 15.

<sup>551</sup> ME. REV. STAT. ANN. tit. 19-A, § 701 (2009).

<sup>552</sup> *Id.*

<sup>553</sup> ME. REV. STAT. ANN. tit. 22, § 2710; *see also* tit. 18-A, §§ 1-201, 2-202, 3-203, 5-311, 5-410; tit. 19-A, § 4002, 2843, 2846 (2009).

<sup>554</sup> MD. CODE ANN., FAM. LAW § 2-201 (2010).

<sup>555</sup> Conaway v. Deanc, 932 A.2d 571 (Md. 2007), discussed *supra* notes 266-268 and accompanying text.

<sup>556</sup> Aaron C. Davis & John Wagner, *Maryland to Recognize Gay Marriages from Other Places*, WASH. POST, Feb. 25, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/24/AR2010022405686.html>.

<sup>557</sup> Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003), discussed *supra* notes 150-173 and accompanying text.

<b>Michigan</b>	<p>State law and constitution ban same-sex marriage and the recognition thereof.</p> <p>Marriage is defined as being between a man and a woman.<sup>558</sup></p> <p>Same-sex marriages from other states are not recognized.<sup>559</sup></p> <p>Constitutional Provision:          “To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”<sup>560</sup></p>
<b>Minnesota</b>	<p>State law bans same-sex marriage and the recognition thereof.</p> <p>There is no constitutional amendment addressing same-sex marriage.</p> <p>Marriage is a civil contract between a man and a woman.<sup>561</sup></p> <p>Same-sex marriages are prohibited.<sup>562</sup></p> <p>A bill has also been introduced recently that would allow gay marriage.<sup>563</sup></p>
<b>Mississippi</b>	<p>State law and constitution ban same-sex marriage and recognition thereof.</p> <p>“Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi.”<sup>564</sup></p> <p>Constitutional provision:</p> <p style="padding-left: 40px;">Marriage may take place and may be valid under the laws of this state only between a man and a woman. A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state.<sup>565</sup></p>

<sup>558</sup> MICH. COMP. LAWS § 551.1 (2009).

<sup>559</sup> MICH. COMP. LAWS § 551.271 (2009).

<sup>560</sup> MICH. CONST. art. 1, § 25 (1963), available at [http://www.legislature.mi.gov/\(S\(3shmdm45r0a5cczo2u2qdn45\)\)/mileg.aspx?page=getobject&objectname=mcl-article-i-25&highlight=](http://www.legislature.mi.gov/(S(3shmdm45r0a5cczo2u2qdn45))/mileg.aspx?page=getobject&objectname=mcl-article-i-25&highlight=).

<sup>561</sup> MINN. STAT. § 517.01 (2009).

<sup>562</sup> MINN. STAT. § 517.03, (2009).

<sup>563</sup> S.B. 2145, 86th Leg., Reg. Sess. (Minn. 2009).

<sup>564</sup> MISS. CODE ANN. § 93-1-1 (2009).

<sup>565</sup> MISS. CONST. art. XIV, § 263A.



<b>Missouri</b>	<p>State law and Constitution ban same-sex marriage and the recognition thereof.</p> <p>"It is the public policy of this state to recognize marriage only between a man and a woman."<sup>566</sup></p> <p>"A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted."<sup>567</sup></p> <p>Constitutional provision:          "That to be valid and recognized in this state, a marriage shall exist only between a man and a woman."<sup>568</sup></p>
<b>Montana</b>	<p>State law and constitution ban same-sex marriage and recognition thereof.</p> <p>"Marriage is a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential."<sup>569</sup></p> <p>Marriage between persons of the same sex is prohibited.<sup>570</sup></p> <p>Constitutional provision:          "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state."<sup>571</sup></p>
<b>Nebraska</b>	<p>The state constitution bans same-sex marriage and recognition thereof.</p> <p>"Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."<sup>572</sup> A federal court challenge to the constitutional amendment failed when the Eighth Circuit held it was rationally related to the legitimate state interest of encouraging heterosexual couples to raise children in committed marriage relationships, and as such did not violate the Equal Protection Clause of the U.S. Constitution.<sup>573</sup></p>
<b>Nevada</b>	<p>The state constitution bans same-sex marriage and recognition thereof. However, Nevada recognizes domestic partnerships.</p> <p>Constitutional Provision:          "Only a marriage between a male and female person shall be recognized and given effect in this state."<sup>574</sup></p> <p>Domestic partnerships are valid in this state.<sup>575</sup></p>

<sup>566</sup> MO. REV. STAT. § 451.022 (2009).

<sup>567</sup> *Id.*

<sup>568</sup> MO. CONST. art. I, § 33.

<sup>569</sup> MONT. CODE ANN. § 40-1-103 (2009).

<sup>570</sup> MONT. CODE ANN. § 40-1-401 (2009).

<sup>571</sup> MONT. CONST. art. XIII, § 7.

<sup>572</sup> NEB. CONST. art. I, § 29.

<sup>573</sup> *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 868-69 (8th Cir. 2006).

<sup>574</sup> NEV. CONST. art. I, § 21.

<sup>575</sup> S.B. 283, 75th Leg., Reg. Sess. (Nev. 2009).

<b>New Hampshire</b>	<p><b>Allows same-sex marriage.</b></p> <p>New Hampshire has had legislation identifying the legal status of civil unions and allowing for all state-level spousal rights and responsibilities since 2007.<sup>576</sup> New Hampshire passed legislation allowing same-sex marriage in May 2009. It became effective on January 1, 2008.<sup>577</sup> Civil unions will merge into marriage by 2011.<sup>578</sup></p>
<b>New Jersey</b>	<p>State law allows civil unions.</p> <p>New Jersey allows “civil unions” with many privileges similar to marriage.<sup>579</sup></p> <p>The Legislature has chosen to establish civil unions by amending the current marriage statute to include same-sex couples. In doing so, the Legislature is continuing its longstanding history of insuring equality under the laws for all New Jersey citizens by providing same-sex couples with the same rights and benefits as heterosexual couples who choose to marry.<sup>580</sup></p> <p><i>Lewis v. Harris</i> led to the establishment of civil unions.<sup>581</sup></p>
<b>New Mexico</b>	<p>State law does not explicitly allow or prohibit same-sex marriage, but does provide that the state will recognize marriages that are valid elsewhere.</p> <p>All marriages celebrated beyond the limits of this state, which are valid according to the laws of the country wherein they were celebrated or contracted, shall be likewise valid in this state, and shall have the same force as if they had been celebrated in accordance with the laws in force in this state.<sup>582</sup></p> <p>The same-sex partners of state employees can receive benefits.<sup>583</sup></p>
<b>New York</b>	<p>State law does not allow same-sex marriages to be performed in New York, but recognizes same-sex marriages performed in other states. This is per a directive from Governor David Patterson<sup>584</sup> issued after the ruling in <i>Martinez v. County of Monroe</i>.<sup>585</sup></p> <p>State law does allow some benefits for domestic partners, including hospital visitation<sup>586</sup> and funeral arrangements.<sup>587</sup></p>

<sup>576</sup> N.H. REV. STAT. ANN. § 457-A:1 (2009).

<sup>577</sup> *Id.*

<sup>578</sup> *Id.*

<sup>579</sup> N.J. STAT. ANN. § 37:1-28 (2010).

<sup>580</sup> *Id.*

<sup>581</sup> *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

<sup>582</sup> N.M. STAT. ANN. § 40-1-4 (2010).

<sup>583</sup> N.M. Exec. Or. No. 2003-010.

<sup>584</sup> See DAVID NOCENTI, STATE OF NEW YORK, EXECUTIVE CHAMBER, *MARTINEZ* DECISION ON SAME-SEX MARRIAGE (May 14, 2008), available at <http://www.nyclu.org/nodc/1821>.

<sup>585</sup> *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 4 Dept. 2008) (holding that a same-sex marriage (in this case from Canada) should be recognized). The state’s highest court declined to review the ruling. However, the state Supreme Court has held that denial of marriage licenses to same-sex couples does not violate the State Constitution. *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (noting that New York’s statutory law did not explicitly

<b>North Carolina</b>	<p>State law bans same-sex marriage and the recognition thereof.</p> <p>There is no constitutional amendment to that effect.</p> <p>“Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.”<sup>588</sup></p>
<b>North Dakota</b>	<p>North Dakota law and constitution ban same-sex marriage and the recognition thereof.</p> <p>Marriage is defined as being between one man and one woman.<sup>589</sup></p> <p>Same-sex marriages from other jurisdictions are not recognized.<sup>590</sup></p> <p>Constitutional provision:  “Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”<sup>591</sup></p>
<b>Ohio</b>	<p>State law and constitution ban same-sex marriage and the recognition thereof.</p> <p>“A marriage may only be entered into by one man and one woman.”<sup>592</sup></p> <p>Same-sex marriages from other jurisdictions are not valid.<sup>593</sup></p> <p>Constitutional provision:</p> <p style="padding-left: 40px;">Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.<sup>594</sup></p> <p>Note that the second sentence of the above constitutional amendment was held unconstitutional by a trial court in 2005 in a case involving the application of the Domestic Violence Act to unwed partners.<sup>595</sup></p>

limit marriage to opposite-sex couples, but that was the clear implication and understanding).

- <sup>586</sup> N.Y. PUB. HEALTH LAW § 2805-Q (2010).  
<sup>587</sup> N.Y. PUB. HEALTH LAW § 4201 (2010).  
<sup>588</sup> N.C. GEN. STAT. § 51-1.2 (2009).  
<sup>589</sup> N.D. CENT. CODE § 14-03-01 (2009).  
<sup>590</sup> N.D. CENT. CODE § 14-03-08 (2009).  
<sup>591</sup> N.D. CONST. art. XI, § 28.  
<sup>592</sup> OHIO REV. CODE ANN. § 3101.01 (2010).  
<sup>593</sup> *Id.*  
<sup>594</sup> OHIO CONST. art. XV, § 11.  
<sup>595</sup> Phelps v. Johnson, No. DV05 305642, 2005 WL 4651081 (Ohio Com. Pl. Nov. 28, 2005).

<b>Oklahoma</b>	<p>State law and constitution ban same-sex marriage and the recognition thereof.</p> <p>“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.”<sup>596</sup></p> <p>Constitutional provision:  “Marriage in this state shall consist only of the union of one man and one woman.”<sup>597</sup></p>
<b>Oregon</b>	<p>State law and constitution ban same-sex marriage and recognition thereof, but Oregon has specific provisions that protect domestic partnerships.<sup>598</sup></p> <p>(5) ORS 106.300 to 106.340 are intended to better align Oregon law with the values embodied in the Constitution and public policy of this state, and to further the state’s interest in the promotion of stable and lasting families, by extending benefits, protections and responsibilities to committed same-sex partners and their children that are comparable to those provided to married individuals and their children by the laws of this state.<sup>599</sup></p>
<b>Pennsylvania</b>	<p>State law bans same-sex marriage or the recognition thereof:</p> <p>It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.<sup>600</sup></p> <p>There is no constitutional provision.</p>
<b>Rhode Island</b>	<p>Rhode Island has no explicit ban on same-sex marriages.</p> <p>However, the legislature has extended some rights to same-sex couples.<sup>601</sup></p>
<b>South Carolina</b>	<p>State law and constitution ban same-sex marriage and the recognition thereof.</p> <p>“A marriage between persons of the same sex is void ab initio and against the public policy of this State.”<sup>602</sup></p> <p>Constitutional provision:  “A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State.”<sup>603</sup></p>

<sup>596</sup> OKLA. STAT. tit. 43, § 3.1 (2009).

<sup>597</sup> OKLA. CONST. art. II, § 35.

<sup>598</sup> OR. REV. STAT. § 106.300 *et. seq.* (West 2010).

<sup>599</sup> OR. REV. STAT. § 106.305 (West 2010).

<sup>600</sup> 23 PA. CONS. STAT. ANN. § 1704 (West 2009).

<sup>601</sup> R.I. GEN. LAWS § 28-48-1, 36-12-4, 44-30-12, 45-49-4.3 (2010).

<sup>602</sup> S.C. CODE ANN. § 20-1-15 (2009).

<sup>603</sup> S.C. CONST. Art. XVII, § 15.

<b>South Dakota</b>	<p>State law and constitution ban same-sex marriage and the recognition thereof.</p> <p>Marriage is defined as that between a man and a woman.<sup>604</sup></p> <p>Out of state same-sex marriages are not recognized.<sup>605</sup></p> <p>Constitutional provision:  “Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.”<sup>606</sup></p>
<b>Tennessee</b>	<p>State law and constitution ban same-sex marriage and the recognition thereof.</p> <p>The only recognized marital union is between one man and one woman; foreign marriages that do not comply with that are not recognized.<sup>607</sup></p> <p>Constitutional provision:  “The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state.”<sup>608</sup></p>
<b>Texas</b>	<p>State law and constitution ban same-sex marriage and the recognition thereof.</p> <p>“(a) A man and a woman desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state;</p> <p>“(b) A license may not be issued for the marriage of persons of the same sex.”<sup>609</sup> “A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.”<sup>610</sup></p> <p>Constitutional provision:  “Sec. 32. (a) Marriage in this state shall consist only of the union of one man and one woman. (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.”<sup>611</sup></p>

<sup>604</sup> S.D. CODIFIED LAWS § 25-1-1 (2009).

<sup>605</sup> S.D. CODIFIED LAWS § 25-1-38 (2009).

<sup>606</sup> S.D. CONST. Art. XXI, § 9.

<sup>607</sup> TENN. CODE ANN. § 36-3-113 (2009).

<sup>608</sup> TENN. CONST. art. XI, § 18.

<sup>609</sup> TEX. FAM. CODE ANN. § 2.001 (West 2010).

<sup>610</sup> TEX. FAM. CODE ANN. § 6.204 (West 2010).

<sup>611</sup> TEX. CONST. art. I, § 32.

<b>Utah</b>	<p>State law and constitution ban same-sex marriage and the recognition thereof.</p> <p>“The following marriages are prohibited and declared void: . . . between persons of the same sex.”<sup>612</sup>          Marriages other than those between a man and a woman are not recognized in Utah.<sup>613</sup></p> <p>Constitutional provision:          “(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.”<sup>614</sup></p>
<b>Vermont</b>	<p><b>Allows same-sex marriage.</b></p> <p>Vermont allows same-sex marriage through legislation passed in April 2009.<sup>615</sup></p> <p>Vermont had an extensive Civil union statute,<sup>616</sup> but has replaced it with marriage. Note, however, that partners in existing civil unions are free to marry each other under the new marriage law.<sup>617</sup></p>
<b>Virginia</b>	<p>State law and constitution ban same-sex marriage and the recognition thereof.</p> <p>Marriages between persons of the same-sex are prohibited,<sup>618</sup> as are civil unions and contractual partnership agreements.<sup>619</sup></p> <p>Constitutional provision:</p> <p style="padding-left: 40px;">That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions . . . . Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.<sup>620</sup></p>

<sup>612</sup> UTAH CODE ANN. § 30-1-2 (West 2009).

<sup>613</sup> UTAH CODE ANN. § 30-1-4.1 (West 2009).

<sup>614</sup> UTAH CONST. art. I, § 29.

<sup>615</sup> Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, April 8, 2009, at A1; VT. STAT. ANN. tit. 15, § 8 (West 2010).

<sup>616</sup> VT. STAT. ANN. tit. 15, § 1204 (West 2010).

<sup>617</sup> See *Getting Married in Vermont*, GettingMarriedInVermontInformationSheet\_08242009-1.pdf, available at [http://www.sec.state.vt.us/municipal/civil\\_mar.htm](http://www.sec.state.vt.us/municipal/civil_mar.htm).

<sup>618</sup> VA. CODE ANN. § 20-45.2 (2009).

<sup>619</sup> VA. CODE ANN. § 20-45.3 (2009).

<sup>620</sup> VA. CONST. art. I, § 15-A.

<b>Washington</b>	<p>Washington law bans same-sex marriage, but domestic partnership is available.</p> <p>There is no constitutional amendment.</p> <p>Marriage is prohibited “when the parties are persons other than a male and a female,” and same-sex marriages are not recognized.<sup>621</sup> Washington expressly allows domestic partnerships that provide many of the same legal benefits as marriage.<sup>622</sup></p>
<b>West Virginia</b>	<p>State law bans same-sex marriage and the recognition thereof. There is no constitutional amendment.<sup>623</sup></p> <p>Same-sex marriages are not recognized or given effect.<sup>624</sup></p>
<b>Wisconsin</b>	<p>State law and constitution ban same-sex marriage and the recognition thereof.</p> <p>“Marriage, so far as its validity at law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting is essential, and which creates the legal status of husband and wife.”<sup>625</sup> Wisconsin forbids its residents from getting married elsewhere to circumvent its laws, finds such marriages void,<sup>626</sup> and even punishes such attempts.<sup>627</sup></p> <p>Constitutional provision:  “Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.”<sup>628</sup></p>
<b>Wyoming</b>	<p>State law bans same-sex marriage and the recognition thereof. There is no constitutional provision.</p> <p>“Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential.”<sup>629</sup></p>

<sup>621</sup> WASH. REV. CODE ANN. § 26.04.020 (West 2009).

<sup>622</sup> WASH. REV. CODE ANN. § 26.60.010 (West 2009) (listing the various protections offered).

<sup>623</sup> However, there is some evidence that a marriage amendment may be in the works. See Thomas D. Miller, *Legislators Try to Get Marriage Amendment to Floor*, THE HERALD-DISPATCH (Feb. 11, 2010), <http://www.herald-dispatch.com/news/x1838470830/Legislators-try-to-get-marriage-amendment-to-floor>; H.J.R. Res. 5, 79th Leg., 2nd Sess. (W. Va. 2010).

<sup>624</sup> W. VA. CODE ANN. § 48-2-603 (West 2009).

<sup>625</sup> WIS. STAT. § 765.01 (2009).

<sup>626</sup> WIS. STAT. § 765.04 (2009).

<sup>627</sup> WIS. STAT. § 765.30 (2009).

<sup>628</sup> WIS. CONST. art. XIII, § 13.

<sup>629</sup> WYO. STAT. ANN. § 20-1-101 (2010).

## APPENDIX II: COUNTRY-BY-COUNTRY LAWS ON SAME-SEX MARRIAGE

Country	Same-Sex Marriage?	Rights for Same-Sex Couples	Relevant Law	Source of Law
Albania	No. <sup>630</sup> Last year, the prime minister proposed allowing same-sex marriage, <sup>631</sup> but anti-discrimination legislation introduced in the country's parliament in January did not include a same-sex marriage provision. <sup>632</sup>	No. <sup>633</sup>		

<sup>630</sup> *Albania Postpones Gay Marriage Provision*, BALKAN INSIGHT, Jan. 27, 2010, <http://www.balkaninsight.com/en/main/news/25264/>.

<sup>631</sup> *Albania Plans to Allow Gay Marriage*, BOSTON GLOBE, Aug. 1, 2009, at 3.

<sup>632</sup> *Albania Postpones Gay Marriage Provision*, BALKAN INSIGHT, Jan. 27, 2010, <http://www.balkaninsight.com/en/main/news/25264/>.

<sup>633</sup> *Albania Plans to Allow Gay Marriage*, BOSTON GLOBE, Aug. 1, 2009, at 3.



<b>Andorra</b>	No. <sup>634</sup>	Yes. Andorra allows registration of unions between both same- and opposite-sex couples. <sup>635</sup> This registered cohabitation gives certain rights and responsibilities to couples, but is not equivalent to marriage. <sup>636</sup>	A registered cohabitating couple has the duty to support one another and the right to maintenance in the event of a split. They have the same rights as married couples in terms of social security and employment laws, and the adoption of children. <sup>637</sup> Partners wanting to register must prove they have lived together for at least six months, have a right of residency in Andorra, and have a private agreement regulating their property and personal relations. <sup>638</sup>	Statute <sup>639</sup>
<b>Argentina</b>	Yes. <sup>640</sup>	No.		Statute <sup>641</sup>
<b>Australia</b>	No. <sup>642</sup>	Civil unions are allowed in the Australian Capital Territory, Tasmania and Victoria. <sup>643</sup> Certain cities provide relationship declaration programs. <sup>644</sup>	Federal government recognizes these state and territory civil unions for federal benefits. <sup>645</sup> These civil unions are open only to the residents of the state or territory that authorizes them. <sup>646</sup> Cities including Melbourne and Sydney provide relationship declaration programs. <sup>647</sup> These programs do not confer the rights of marriage, but may be relevant to establishing certain property rights and receiving	Statutes <sup>650</sup>

<sup>634</sup> *Marriage and Partnership Rights for Same-Sex Partners: Country-by-Country*, IGLA EUROPE, [http://www.ilga-europe.org/europe/issues/lgbt\\_families/marriage\\_and\\_partnership\\_rights\\_for\\_same\\_sex\\_partners\\_country\\_by\\_country#andorra](http://www.ilga-europe.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country#andorra) (last visited Feb. 3, 2010).

<sup>635</sup> *Id.*

<sup>636</sup> *Id.*

<sup>637</sup> *Id.*

<sup>638</sup> *Id.*

<sup>639</sup> *Marriage and Partnership Rights for Same-Sex Partners: Country-by-Country*, IGLA EUROPE, [http://www.ilga-europe.org/europe/issues/lgbt\\_families/marriage\\_and\\_partnership\\_rights\\_for\\_same\\_sex\\_partners\\_country\\_by\\_country#andorra](http://www.ilga-europe.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country#andorra) (last visited Feb. 3, 2010).

<sup>640</sup> Almudena Calatrava, *Gay Marriage in Argentina is 1st in Latin America*, MercuryNews.com, Dec. 28, 2009, [http://www.mercurynews.com/news/ci\\_14082112?nclick\\_check=1](http://www.mercurynews.com/news/ci_14082112?nclick_check=1).

<sup>641</sup> *Id.*

<sup>642</sup> *Civil Unions in Australia*, AUSTRALIAN MARRIAGE EQUALITY, <http://www.australianmarriageequality.com/civilunions.htm> (last visited Feb. 7, 2010).

<sup>643</sup> *Id.*

<sup>644</sup> *Id.*

<sup>645</sup> *Id.*

<sup>646</sup> *Id.*

<sup>647</sup> *Civil Unions in Australia*, AUSTRALIAN MARRIAGE EQUALITY, <http://www.australianmarriageequality.com/civilunions.htm>

			inheritance rights. <sup>648</sup> However, Australian law defines marriage as solely between a man and a woman. <sup>649</sup>	
<b>Austria</b>	No. <sup>651</sup>	Since 2003, the country allows for unregistered cohabitation. <sup>652</sup> This provides very limited rights after a specified period of cohabitation. <sup>653</sup> Beginning Jan. 1, 2010, the country, now, allows for registered partnerships. <sup>654</sup>	The right of unregistered cohabitation was extended following the European Court of Human Rights' 2003 decision in <i>Karner v. Austria</i> , <sup>655</sup> which held that a surviving same-sex partner was allowed to succeed his deceased partner's tenancy. <sup>656</sup>	Court decision <sup>657</sup> and statute <sup>658</sup>

equality.com/civilunions.htm (last visited Feb. 7, 2010).

<sup>650</sup> *Australian Capital Territory, Civil Partnerships Act*, available at <http://www.legislation.act.gov.au/a/2008-14/current/pdf/2008-14.pdf> (last visited Feb. 7, 2010); *Tasmania, Relationships Act 2003*, available at [http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=;doc\\_id=44%2B%2B2003%2BAT%40EN%2B20100208000000;histon=;prompt=;rcc=-1;term=](http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=;doc_id=44%2B%2B2003%2BAT%40EN%2B20100208000000;histon=;prompt=;rcc=-1;term=) (last visited Feb. 7, 2010); *Relationships Act of 2008*, available at [http://www.legislation.vic.gov.au/Domino/Web\\_Notes/LDMS/PubStatbook.nsf/f932b66241ccf1b7ca256e92000c23bc/A7417CE604D359DECA25742C0022EC95/\\$FILE/08-012a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ccf1b7ca256e92000c23bc/A7417CE604D359DECA25742C0022EC95/$FILE/08-012a.pdf) (last visited Feb. 7, 2010).

<sup>648</sup> *City of Sydney Relationship Declaration Information Pack*, CITY OF SYDNEY (Sept. 2005), <http://www.cityofsydney.nsw.gov.au/Community/documents/ServicesAndPrograms/RelationshipsDeclarationProgram/RelationshipsDeclarationProgramInfoPack.pdf>.

<sup>649</sup> *Schedule 1- Amendment of the Marriage Act 1961*, AMENDMENT OF THE MARRIAGE ACT 1961, available at [http://legislation.gov.au/comlaw/Legislation/Act1.nsf/0/91DFFD1199DF26D8CA2574170007CE06/\\$file/1262004.pdf](http://legislation.gov.au/comlaw/Legislation/Act1.nsf/0/91DFFD1199DF26D8CA2574170007CE06/$file/1262004.pdf) (last visited Feb. 7, 2010).

<sup>651</sup> *Marriage and Partnership Rights for Same-Sex Partners: Country-by-Country*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/issues/lgbt\\_families/marriage\\_and\\_partnership\\_rights\\_for\\_same\\_sex\\_partners\\_country\\_by\\_country](http://www.ilga-europe.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country) (last visited Feb. 7, 2010).

<sup>652</sup> *Marriage and Partnership Rights for Same-Sex Partners: Country-by-Country*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/issues/lgbt\\_families/marriage\\_and\\_partnership\\_rights\\_for\\_same\\_sex\\_partners\\_country\\_by\\_country](http://www.ilga-europe.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country) (last visited Feb. 7, 2010).

<sup>653</sup> *Id.*

<sup>654</sup> *Austrian Parliament Adopts Registered Partnership Law for Same-Sex Partners*, ILGA-EUROPE, (Oct. 12, 2009), [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/austria/austrian\\_parliament\\_adopts\\_registered\\_partnership\\_law\\_for\\_same\\_sex\\_partners](http://www.ilga-europe.org/europe/guide/country_by_country/austria/austrian_parliament_adopts_registered_partnership_law_for_same_sex_partners).

<sup>655</sup> *Karner v. Austria*, 40016/98, Eur. Ct. H.R. (2004).

<sup>656</sup> Citing *Karner v. Austria*, *Marriage and Partnership Rights for Same-Sex Partners: Country-by-Country*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/issues/lgbt\\_families/marriage\\_and\\_partnership\\_rights\\_for\\_same\\_sex\\_partners\\_country\\_by\\_country](http://www.ilga-europe.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country) (last visited Feb. 7, 2010).

<sup>657</sup> *Karner v. Austria*, 40016/98, Eur. Ct. H.R. (2004).

<sup>658</sup> *Id.*

<b>Belgium</b>	Ycs. <sup>659</sup>	Ycs. Prior to the passage of same-sex marriage in 2003, a registered cohabitation law gave couple some rights.	Same-sex marriage was first allowed in 2003, giving homosexual couples the same tax and inheritance rights as heterosexual couples. <sup>660</sup> Adoption rights were added in 2006. <sup>661</sup>	Statute <sup>662</sup>
<b>Brazil</b>	No. <sup>663</sup>	The state of Rio Grande do Sul allows civil unions. <sup>664</sup>		Court decision <sup>665</sup>
<b>Bulgaria</b>	No. <sup>666</sup>	No. <sup>667</sup>		
<b>Cambodia</b>	No. <sup>668</sup>	No. <sup>669</sup>		
<b>Canada</b>	Ycs. <sup>670</sup>	N/A.	Same-sex marriage gradually became legal through a series of court cases beginning in 2003. <sup>671</sup> In 2005, the Canadian Parliament passed legislation making same-sex marriage legal nationwide. <sup>672</sup> The Canadian Supreme Court had upheld that legislation as within the authority of Parliament and consistent with the Canadian Charter of Rights and Freedoms. <sup>673</sup>	Court decisions and statute <sup>674</sup>

<sup>659</sup> *Marriage and Partnership Rights for Same-Sex Partners: Country-by-Country*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/issues/lgbt\\_families/marriage\\_and\\_partnership\\_rights\\_for\\_same\\_sex\\_partners\\_country\\_by\\_country](http://www.ilga-europe.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country) (last visited Feb. 7, 2010).

<sup>660</sup> PEW FORUM, SAME-SEX MARRIAGE: REDEFINING MARRIAGE, *supra* note 366, at 40.

<sup>661</sup> *Id.*

<sup>662</sup> *Id.*

<sup>663</sup> *Brazilian Go-Ahead for Gay Unions*, BBC NEWS (Mar. 5, 2004), <http://news.bbc.co.uk/2/hi/americas/3534959.stm>.

<sup>664</sup> PEW FORUM, GAY MARRIAGE AROUND THE WORLD, *supra* note 377, at 42.

<sup>665</sup> *Id.*

<sup>666</sup> *Marriage and Partnership Rights for Same-Sex Partners: Country-by-Country*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/advocacy\\_lobbying/lgbt\\_families/marriage\\_and\\_partnership\\_rights\\_for\\_same\\_sex\\_partners\\_country\\_by\\_country#bulgaria](http://www.ilga-europe.org/europe/advocacy_lobbying/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country#bulgaria) (last visited Feb. 8, 2010).

<sup>667</sup> *Id.*

<sup>668</sup> The Cambodian king did informally express support for gay marriage in 2004. *Cambodian King Backs Gay Marriage*, BBC NEWS, Feb. 20, 2004, <http://news.bbc.co.uk/2/hi/asia-pacific/3505915.stm>.

<sup>669</sup> *Id.*

<sup>670</sup> PEW FORUM, SAME-SEX MARRIAGE: REDEFINING MARRIAGE, *supra* note 366, at 40.

<sup>671</sup> *Id.*

<sup>672</sup> *Id.*

<sup>673</sup> *Re: Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698 (Can.).

China	No. <sup>675</sup>	No. <sup>676</sup>		Statute <sup>677</sup>
Colombia <sup>678</sup>	No. <sup>679</sup>	In a 2009 ruling, Colombia's Constitutional Court ruled that same-sex partners must receive the same rights as those in heterosexual common-law marriages. <sup>680</sup>	The rights granted to same-sex couples include housing protections, rights to benefits, including social security and certain subsidies, and rights for same-sex partners of crime victims. <sup>681</sup>	Court ruling <sup>682</sup>
Denmark	No. <sup>683</sup>	Denmark allows for registered partnerships that provide limited rights. <sup>684</sup>	Adoption rights are limited, but same-sex partners may adopt each other's children. <sup>685</sup>	Statute <sup>686</sup>
Dominican Republic	No. <sup>687</sup>			
Ecuador	No. <sup>688</sup>	Civil unions <sup>689</sup>	Note that adoption of children is not	Constitution <sup>691</sup>

<sup>674</sup> PEW FORUM, SAME-SEX MARRIAGE: REDEFINING MARRIAGE, *supra* note 366, at 40.

<sup>675</sup> Huang Zhiling & Zhang Ao, *In a 'First,' Gay Couple Tie the Knot in China*, CHINA DAILY, Jan. 13, 2010, available at [http://www.chinadaily.com.cn/regional/2010-01/13/content\\_9314498.htm](http://www.chinadaily.com.cn/regional/2010-01/13/content_9314498.htm).

<sup>676</sup> Although such marriages are not legally recognized in China, two men recently publicly wed, which was described as a first by the Chinese media. Huang Zhiling & Zhang Ao, *In a 'First,' Gay Couple Tie the Knot in China*, CHINA DAILY, Jan. 13, 2010, available at [http://www.chinadaily.com.cn/regional/2010-01/13/content\\_9314498.htm](http://www.chinadaily.com.cn/regional/2010-01/13/content_9314498.htm).

<sup>677</sup> China's law recognizes only marriage between opposite-sex couples. Marriage Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong, Sept. 10<sup>th</sup>, 1980, effective Jan. 1, 1981) available at <http://www.lawinfochina.com>.

<sup>678</sup> Press Release, Colombia Diversa, Colombia's Constitutional Court Rules for Equality, (Jan. 28, 2009), <http://www.colombiadiversa.org/dmdocuments/COLOMBIAN%20CONSTITUTIONAL2.pdf>.

<sup>679</sup> *Id.*

<sup>680</sup> *Id.*

<sup>681</sup> *Id.*

<sup>682</sup> *Id.*

<sup>683</sup> *Country-by-Country: Denmark*, ILGA EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/Denmark](http://www.ilga-europe.org/europe/guide/country_by_country/Denmark) (last visited Feb. 11, 2010).

<sup>684</sup> *Id.*

<sup>685</sup> *Id.*

<sup>686</sup> Marriage Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong, Sept. 10, 1980, effective Jan. 1, 1981) available at <http://www.lawinfochina.com>.

<sup>687</sup> *Dominican Lawmakers Reject Legalization of Same-Sex 'Marriage'*, CATHOLIC NEWS AGENCY, June 12, 2009, [http://www.catholicnewsagency.com/news/dominican\\_lawmakers\\_reject\\_legalization\\_of\\_samesex\\_marriage/](http://www.catholicnewsagency.com/news/dominican_lawmakers_reject_legalization_of_samesex_marriage/).

<sup>688</sup> CONSTITUCIONES [CONSTITUTION] DE 2008 Oct. 7, 2008 [hereinafter CONSTITUCIONES [CONSTITUTION] DE 2008], art. 67, available at Georgetown Political Database of the Americas, <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador08.html>.

			permitted by same sex couples. <sup>690</sup>	
<b>England/ Wales/ Scotland/ Northern Ireland</b>	No. <sup>692</sup>	Civil unions <sup>693</sup>	The law gives same-sex partners rights in regard to occupancy of the family home, tax and employment benefits, child support, recognition under intestacy rules, and the ability to apply for parental responsibility of civil partners' children. <sup>694</sup>	Statute <sup>695</sup>
<b>Estonia</b>	No. <sup>696</sup>	No. <sup>697</sup>		
<b>France</b>	No. <sup>698</sup>	France does not recognize same-sex unions from other countries. <sup>699</sup>		
<b>Germany</b>	No. <sup>700</sup>	Registered partnerships provide limited rights. <sup>701</sup>	Germany's constitutional court has upheld the Lifetime Partnership Act, passed in 2001. <sup>702</sup> The act allows same-sex partners to share property, obligates them to support one another, gives them visitation rights to children raised in the partners' home, and gives them standing with respect to the estate of a deceased partner. <sup>703</sup>	Statute <sup>704</sup>

<sup>689</sup> Joshua Partlow & Stephan Kuffner, *Ecuadorans Approve Constitution*, WASH. POST, Sept. 29, 2008, at A14; see also CONSTITUCIONES [CONSTITUTION] DE 2008, *supra* note 688, at arts. 67-68 (establishing that marriage is between a man and a woman but providing recognitions and protections for diverse familial structures including civil unions).

<sup>691</sup> *Id.*

<sup>690</sup> CONSTITUCIONES [CONSTITUTION] DE 2008, *supra* note 688, at Art. 68.

<sup>692</sup> Civil Partnership Act of 2004, 2004, c. 33, sched. 24 (U.K.) available at [http://www.opsi.gov.uk/acts/acts2004/ukpga\\_20040033\\_en\\_1](http://www.opsi.gov.uk/acts/acts2004/ukpga_20040033_en_1).

<sup>693</sup> *Id.*

<sup>694</sup> *Id.*

<sup>695</sup> *Id.*

<sup>696</sup> *Country-by-Country: Estonia*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/Estonia](http://www.ilga-europe.org/europe/guide/country_by_country/Estonia) (last visited Feb. 12, 2010).

<sup>697</sup> *Id.*

<sup>698</sup> PEW FORUM, GAY MARRIAGE AROUND THE WORLD, *supra* note 377.

<sup>699</sup> *Id.*

<sup>700</sup> *Country-by-Country: Germany*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/germany](http://www.ilga-europe.org/europe/guide/country_by_country/germany) (last visited Feb. 12, 2010).

<sup>701</sup> *Id.*

<sup>702</sup> Russell Miller & Volker Röben, *Constitutional Court upholds Lifetime Partnership Act*, 3 German L.J. 8 (2002), available at <http://www.germanlawjournal.com/article.php?id=176>.

<sup>703</sup> *Id.*

<sup>704</sup> *Id.*

<b>Greece</b>	No. <sup>705</sup>	No. <sup>706</sup>		
<b>Honduras</b>	No. <sup>707</sup>	No. A constitutional amendment bans marriage and adoption for same-sex couples. <sup>708</sup>		Constitutional Amendment <sup>709</sup>
<b>Hungary</b>	No. <sup>710</sup>	Registered partnerships <sup>711</sup>	Registered partners are entitled to many of the same rights as married couples, but not the right to take their partners' names, adopt children or participate in assisted reproduction methods. <sup>712</sup>	Statute <sup>713</sup>
<b>India</b>	No. <sup>714</sup>	No. <sup>715</sup>		
<b>Ireland</b>	No.	In July, 2010, the Irish parliament passed the Civil Partnership Bill, which is expected to be signed into law before the start of 2011. <sup>716</sup>		
<b>Italy</b>	No. <sup>717</sup>	No. <sup>718</sup>		

<sup>705</sup> *Country-by-Country: Greece*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/Greece](http://www.ilga-europe.org/europe/guide/country_by_country/Greece) (last visited Feb. 12, 2010).

<sup>706</sup> *Id.*

<sup>707</sup> GLOBAL RIGHTS & UNIVERSITY OF VIRGINIA INTERNATIONAL HUMAN RIGHTS LAW CLINIC, VIOLATIONS OF THE RIGHTS OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER PERSONS IN HONDURAS, (2006), 13, [http://www.globalrights.org/site/DocServer/Shadow\\_Report\\_Honduras.pdf?docID=9964](http://www.globalrights.org/site/DocServer/Shadow_Report_Honduras.pdf?docID=9964).

<sup>708</sup> *Id.*

<sup>709</sup> *Id.*

<sup>710</sup> ILGA-EUROPE, *Hungary Introduces Registered Partnership for Same-Sex Partners*, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/hungary/hungary\\_introduces\\_registered\\_partnership\\_for\\_same\\_sex\\_partners](http://www.ilga-europe.org/europe/guide/country_by_country/hungary/hungary_introduces_registered_partnership_for_same_sex_partners) (last visited Feb. 12, 2010).

<sup>711</sup> Russell Miller & Volker Röben, *Constitutional Court upholds Lifetime Partnership Act*, 3 German L.J. 8 (2002), available at <http://www.germanlawjournal.com/article.php?id=176>.

<sup>712</sup> *Id.*

<sup>713</sup> *Id.*

<sup>714</sup> ILGA-ASIA, *India Country Survey*, <http://ilga.org/ilga/cn/countries/INDIA/Law> (last visited Feb. 12, 2010).

<sup>715</sup> *Id.*

<sup>716</sup> See Carl O'Brien, *Dáil passes Civil Partnership Bill*, IRISH TIMES, July 2, 2010, <http://www.irishtimes.com/newspaper/breaking/2010/0702/breaking4.html?via=mr> The text of the bill is available here. House of the Oireachtas, Civil Partnership Bill 2009, [www.oireachtas.ie/documents/bills28/bills/2009/4409/b4409d.pdf](http://www.oireachtas.ie/documents/bills28/bills/2009/4409/b4409d.pdf) (last visited Feb. 18, 2010).

<sup>717</sup> *Country-by-Country: Italy*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/Italy](http://www.ilga-europe.org/europe/guide/country_by_country/Italy) (last visited Feb. 12, 2010).

<b>Japan</b>	No. <sup>719</sup>	Japan does recognize same-sex unions from other countries. <sup>720</sup>		
<b>Latvia</b>	No. <sup>721</sup>	No. <sup>722</sup>	Marriage between persons of the same sex is banned by both the Civil Code and a 2005 amendment to the Constitution. <sup>723</sup>	Constitutional Amendment, statute. <sup>724</sup>
<b>Liechtenstein</b>	No. <sup>725</sup>	No protections of same-sex couples, or attempts by same-sex couples to adopt. <sup>726</sup>		
<b>Lithuania</b>	No. <sup>727</sup>	No protections of same-sex couples, or attempts by same-sex couples to adopt. <sup>728729</sup>		
<b>Mexico</b>	No. <sup>730</sup>	Mexico City <sup>731</sup> and Coahuila <sup>732</sup> allow civil unions; Mexico City	Mexico City's civil union law did not allow for adoption, social security benefits, or joint loans for same-sex couples, but the newly passed marriage	Statute. <sup>736</sup>

<sup>718</sup> *Id.*

<sup>719</sup> PEW FORUM, GAY MARRIAGE AROUND THE WORLD, *supra* note 377.

<sup>720</sup> *Id.*

<sup>721</sup> *Country-by-Country: Latvia*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/latvia](http://www.ilga-europe.org/europe/guide/country_by_country/latvia) (last visited Feb. 12, 2010).

<sup>722</sup> *Id.*

<sup>723</sup> *Id.*

<sup>724</sup> *Id.*

<sup>725</sup> *Country-by-Country: Liechtenstein*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/liechtenstein](http://www.ilga-europe.org/europe/guide/country_by_country/liechtenstein) (last visited Feb. 12, 2010).

<sup>726</sup> House of the Oireachtas, Civil Partnership Bill 2009, [www.oireachtas.ie/documents/bills28/bills/2009/4409/b4409d.pdf](http://www.oireachtas.ie/documents/bills28/bills/2009/4409/b4409d.pdf) (last visited Feb. 18, 2010).

<sup>727</sup> *Country-by-Country: Lithuania*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/lithuania](http://www.ilga-europe.org/europe/guide/country_by_country/lithuania) (last visited Feb. 12, 2010).

<sup>728</sup> House of the Oireachtas, Civil Partnership Bill 2009, [www.oireachtas.ie/documents/bills28/bills/2009/4409/b4409d.pdf](http://www.oireachtas.ie/documents/bills28/bills/2009/4409/b4409d.pdf) (last visited Feb. 18, 2010).

<sup>729</sup> *Id.*

<sup>730</sup> Elisabeth Malkin, *Same-Sex Marriage Puts Mexico City at the Center of Rights Debate*, N.Y. TIMES, Feb. 7, 2010, at A10.

<sup>731</sup> *Mexico City Embraces Gay Unions*, BBC NEWS, Mar. 17, 2007, <http://news.bbc.co.uk/2/hi/6461159.stm>.

<sup>732</sup> *Id.*

		allowed gay marriage beginning in March 2010. <sup>733</sup>	law docs. <sup>734</sup> Mexico's Supreme Court upheld this law and also required that same-sex marriages entered into in the capital be recognized throughout the country. <sup>735</sup>	
<b>Moldova</b>	No. <sup>737</sup>	No. <sup>738</sup>		
<b>Montenegro</b>	No. <sup>739</sup>	No. <sup>740</sup>		
<b>Nepal</b>	Yes, although a court decision <sup>741</sup> implementing that right had not yet been enacted as of September 2010. <sup>742</sup>			Court decision, constitutional amendment pending. <sup>743</sup>
<b>Netherlands</b>	Yes. <sup>744</sup>	Same-sex couples may marry or enter into a registered partnership. The country also provides registered cohabitating	First country to legalize same-sex marriage. <sup>746</sup> Partners may jointly adopt children; artificial insemination is available for lesbian couples. <sup>747</sup>	Statute. <sup>748</sup>

<sup>736</sup> *Id.*

<sup>733</sup> Elisabeth Malkin, *Same-Sex Marriage Puts Mexico City at the Center of Rights Debate*, N.Y. TIMES, Feb. 7, 2010, at A10.

<sup>734</sup> Gutierrez, *Mexico City Allows Gay Marriage with Landmark Law*, *supra* note 372.

<sup>735</sup> *Latin America Ahead of US on Same-sex Marriage*, LOS ANGELES TIMES, August 13, 2010, <http://articles.latimes.com/2010/aug/13/opinion/la-cd-mexico-20100813>.

<sup>737</sup> *Country-by-Country: Moldova*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/moldova](http://www.ilga-europe.org/europe/guide/country_by_country/moldova) (last visited Sep. 17, 2010).

<sup>738</sup> *Id.*

<sup>739</sup> *Country-by-Country: Montenegro*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/montenegro](http://www.ilga-europe.org/europe/guide/country_by_country/montenegro) (last visited Sep. 18, 2010).

<sup>740</sup> *Id.*

<sup>741</sup> Nepal's Supreme Court in 2008 ordered the government to enact legislation allowing for same-sex marriage. *Nepal SC approves same-sex marriage*, HINDUSTAN TIMES, Nov. 19, 2008, <http://www.hindustantimes.com/News-Feed/nepal/Nepal-SC-approves-same-sex-marriage/Article1-352722.aspx>.

<sup>742</sup> Dean Nelson, *Nepal 'to Stage Gay Weddings on Everest'*, TELGRAPH.CO.UK, Jan. 19, 2010, <http://www.telegraph.co.uk/news/worldnews/asia/nepal/7027736/Nepal-to-stage-gay-weddings-on-Everest.html>. There have also been some reports that there might be delays. See Timothy Kincaid, *Nepal's Marriage Equality Delayed*, Box Turtle Bulletin, May 31, 2010, [http://www.boxturtlebulletin.com/2010/05/31/23131?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+BoxTurtleBulletin+%28Box+Turtle+Bulletin%29](http://www.boxturtlebulletin.com/2010/05/31/23131?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+BoxTurtleBulletin+%28Box+Turtle+Bulletin%29).

<sup>743</sup> *Id.*

<sup>744</sup> *Country-by-Country: The Netherlands*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/the\\_netherlands](http://www.ilga-europe.org/europe/guide/country_by_country/the_netherlands) (last visited Feb. 21, 2010) [hereinafter *Country-by-Country: The Netherlands*].



		partners with limited rights. <sup>745</sup>		
Norway	Yes. <sup>749</sup>	Same-sex couples can marry; registered cohabitating couples also have limited rights. <sup>750</sup>	Same-sex couples may jointly adopt children; artificial insemination is available for lesbian couples. <sup>751</sup>	Statute. <sup>752</sup>
Poland	No. <sup>753</sup>	No. <sup>754</sup>		
Romania	No. <sup>755</sup>	No. <sup>756</sup>	Statute prohibits recognition of same-sex marriage or partnerships, as well as adoption by same-sex couples. <sup>757</sup>	Statute. <sup>758</sup>
Russia	No. <sup>759</sup>	No. <sup>760</sup>		
Serbia	No. <sup>761</sup>	No. <sup>762</sup>		
Slovakia	No. <sup>763</sup>	No. <sup>764</sup>		

<sup>746</sup> PEW FORUM, SAME-SEX MARRIAGE: REDEFINING MARRIAGE, *supra* note 366.

<sup>747</sup> *Country-by-Country: The Netherlands*, *supra* note 744.

<sup>748</sup> PEW FORUM, SAME-SEX MARRIAGE: REDEFINING MARRIAGE, *supra* note 366.

<sup>745</sup> *Id.*

<sup>749</sup> *Country-by-Country: Norway*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/norway](http://www.ilga-europe.org/europe/guide/country_by_country/norway) (last visited Feb. 21, 2010).

<sup>750</sup> *Id.*

<sup>751</sup> *Id.*

<sup>752</sup> Norway's marriage law is available here: information from the Government and the Ministries, The Marriage Act, <http://www.regjeringen.no/en/doc/Laws/Acts/the-marriage-act.html?id=448401> (last visited Feb. 21, 2010).

<sup>753</sup> *Country-by-Country: Poland*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/poland](http://www.ilga-europe.org/europe/guide/country_by_country/poland) (last visited Feb. 21, 2010).

<sup>754</sup> *Id.*

<sup>755</sup> *Country-by-Country: Romania*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/romania](http://www.ilga-europe.org/europe/guide/country_by_country/romania) (last visited Feb. 21, 2010).

<sup>756</sup> *Id.*

<sup>757</sup> *Romania: Discriminatory Partnership and Adoption Provisions in New Civil Code*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/romania/romania\\_discriminatory\\_partnership\\_and\\_adoption\\_provisions\\_in\\_new\\_civil\\_code](http://www.ilga-europe.org/europe/guide/country_by_country/romania/romania_discriminatory_partnership_and_adoption_provisions_in_new_civil_code) (last visited Feb. 21, 2010).

<sup>758</sup> *Id.*

<sup>759</sup> *Country-by-Country: Russia*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/russia](http://www.ilga-europe.org/europe/guide/country_by_country/russia) (last visited Feb. 21, 2010).

<sup>760</sup> *Id.*

<sup>761</sup> *Country-by-Country: Serbia*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/serbia](http://www.ilga-europe.org/europe/guide/country_by_country/serbia) (last visited Feb. 21, 2010).

<sup>762</sup> *Id.*

<sup>763</sup> *Country-by-Country: Slovakia*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_](http://www.ilga-europe.org/europe/guide/country_)

<b>South Africa</b>	Yes. <sup>765</sup>		Parliament legalized same-sex marriage in November 2006 after South Africa's highest court found that the country's marriage laws violated the constitutional guarantee of equal rights. <sup>766</sup>	Statute, following court ruling. <sup>767</sup>
<b>Spain</b>	Yes. <sup>768</sup>		Same-sex couples may adopt children; artificial insemination is available for lesbian couples. <sup>769</sup>	
<b>Sweden</b>	Yes. <sup>770</sup>			Statute. <sup>771</sup>
<b>Uganda</b>	No. <sup>772</sup>	No. <sup>773</sup>		
<b>Ukraine</b>	No. <sup>774</sup>	No. <sup>775</sup>		
<b>Uruguay</b>	No. <sup>776</sup>	Yes. <sup>777</sup>	Same-sex couples may adopt children. <sup>778</sup>	

by\_country/slovakia (last visited Feb. 21, 2010).

<sup>764</sup> *Id.*

<sup>765</sup> PEW FORUM, SAME-SEX MARRIAGE: REDEFINING MARRIAGE, *supra* note 366.

<sup>766</sup> *Id.*

<sup>767</sup> *Id.* The South African statute is available on the website of the country's government: South African Government Information, Government Gazette, *supra* note 366.

<sup>768</sup> *Country-by-Country: Spain*, *supra* note 364.

<sup>769</sup> *Id.*

<sup>770</sup> Nyberg, *Sweden Passes Same-Sex Marriage Law*, *supra* note 361.

<sup>771</sup> Swedish government website, <http://www.sweden.gov.se/sb/d/574/a/125584> (last visited Feb. 21, 2010).

<sup>772</sup> PEW FORUM, SAME-SEX MARRIAGE: REDEFINING MARRIAGE, *supra* note 366.

<sup>773</sup> *Id.*

<sup>774</sup> *Country-by-Country: Ukraine*, ILGA-EUROPE, [http://www.ilga-europe.org/europe/guide/country\\_by\\_country/ukraine](http://www.ilga-europe.org/europe/guide/country_by_country/ukraine) (last visited Feb. 21, 2010).

<sup>775</sup> *Id.*

<sup>776</sup> Gutierrez, *Mexico City Allows Gay Marriage with Landmark Law*, *supra* note 372.

<sup>777</sup> *Id.*

<sup>778</sup> *Id.*

