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THE DEBATE OVER THE DENIAL OF MARRIAGE RIGHTS
AND BENEFITS TO SAME-SEX COUPLES AND THEIR CHILDREN

LIZ SEATON

[G]ay and lesbian Americans across the Nation ... are looking to the Senate today to see whether this body is going to brand them as inferiors in our society. Those who vote against cloture recognize the fullness of their worth and their citizenship. I will not vote to diminish other Americans in the Constitution. - Sen. Patrick Leahy (D-Vt.), Senate Floor Debate on the so-called Federal Marriage Amendment, July 14, 2004

A constitutional amendment to prohibit gay marriage ... will deny ... millions of Americans equal rights. ... This great Constitution of ours should never be used to make a group of Americans permanent second-class citizens. ... This constitutional amendment is an attempt to appeal to our prejudice instead of to our compassion, to our hatreds instead of to our hopes, to our fears instead of our dreams. - Sen. Barbara Boxer (D-Cal.), Senate Floor Debate, July 13, 2004

I know ... that many of the opponents of the amendment believe it is purposely divisive, discriminatory and intended to deny some Americans their right to the pursuit of happiness. - Sen. John McCain (R-Ariz.), Senate Floor Debate, July 13, 2004

On February 12, 2004, San Francisco, California became the first jurisdiction in the United States to marry same-sex couples. San

* M.A., American University, 1990; J.D., American University, 1994. The author currently serves as Senior Counsel with the Human Rights Campaign (HRC). I dedicate this article to Patricia Evans, the love of my life and our daughter Janette Ryan, who deserves the same protections under the law as any other child. Thanks are due to HRC Law Fellows Jennifer Wood, Christopher Dolan and Jonah Knobler, HRC Legal Assistant Bradley Jacklin, and HRC Legislative Lawyer Rodney M. Hunter for research assistance for this article.

Francisco Mayor Gavin Newsom ordered the issuance of marriage licenses, stating that state statutes prohibiting same-sex couples from marrying or having their marriages recognized violated the equal protection mandate of the state constitution.[^5][^6] The first to marry were Del Martin and Phyllis Lyon, a lesbian couple who live in San Francisco and have been together in a loving relationship for fifty-one years.[^7] Hundreds of devoted couples lined up to marry, which required the clerk's office to begin handing out numbers.[^8] Due to the

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[^6]: California's due process and equal protection guarantees are found in Article I, Section 7 of the California Constitution which reads, in relevant part: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws ...." CAL. CONST. art. I, § 7(a); "A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked ...." CAL. CONST. art. I, § 7(b). Article I, Section 8 of the California Constitution also contains an anti-discrimination guarantee: "A person may not be disqualified from entering or pursuing a business, profession, vocations, or employment because of sex, race, creed, color, or national or ethnic origin." CAL. CONST. art. I, § 8.

[^7]: California has at least three code provisions that attempt to prevent same-sex couples from marrying or having their marriages recognized or validated in or by California. These statutory provisions constitute sex-based discrimination and sexual orientation discrimination because the marriage licenses would be issued to a same-sex couple but for the fact that one of the partners is not of the other sex. For example, the statutory definition of marriage is written to include only opposite-sex couples:

> Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone does not constitute marriage. Consent must be followed by the issuance of a license and solemnization as authorized by this division, except as provided by Section 425 and Part 4 (commencing with Section 500).

CAL. FAM. CODE § 300 (West 1994).

The statutory language about who may consent to marry and consummate a marriage in California is also written to include only different-sex couples. "An unmarried male of the age of 18 years or older, and an unmarried female of the age of 18 years of older, and not otherwise disqualified, are capable of consenting to and consummating marriage." CAL. FAM. CODE § 301 (West 1994).

California's Proposition 22, a voter initiative on marriage between same-sex couples passed on March 7, 2000, provides that "[o]nly marriage between a man and a woman is valid or recognized in California." See CAL. FAM. CODE § 308.5 (West Supp. 2004). Some attorneys believe that Proposition 22 applies only to marriages between same-sex couples performed out of state, since it amended the family code section dealing with marriages from other jurisdictions rather than the code section that defines who may marry in the state, and did not attempt to define who may marry in California.

[^7]: Anne Hull, *Just Married, After 51 Years Together*, WASH. POST, Feb. 29, 2004, at A1. Del and Phyllis have lived in their home in San Francisco for over twenty-five years. *Id.*

enormous response, city staff volunteered their time to keep the marriage office open over the long Presidents’ Day weekend. Within six days, more than 2,400 same-sex couples received marriage licenses and married.

Activist opponents of marriage rights for same-sex couples, such as anti-gay groups like the Alliance Defense Fund, founded by Focus on the Family, and the Campaign for California Families, filed for injunctions in two trial courts and at the California Supreme Court to stop the weddings. However, the trial courts initially refused to issue such orders, stating that the issue of whether city officials could defy state laws first had to be resolved. One trial court judge said that the anti-gay petitioners had failed to demonstrate any “imminent, irreparable harm” to themselves or to anyone from the issuance of the licenses. A few days later, the City of San Francisco filed suit against the state of California to assert the unconstitutionality of the state’s marriage statutes, citing both equal protection and due process arguments in favor of marriage equality for same-sex couples. However, on March 11, 2004, one month to the day after San Francisco began issuing marriage licenses to same-sex couples, the California Supreme Court temporarily halted the practice, ruling that it needed to review whether San Francisco had the authority to issue the marriage licenses under state law.

10. Id.
11. “Anti-gay” describes people who invest considerable time, energy, and resources to oppose equality under the law for gay, lesbian, bisexual and transgender people at every level. For example, Campaign for California Families, Traditional Values Coalition, and Maryland Family Values Alliance oppose not only marriage for same-sex couples, but all forms of legal equality, such as domestic partnership benefits, same-sex parental rights and employment anti-discrimination legislation.
14. Id.
The recent developments in San Francisco and elsewhere in the nation have placed the issue of marriage between same-sex couples at the heart of public debate. The purpose of this article is to provide a snapshot of the key aspects of the debate over marriage equality for same-sex couples, to outline the main reasons why marriage rights should be extended to same-sex couples and their children, and to expose the fallacies underlying opponents’ arguments against marriage for same-sex couples. Part I of this article will review recent developments, including those in San Francisco, that have created limited opportunities for same-sex couples to marry in the United States. Part II will assess the kinds of benefits of marriage that are denied to same-sex couples and their children when same-sex couples cannot marry or have their marriages recognized, and the impact of that denial on individual couples and families. Part III examines the legal barriers that have been, or are being, erected to deny marriage equality to same-sex couples. Part IV exposes the fallacies underlying two of the rationales used to justify the denial of marriage equality to same-sex couples - religion and the “best interest of the child.” This Part explains that the First Amendment to the Constitution already protects religious officiants from having to marry same-sex couples and protects individuals’ rights to share their religious viewpoints on marriage for same-sex couples. It also exposes the mischaracterization of anti-gay activists’ reliance on arguments about the best interests of children by showing that mainstream child welfare organizations, that have reviewed the available relevant scientific research, support lesbian and gay parenting. This article concludes that the discriminatory denial of marriage to same-sex couples harms both the couples and their children, and denies them the rights and benefits necessary to build strong, healthy families. For these reasons, discriminatory laws in the United States that deny marriage to same-sex couples need to be eliminated.

I. SAME-SEX COUPLES MARRYING: RECENT DEVELOPMENTS

Within days of San Francisco’s issuance of marriage licenses, local officials in several other jurisdictions began marrying same-sex couples. On February 20, 2004, County Clerk Victoria Dunlap authorized the issuance of marriage licenses to same-sex couples in

Sandoval County, New Mexico. That same day, New Mexico’s attorney general, Patricia A. Madrid, issued an advisory opinion that reviewed the current state of New Mexico’s marriage laws and stated, “[u]ntil the laws are changed through the legislative process or declared unconstitutional by the judicial process, the statutes limit marriage in New Mexico to a man and a woman. Thus, in my judgment, no county clerk should issue a marriage license to same sex couples because those licenses would be invalid under current law.”

On March 23, 2004 Madrid’s office was granted a restraining order against Sandoval County, restricting the county clerk from issuing any more marriage licenses to same-sex couples.

Approximately one week after the Sandoval County licenses were issued, Mayor Jason West of New Paltz, New York authorized the issuance of marriage licenses to same-sex couples and, with hundreds watching, performed the state’s first marriage of a same-sex couple for Billiam van Roestenberg and Jeffrey McGowan.

Mayor West subsequently faced criminal charges for his authorization and performance of marriages for same-sex couples, as did two Unitarian ministers who also began marrying same-sex couples.

Likewise, the first marriage license in Asbury Park, New Jersey was issued to a same-sex couple, Louis Navarrete and his


partner Ric Best, who married at City Hall on March 8, 2004.\textsuperscript{23} On March 10, 2004, the City Council of Asbury Park voted 5-0 to stop accepting marriage license applications from same-sex couples, but to file a lawsuit asking a court to rule on the issue instead.\textsuperscript{24} A marriage equality lawsuit filed by Lambda Legal on behalf of seven same-sex couples and based on the New Jersey Constitution has been working its way through the state courts for a few years.\textsuperscript{25} The basis for this suit is equal protection of the law and the right to privacy.\textsuperscript{26} On April 20, 2004, an Oregon Circuit Court Judge found that a state law prohibiting same-sex couples from marrying violated the state’s equal protection guarantees.\textsuperscript{27} The judge ordered that 3,000 same sex marriages be recognized and directed the legislature to remedy the discrimination within ninety days of the next legislative session.\textsuperscript{28} When the lawsuit was originally filed on March 24, 2004, Multnomah County was the only jurisdiction in the country where gays and lesbians could legally obtain marriage licenses.\textsuperscript{29} Benton County, Oregon, was poised to follow Multnomah County’s lead and begin issuing marriage licenses in late March.\textsuperscript{30} However, under pressure from the state’s attorney general, the county commissioners decided to stop issuing marriage licenses to anyone - even heterosexual couples - until the Oregon Supreme Court rules on the legality of marriages between same-sex couples in Oregon.\textsuperscript{31} As of the time of this publication, Benton County has not lifted its ban on issuing marriage licenses.\textsuperscript{32}

\textsuperscript{23} Jeffrey Gold, Associated Press, \textit{Asbury Park Votes to Stop Taking Marriage License Applications from Gay Couples} (Mar. 10, 2004), WESTLAW, Factiva, Dow Jones & Reuters.

\textsuperscript{24} \textit{Id.}


\textsuperscript{26} \textit{Id.}


\textsuperscript{28} \textit{Id.}


\textsuperscript{31} \textit{Id.}

\textsuperscript{32} BENTON COUNTY, OREGON RECORDS & LICENSES OFFICE, MARRIAGE LICENSE INFORMATION, at http://www.co.benton.or.us/records/marriage.htm (last visited June 23, 2004) (on file with MARGINS: Maryland’s Law Journal on Race, Religion, Gender and Class).
These occurrences were not the first marriage opportunities for same-sex couples in the United States. For over six months, same-sex couples were traveling from the United States to Canada in order to receive marriage licenses. Advocates, ably led by the Canadian advocacy group Egale Canada, were working on marriage equality in Canada for years, province by province. On June 10, 2003, the three-judge per curiam panel in Ontario in *Halpern v. Toronto (City)* ruled that the Canadian law limiting marriage to heterosexuals violated Sec. 15(1) of the 1982 Charter of Rights and Freedoms, a part of the Canadian Constitution. The court stated that “the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage.” The court rewrote the common law definition of marriage to state “the voluntary union for life of two persons to the exclusion of all others.”

The province’s marriage license clerks in Toronto and other localities in Ontario immediately began issuing marriage licenses to same-sex couples. Canadian marriage law, which is national, does not have strict residency or citizenship requirements. As a result, same-sex couples from the United States were eligible to marry in Ontario, and they began to cross the border into the province to

33. Egale Canada is a national organization working towards the advancement of equality and justice for gay, lesbian, bisexual and transgender people and their families.

34. [2003] 172 O.A.C. 276 (Can.).

35. *Id.* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15(1) (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”).

36. [2003] 172 O.A.C. 276 (Conclusion) (Can.).

37. *Id.* (Disposition). The previous common law definition of marriages was “the voluntary union for life of one man and one woman to the exclusion of all others.” *Id.* (Conclusion).


39. For example, there are no residency or citizenship requirements in Ontario. See *CITY OF TORONTO CITY CLERK’S DIVISION, MARRIAGE LICENSE REQUIREMENTS*, at http://www.city.toronto.on.ca/depts/legserv_marriage.htm (last visited July 25, 2004). British Columbia also does not have residency of citizenship requirements. See *BRITISH COLUMBIA VITAL STATISTICS AGENCY, HOW TO GET MARRIED IN BRITISH COLUMBIA*, at http://www.vs.gov.bc.ca/marriage/howto.html (last visited July 25, 2004). When the Netherlands in 2001, and then Belgium in 2003, began permitting same-sex couples to marry, both countries had strict residency or citizenship requirements. On Feb. 6, 2004, the Netherlands eliminated those requirements. For an overview on “Rights Conferred on Same-Sex Partners Worldwide” see http://www.iglhr.org (last visited July 25, 2004).
The British Columbia Court of Appeal issued a ruling similar to that of the Ontario Court on July 8, 2003, and Québec began to offer legal marriage to same-sex couples on March 19, 2004.

Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes

WHEREAS marriage is a fundamental institution in Canadian society and the Parliament of Canada has a responsibility to support that institution because it strengthens commitment in relationships and represents the foundation of family life for many Canadians;

WHEREAS, in order to reflect values of tolerance, respect and equality consistent with the Canadian Charter of Rights and Freedoms, access to marriage for civil purposes should be extended to couples of the same sex;

AND WHEREAS everyone has the freedom of conscience and religion under the Canadian Charter of Rights and Freedoms and officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.


A similar court ruling soon followed in the United States. Within a few months of the Ontario and British Columbia decisions, the Supreme Judicial Court of Massachusetts ruled in *Goodridge v. Department of Public Health*[^43] that the Massachusetts State Constitution mandated marriage equality for same-sex couples.[^44] The court held that "[l]imiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution."[^45] The Supreme Judicial Court unambiguously reaffirmed that ruling on February 4, 2004, when it advised that the Massachusetts Legislature could not constitutionally create a law that barred same-sex couples from marrying while at the same time allowing the couples to enter into Vermont-like civil unions.[^46] In accordance with the time frame delineated by the Supreme Judicial Court in *Goodridge*, which had delayed effectuation

[^44]: Id. at 968. The Massachusetts Court was not the first to recognize that a state constitution's mandate of equality included marriage rights. In *Baehr v. Lewin*, the Hawaii Supreme Court concluded that the state's marriage statutes violated the Hawaii Constitution's equal protection clause and remanded the case to the lower court for further proceedings. 852 P.2d 44, 68 (Haw. 1993). The votes of Hawaii then adopted a constitutional amendment that permitted the legislature to define marriage. Elaine Herscher, *Same-Sex Marriage Suffers Setback*, S.F. CHRON., Nov. 5, 1998, at A2. "The legislature shall have the power to reserve marriage to opposite-sex couples." HAW. CONST. art. I, § 23. Hawaii now has an express statutory prohibition against marriage for same sex couples. HAW. REV. STAT. ANN. § 572-1 (Michie 1999) ("to make valid the marriage contract, which shall be only between a man and a woman . . ."). By contrast, in *Baker v. State*, the Vermont Supreme Court concluded that the state's marriage statute violated the Vermont Constitution's common benefits clause, but rules that to remedy the violation, same-sex couples had to be granted either marriage or the civil equivalent. 744 A.2d 864, 886-87 (Vt. 1999).
[^45]: Goodridge, 798 N.E.2d at 968.
[^46]: See Opinions of the Justices to the Senate, SJC-09163, 802 N.E.2d 565 (Feb. 3, 2004). This reaffirmation of the *Goodridge* mandate of marriage equality was a result of the Massachusetts State Senate asking the Supreme Judicial Court ("SJC") whether a bill denying same-sex couples access to marriage but allowing them to enter into civil unions would pass muster. Id at 566. The question read:

Does Senate No. 2175, which prohibits same-sex couples from entering into marriage but allows them to form civil unions with all ‘benefits protections, rights and responsibilities’ of marriage, comply with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12 and 16 of the Declaration of Rights?

*Id.* at 567.

The SJC answered "No." *Id.* at 572. The SJC then conveyed a deep understanding of the level of anti-gay bias inherent in such legislation: "The bill’s absolute prohibition of the use of the word ‘marriage’ by ‘spouses’ who are of the same sex is more than semantic. The dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to a second-class status." *Id.* at 570.
of its decision for 180 days, Massachusetts began accepting applications for marriage licenses on May 17, 2004. Because state marriage licensing laws include a three-day waiting period between the application and licensing, but also include a court procedure for waiver of the waiting period, many same-sex couples were also married on May 17, 2004.

II. THE IMPACT OF DENYING MARITAL BENEFITS TO SAME-SEX COUPLES AND THEIR CHILDREN

The protections of marriage are not theoretical, they are very real, and it is the real families in the U.S. – millions of same-sex couples and their children – who are hurt by the denial of marriage rights. Like it or not, marriage is the major system in the United States by which our government, as well as many private actors, provide significant levels of support to families. A state-issued marriage license is the key to federal, state, local and, in many cases, privately-issued benefits. Therefore, only marriage, legally respected and honored when entered into by same-sex couples under law the same way that it is for heterosexual couples, can provide the protections of marriage for families headed by same-sex couples. This section gives the best available data about how many same-sex couples and their families live in the United States today and the kinds of common benefits and rights that they are denied because they have not been granted marital equality; providing real-life examples of how this impacts families who need the protections that marriage has to offer.

The American Academy of Pediatrics has estimated that between one and nine million children are being raised in households headed by same-sex couples or headed by lesbians and gays. The 2000 census, a measure that for several documented reasons is thought to dramatically undercount the number of same-sex couples in the

47. Goodridge, 798 N.E.2d at 970.
United States,51 demonstrated conclusively that at least one million children are being raised in households headed by same-sex couples.52 Despite its imperfections, the census data shows that same-sex couples live in 99.3% of all counties in the United States.53 The data also shows that one in three households headed by lesbian couples and one in five households headed by gay couples, includes minor children.54 These are not cold and dry statistics, but numbers that represent American families: same-sex couples and their children.

On the federal level, the Government Accounting Office says that there now are 1,138 rights, responsibilities and protections that flow to families from the marital relationship.55 A few of the federal benefits of marriage are Social Security survivor and disability benefits,56 veteran survivor's benefits,57 ability to immigrate as a spouse,58 and guaranteed time off from work if a spouse becomes ill or injured.59 However, these benefits of marriage are denied to same-sex couples and their children – whether the parents have entered into civil unions, domestic partnerships, or marriages – because Section 3 of the federal Defense of Marriage Act (DOMA) prohibits the extension of those benefits to married, same-sex couples by defining “marriage” and “spouse” to exclude same-sex couples.60 While many believe that DOMA is unconstitutional,61 there are others who believe differently.62

52. Id.
53. Id. at 2.
55. U.S. GEN. ACCOUNTING OFFICE (GAO), DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT, GAO-04-353R (Jan. 23, 2004). In 1997, a GAO study showed over 1,049 benefits, rights and protections provided in federal law on the basis of marital status. Id. (citing U.S. GEN. ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT, GAO/OGC-97-16 (Jan. 31, 1997)). Between 1997 and 2004, the GAO identified a net of 89 new “statutory provisions in which marital status is a factor in determining or receiving benefits, rights and privileges.” Id.

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
In each state, there are somewhere between dozens and hundreds of state protections, rights, responsibilities and benefits that flow from marriage. These fall into several categories: protecting the spousal relationship; enforcing spouses’ obligations to one another; union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (2000). See also discussion infra Part III.


64. See, e.g., HAW. R. EVID. 505 (providing spousal privilege not to testify and protection of marital confidential communications); MASS. GEN. LAWS ANN. ch. 38, § 13 (West 1999) (concerning the right of a spouse to disposition of the body after death); MASS. GEN. LAWS ANN. ch. 114, §§ 29-33 (West 2003) (regarding the right to interment in the lot or tomb owned by one’s deceased spouse); MASS. GEN. LAWS ANN. ch. 233, § 20 (West 2000) (regarding evidentiary rights, such as the prohibition against spouse testifying against one another about their private conversations in civil and criminal cases); VT. STAT. ANN. tit. 18, § 1852 (2002) (providing for hospital visitation and other rights incident to the medical treatment of a family member); VT. R. EVID. 504 (concerning the right to claim an evidentiary privilege for marital communications).

65. See, e.g., HAW. REV. STAT. ANN. §§ 510-2 to -30 (Michie 2000) (regarding control, division, acquisition, and disposition of community property); HAW. REV. STAT. ANN. § 572-24 (Michie 1999) (outlining right to spousal support); HAW. REV. STAT. ANN. §§ 572D-1-11 (Michie 1999) (concerning right to enter into into premartial agreements); HAW. REV. STAT. ANN. § 575-2 to -4 (Michie 1999) (providing for right to file a nonsupport action); HAW. REV. STAT. ANN. §§ 580-1 to -76 (Michie 1999 & Supp. 2003) (outlining post-divorce rights relating to support and property division); MASS. GEN. LAWS ANN. ch. 208, § 34 (West 1998) (providing for equitable division of marital property on divorce); MASS. GEN. LAWS ANN. ch. 208, §§ 17, 34 (West 1998) (regarding temporary and permanent alimony rights); MASS. GEN. LAWS ANN. ch. 209, § 32 (West 1998) (allowing court to issue support and custody orders when spouses separate); VT. STAT. ANN. tit. 15, §§ 751-52 (2002) (regarding the right to
treating spouses as one financial unit and recognizing their interdependence, offering special benefits to spouses, and protecting the children of married couples. Generally, these are receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce.


denied to same-sex couples who are not permitted to marry. While not as well-documented, there are many types of local rights and benefits typically linked with marriage as well, such as local real estate transfer tax exemptions and family discounts at local park and recreation facilities. Individuals are also denied other privately issued benefits of marriage, such as family discounts for gym facilities or museums.

out-of-state when married parents divorce); MASS. GEN. LAWS ANN. ch. 209C, § 6 (West 1998) (creating presumption of paternity of husband when a child is born during marriage).

69. It should be noted that in a few states, some of the protections associated with marriage have been specifically made available to qualifying same-sex couples by state statute. These protections mean little or nothing across state lines, however, and no state grants full marriage equality. In Vermont, in 2000, virtually all of the state level benefits of marriage (except presumption of parenthood) were granted to same-sex couples who entered into state-licensed civil unions. See VT. STAT. ANN. tit. 15, §§ 1201-07 (2002). Benefits from civil unions, however, are not portable across state lines. See Burns v. Burns, 560 S.E.2d 47 (Ga. Ct. App. 2002) (holding that the lower court did not err in concluding that a lesbian mom was in violation of a visitation order prohibiting her from having visitation with her children while living with a non-marital partner, since a civil union is not the equivalent of marriage). But see Langan v. St. Vincent's Hosp., 765 N.Y.S.2d 411 (N.Y. App. Div. 2003) (ruling that a partner of a Vermont civil union could be recognized as a “spouse” under New York law for purposes of filing a wrongful death suit).

In California, in 2003, the state’s domestic partnership law was expanded to include virtually all of the state-level benefits of marriage (except the ability to file joint taxes) to partners who register with the state as domestic partners. California Domestic Partner Rights and Responsibilities Act of 2003, 2003 Cal. Stat. 421.

In July, 2004, a New Jersey law took effect that creates a statewide domestic partner registry that grants domestic partners benefits related to taxation and medical treatment decisions, prohibits discrimination in housing, public accommodations, and employment based on domestic partner status and requires all health insurers in the state that offer dependent coverage to also offer domestic partner coverage. N.J. STAT. ANN. §§ 26:8A-1 to -12 (West 1996 & Supp. 2004).

70. See NEW YORK CITY, N.Y., CODE § 11-2106 (West, WESTLAW through Local Law 72 of 2003 and Chapter 698 of the Laws of New York for 2003) (providing exemption of real estate property transfer tax when the “beneficial ownership” remains the same); but see CHICAGO, ILL., CODE § 3-33-030, available at http://library.municode.com/resources/online_codes.asp (last visited May 28, 2004).


It is the stories of real people that provide the most powerful evidence of the devastating impact of the denial of federal and state benefits to same-sex couples and, by extension, their families. For example, Jeri Berc and Roni Posner of Washington, D.C. have been together for over fifteen years; they had a traditional Jewish wedding on June 18, 1988 and “filed domestic partnership papers in the District of Columbia as soon as they could.”73 However, Jeri cannot provide the same family health care benefits for Roni as her colleagues are able to provide to their spouses.74 If one of them is ever hospitalized at any time, they might be denied access to each other.75 The potential nightmare of restricted hospital access became a reality for Lydia Ramos when her partner of almost fourteen years, Linda Rodriguez, was tragically killed in a car accident in 2002.76 Because Lydia was not legally recognized as Linda’s spouse, the coroner refused to turn Linda’s body over to Lydia and she had no say in carrying out Linda’s wishes after her death, even though they “had discussed what [they] would want if anything happened to either of [them] and had promised to make sure each other’s wishes were respected.”77

Jo Deutsch and Teresa Williams of Cheverly, Maryland have been together for more than nineteen years and have three children, Jacob (13), Matthew (10), and Bena (3).78 Although Jo and Teresa face the same economic challenges as married couples who are raising children, they do not receive the additional economic support through the state and federal governments and employers that heterosexual married couples do.79 Jo and Teresa do not receive the same health benefits as married couples from Jo’s employer, and Teresa would not

74. Id.
75. Id.
77. Id.
be eligible for COBRA\textsuperscript{80} if Jo were to leave her job.\textsuperscript{81} They are not eligible for family and medical leave and they will not get Social Security survivor’s benefits for each other, “even after paying into the system like married couples.”\textsuperscript{82}

The refusal to provide social security survivor’s benefits is of particular concern for Frank Benedetti and Gary Trowbridge from Winston-Salem, North Carolina, aging partners who have been together since 1964.\textsuperscript{83} Furthermore, they are worried about the fact that their retirement benefits will be treated differently (meaning more expenses) under tax law; if one of them dies, the other could face a significant tax burden, whereas different-sex spouses would be able to deal with the loss of a loved one without added financial worries.\textsuperscript{84} The fear that Frank and Gary share is confirmed by a recent joint report of the Urban Institute and the Human Rights Campaign, which concludes that the inability to marry or to have marriages legally recognized seriously financially disadvantages same-sex couples in their later years.\textsuperscript{85}

When a gay, lesbian, or bisexual senior dies, his or her surviving partner faces a financial loss that can amount to tens of thousands of dollars because the couple cannot be legally recognized as married in the United States. Despite having paid taxes their whole lifetime at the same rate as other Americans, surviving partners are:

1. Denied the Social Security survivor benefits that are made available to all married couples;
2. Heavily taxed on any retirement plan . . . they inherit from their partners . . .

\textsuperscript{81} Deutsch & Williams, \textit{supra} note 78.
\textsuperscript{82} \textit{Id.}
\textsuperscript{84} \textit{Id.}
3. Charged an estate tax on the inheritance of a home, even if it was jointly owned – a tax that would not apply to married persons.\textsuperscript{86}

Frank and Gary may also face the risk of losing their home if one of them dies, since seniors in same-sex couples are at more risk of losing their home, for reasons ranging from discriminatory tax laws to Medicaid rules.\textsuperscript{87}

As this section has made clear, being denied marriage equality puts same-sex couples, families headed by same-sex couples, and seniors in same-sex couples at greater financial risk. When same-sex couples either are refused the right to marry or are denied the legal respect and recognition of their marriages, they and their children are denied the panoply of protections, rights, responsibilities and benefits that flow to other married couples and their children.

III. LEGAL BARRIERS AGAINST MARRIAGE FOR SAME-SEX COUPLES

Barriers preventing same-sex couples from marrying remain in place and continue to be erected. Marriage for same-sex couples has not yet been held to be a federal constitutional right. State statutes deny same-sex couples the right to marry in all states except Massachusetts; most states also have laws that purport to refuse to recognize marriages from other jurisdictions if same-sex couples manage to marry out-of-state and then bring those marriages home. There is also an effort in Congress, supported by the President, to amend the federal constitution to deny the right of marriage for same-sex couples. The barriers to marriage for same-sex couples need to be removed in order to ensure equality and security for same-sex families.

A. Marriage Has Not Yet Been Ruled A Fundamental Right for Same-Sex Couples

For some, marriage has been held to be a right under the U.S. Constitution.\textsuperscript{88} In the 1967 case \textit{Loving v. Virginia},\textsuperscript{89} the Supreme

\textsuperscript{86} Id. at 2.
\textsuperscript{87} Id. at 6.
\textsuperscript{88} The U.S. Supreme Court has described the right to marry as "of fundamental importance for all individuals" and "part of the fundamental "right of privacy" implicit in the Fourteenth Amendment's Due Process Clause." Zablocki v. Redhail, 434 U.S. 374, 384 (1978).
Court struck down a state law prohibiting interracial marriage, applying strict scrutiny analysis\(^90\) to the Equal Protection Clause claim based on race. The Court also held that the law violated the Due Process Clause since “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”\(^91\) The Court recognized that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”\(^92\)

It is unclear, however, what the Court’s decision in *Loving* means for same-sex couples, since courts have not yet ruled on any federal constitutional challenge to the denial of marriage rights. Many are optimistic about the possible outcome of such a challenge, given the Supreme Court’s recent decisions in *Romer v. Evans*\(^93\) and *Lawrence v. Texas*.\(^94\) In *Romer*, the Court struck down a state constitutional amendment that overruled local laws banning sexual orientation discrimination and granting domestic partner benefits, relying on an equal protection analysis.\(^95\) In *Lawrence*, the Court overruled its 1986 decision in *Bowers v. Hardwick*\(^96\) and struck down sodomy laws, arguably based on due process grounds, albeit in a

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89. 388 U.S. 1 (1967).
90. In order for a law to pass constitutional muster under strict scrutiny analysis, it must serve a compelling governmental interest and be narrowly tailored to serve that interest. *Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995). Courts tend to apply this level of scrutiny to fundamental rights or classifications that the U.S. Supreme Court has determined merit that level of scrutiny, especially racial classifications. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (stating that courts apply the “most rigid scrutiny” to laws “which curtail the civil rights of a single racial group”).
92. *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).
Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals. Long ago, in *Maynard v. Hill*, 125 U.S. 190 (1888), the Court characterized marriage as “the most important relations in life,” *id.* at 205, and as “the foundation of the family and of society, without which there would be neither civilization nor progress,” *id.* at 211. In *Meyer v. Nebraska*, 262 U.S. 290 (1923), the Court recognized that the right “to marry, establish a home and bring up children” is a central part of the liberty protected by the Due Process Clause, *id.* at 399, and in *Skinner v. Oklahoma ex. rel. Williamson*, * supra*, marriage was described as “fundamental to the very existence and survival of the race,” 316 U.S., at 541.
95. *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).
Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals. Long ago, in *Maynard v. Hill*, 125 U.S. 190 (1888), the Court characterized marriage as “the most important relations in life,” *id.* at 205, and as “the foundation of the family and of society, without which there would be neither civilization nor progress,” *id.* at 211. In *Meyer v. Nebraska*, 262 U.S. 290 (1923), the Court recognized that the right “to marry, establish a home and bring up children” is a central part of the liberty protected by the Due Process Clause, *id.* at 399, and in *Skinner v. Oklahoma ex. rel. Williamson*, * supra*, marriage was described as “fundamental to the very existence and survival of the race,” 316 U.S., at 541.
96. 478 U.S. 186 (1986) (declining to strike down Georgia’s criminal sodomy law that punished same-sex couples for engaging in consensual intimacy in the privacy of their own homes).
decision substantially inclusive of language of traditional equal protection analysis.\footnote{Lawrence, 539 U.S. 558, 575 ("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."). In both Romer and Lawrence, the Supreme Court noted that the state laws in question failed to pass even the lowest level of constitutional review, the rational basis test. Romer, 517 U.S. at 632 (stating that the Colorado law "lacks a rational relationship to legitimate state interests"); Lawrence, 530 U.S. 558, 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").}

Whether a constitutional challenge based on the Court’s holdings in Romer and Lawrence would lead to nationwide marriage rights for same-sex couples is a question for another article, and another day. A finding of a fundamental right to marriage for same-sex couples, however, could overrule both the federal Defense of Marriage Act and state statutes prohibiting marriage for same-sex couples just as Loving overruled the remaining miscegenation laws in the United States.

B. Federal “Defense of Marriage Act” (DOMA) Denies Marriage Rights to Same-Sex Couples at the Federal Level and Allows It at State Levels

Existing federal law leaves no doubt that same-sex couples who are married, whether in one of the Canadian provinces, Massachusetts, San Francisco, or another locality, will find themselves discriminated against by the U.S. government. Likewise, most state governments also have laws that purport to deny the recognition of otherwise valid marriages between same-sex couples. A brief overview of these discriminatory laws follows.

In 1996 Congress passed the Defense of Marriage Act\footnote{Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738(c) (2000) & 1 U.S.C. § 7 (2000)). Given its restrictive nature, the legislation could more properly have been titled the “Denial of Marriage Act.”} (DOMA), which President Bill Clinton signed into law on September 21, 1996.\footnote{Barbara A. Robb, Note, The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans, 32 New Eng. L. Rev. 263, 263 (1997).} The motivation behind DOMA was the potential that the State of Hawaii would begin allowing same-sex couples to marry.\footnote{Id. at 268 ("Congress declared that the purpose of DOMA is to deter other states from being compelled to recognize marriages of same-sex couples that were contracted in Hawaii, and to prevent married same-sex couples from becoming eligible for federal entitlements.") (footnotes omitted). When DOMA was enacted, Hawaii was the state where marriage licenses were expected to soon be issued to same-sex couples because of the Hawaii Supreme Court’s decision in Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). In Baehr, the court}
The law, enacted for the sole purpose of discriminating against same-sex couples in the arena of marriage and denying them marriage's associated protections, rights and benefits, contains two substantive provisions. First, DOMA defines "marriage" and "spouse" for federal purposes to exclude marriages between same-sex couples. The intended effect of those definitions was to make it possible for the U.S. government to deny recognition of marriages between same-sex couples at a point in the future when such couples might be able to marry in some U.S. state. DOMA also allows states to discriminate.

found that the state's marriage law defining marriage as between a man and a woman "regulates access to the marital status and its concomitant rights and benefits on the basis of the applicants' sex" and "establishes a sex-based classification." Id. at 64. The court held that such a classification is subject to strict scrutiny analysis under the state's equal protection clause and that Hawaii's marriage statute would be presumed unconstitutional unless the circuit court determined on remand that the sex-based classification was justified by compelling state interests and was narrowly drawn to avoid "unnecessary abridgements" of gay couples' constitutional rights. Id. at 67-68. On remand, the circuit court declared the state's marriage statute unconstitutional. Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996). On appeal, the Hawaii Supreme Court delayed ruling and in 1998, voters approved a state constitutional amendment denying gay couples marriage rights under state law. Haw. Const. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

101. The plain language of the statute and its legislative history make this discriminatory purpose clear. Bradley J. Betlach, The Unconstitutionality of the Minnesota Defense of Marriage Act: Ignoring Judgments, Restricting Travel and Purposeful Discrimination, 24 WM. MITCHELL L. REV. 407, 453 (1998) ("Romer commands that courts considering the constitutionality of either the federal or state version of DOMA must look at whether Congress or the state legislature intended to discriminate against homosexuals. The answer to that question is apparent: of course they did."); Kevin H. Lewis, Note, Equal Protection in the Wake of Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws, 49 HASTINGS L.J. 175, 208 (1997) ("Because the 'protection of the heterosexual marriage' reasons advanced by the DOMA supporters have been exposed as motivated by a similar discrimination against gays and lesbians, this government interest surely has no rational basis either."); Barbara A. Robb, Note, The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans, 32 NEW ENG. L. REV. 263, 339 (1997) ("The object of DOMA was to target marriages of same-sex couples based on irrational beliefs about homosexuality, negative attitudes toward gays and lesbians held by the majority, and subjective discomfort with homosexuality.").


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.


103. Congress asserted that in passing DOMA it was legislating pursuant to Article IV, Section 1 of the U.S. Constitution.

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
more fully against same-sex couples by permitting states to refuse to recognize marriages from other states. No court has yet ruled on DOMA, either on its scope or its constitutionality.

Until 2003, there was little or no opportunity for DOMA to be applied because same-sex couples were not marrying in the United States and the few U.S. citizens who married a same-sex partner abroad had not returned home to challenge DOMA. However, in 2003, U.S. same-sex couples began marrying in Ontario and British Columbia, and brought those marriages home. Same-sex couples have also started marrying in a number of jurisdictions in the United States. Therefore, the federal and state DOMA laws have just started to become legally relevant.

A major effect of DOMA was probably first felt by married same-sex couples on April 15, 2004, the deadline for married same-sex couples to turn in their federal and state tax returns. Because the federal government will not recognize these marriages, it created a messy legal situation for married same-sex couples during tax season. A married same-sex couple filling out their federal tax forms can be legally married for the purposes of the jurisdiction where their marriage took place, or even in their home state, but are not legally married for purposes of their federal taxes. Due to DOMA, these couples were faced with either potentially perjuring themselves on their tax returns by denying they were married or violating DOMA by claiming to be married. As a result, in order to comply with federal law when filling out their tax returns, married same-sex couples apparently were required to file as single and then had to find some way to disclose that they were married to avoid perjury when signing their returns.

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.


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.


105. See discussion supra Part I.

106. Id. To date, there have been no notable tests of the validity of those marriages in U.S. couples' home states or by the U.S. government.

107. GAY & LESBIAN ADVOCATES & DEFENDERS, MARRIAGE – TIPS & TRAPS (suggesting that married same-sex couples file single tax returns but include a letter or disclosure form
DOMA is a law that discriminates against a defined group of people by design and its plain language. In Section 3, DOMA clearly denies benefits to married same-sex couples that are provided to married opposite-sex couples. The law provides as follows:

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.\(^{108}\)

In other words, but for the fact that a person’s spouse is of the same sex rather than the opposite sex, the federal rights, responsibilities, protections and benefits of marriage would be provided to that couple. Put another way, but for the fact that the two spouses in the married same-sex couple are not of heterosexual sexual orientation, the federal rights, responsibilities, protections and benefits of marriage would be provided to that couple.

In DOMA’s Section 2, the statute purports to allow the states to discriminate in the same way, by allowing states to create laws that deny married same-sex couples the state-level rights, responsibilities, protections and benefits of marriage that are provided to married opposite sex couples.

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.\(^{109}\)

All states except Massachusetts have state marriage licensing statutes that, by express language or through interpretation, discriminate against same-sex couples by denying them the right to marry.\(^{110}\) In addition, four states – Alaska, Hawaii, Nebraska, and

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110. For a state by state review of marriage laws, see HUMAN RIGHTS CAMPAIGN, WHAT’S HAPPENING IN YOUR STATE & IN YOUR COMMUNITY, http://www.hrc.org (last visited June 23,
Nevada – also have state constitutional amendments that deny marriage rights to same-sex couples or explicitly allow the state legislatures to discriminate against same-sex couples in the area of marriage.111 Forty-one states have explicit statutory denial of marriage laws that generally say that the state will not recognize marriages performed in another state and/or declare marriage between same-sex couples as against the public policy of the state.112

C. The So-Called Federal Marriage Amendment: Anti-Gay Forces Try To Enshrine Discrimination Against Families Headed By Same-Sex Couples In The U.S. Constitution

Anti-gay activists have been pressing to amend the U.S. Constitution to deny marriage rights to same-sex couples and, by extension, their children.113 Couching in rhetoric about “protecting traditional marriage,” anti-gay extremists have been lobbying for the Federal Marriage Amendment, which would deny same-sex couples the right to marry anywhere in the United States. Many believe that it is intended to and would deny same-sex couples marriage-related rights, even those available through civil unions in Vermont, domestic partnership laws in other states such as California, Hawaii, and New Jersey, or even the most basic contractual arrangements now available in most states to same-sex couples. It would further deny same-sex couples the rights available under the federal and state constitutions, as well as equal access to the federal and state courts.

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111. ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."); HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."); NEB. CONST. art. I, § 29 ("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."); NEV. CONST. art. I, § 21 ("Only a marriage between a male and female person shall be recognized and given effect in this state.").


113. As this article was going to press, the U.S. Senate took a procedural vote that amounted to a defeat of the FMA in the Senate. In a 50-48 vote, Senators refused to end debate on the proposed FMA, thus blocking a vote on the underlying language and demonstrating that the Republican leadership did not have the 67 votes needed to pass it. Helen Dewar, “Ban on Gay Marriage Fails,” WASH. POST, July 15, 2004, at A01.
On March 22, 2004, the day before a Senate Committee hearing was scheduled on the proposed language amendment pending in both the House and the Senate, Senator Wayne Allard (R-Colo.), a vocal opponent of marriage rights for same-sex couples and civil rights based on sexual orientation and gender identity, announced new language for a proposed constitutional amendment entitled the "Federal Marriage Amendment." The language of the proposed amendment provides that

[m]arriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

Senator Allard, and other amendment supporters such as Representative Marilyn Musgrave (R-4th - Colo.), like to claim that this language bars marriage between same-sex couples that might be mandated by the courts; they claim they are trying to block the Goodridge decision and other decisions like it. They assert that the amendment leaves open the possibility of state legislatures creating civil unions or similar structures to provide some level of protections for same-sex couples. However, the language of the amendment could make legislatively created civil unions or domestic partnerships

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115. S.J. Res. 30, 108th Cong. (2004). Representative Marilyn Musgrave (R-4th - Colo.), who introduced the earlier version of the amendment in the House of Representatives (H.R.J. Res. 56), has been unable to achieve a House version that matches the new Senate version. The title of the proposed amendment is really a misnomer; its title implies that it seeks to expand marriage rights, when, in reality, it purports to deny marital rights to a large class of citizens.
116. Id. The previous language that Representative Musgrave and Senator Allard supported read,

[m]arriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the Constitution of any State, nor State or Federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.
118. Id.
immune from constitutional scrutiny, or could eliminate the possibility of civil unions altogether.  

The Federal Marriage Amendment is remarkable in that it would violate core constitutional principles of federalism, by overriding states' decisions about whether or not state marriage rights should be extended to same-sex couples and mandating how states would interpret their own state laws and constitution. Furthermore, like the failed Corwin Amendment, which would have made the abolishment of slavery immune from congressional abolition, the Federal Marriage Amendment would unwisely constitutionalize a knee-jerk, contemporary social policy decision that would be very difficult to undo. This proposed amendment could also cause courts to cut back on the "legal incidents" of marriage that they have extended to families not headed by a married man and woman.

As noted by Professor Louis Michael Seidman, Professor of Law at Georgetown University Law Center and the Reporter for the Constitution Projects' Initiative on Constitutional Amendments, although the amendment purports to be intended to save "traditional marriage," ironically, the most serious threat to traditional marriage may be the amendment itself. Since gay men and lesbians have a constitutional right to engage in even anonymous and casual sex under

119. For example, the Vermont legislature enacted civil unions in response to the Vermont Supreme Court's ruling that the Common Benefits Clause of the state constitution required that the state provide the same equal benefits and protections for same-sex couples as for married couples. Baker v. State, 744 A.2d 864, 886 (Vt. 1999). While civil unions are not marriages, they provide the equivalent benefits and protections of marriage, according to the court. Id. Under the Federal Marriage Amendment, it is possible that "or the legal incidents thereof" would include civil unions and therefore civil unions or any other legal incidents would not be required by any state constitution. Under this reading of the language, the Vermont legislature could repeal its civil union law without violating the Common Benefits Clause of the Vermont constitution.


123. Memorandum from Erwin Chemerinsky, Professor of Law at the University of Southern California, to Liz Seaton, Senior Counsel with the Human Rights Campaign (Apr. 15, 2004) (on file with author).

Lawrence v. Texas, the Federal Marriage Amendment would effectively “constitutionalize the one night stand.” On the one hand, gay couples would have an absolute constitutional right to uncommitted sex, and on the other hand, they would face an absolute constitutional prohibition against legally committed, married relationships. Furthermore, the amendment does nothing to prohibit state courts, like the Massachusetts court in Goodridge, from determining that the failure to confer marriage on same-sex couples violates state constitutional anti-discrimination provisions. Since anti-discrimination law provides that no one group can be better off than another, state courts would be constitutionally obligated to equalize gay and straight couples by eliminating marriage altogether and instituting civil unions for everyone.

At this moment as this article goes to press, the proposed amendment is pending before the Senate, and a previous version, with arguably broader language, is still pending in the House. In order for the proposed amendment to advance, it must be passed by two-thirds of each chamber of Congress. Following Congressional approval, the amendment would be sent to the states for ratification. It takes three-fourths of the states to ratify an amendment to the U.S. Constitution. Because the proposed Federal Marriage Amendment is poorly drafted, it contains no time limit whatsoever in which the states would need to act to ratify. In other words, proponents of the proposed amendment seek to have the struggle over marriage rights for same-sex couples continue indefinitely.

126. Id.
127. Id.
128. Id.
129. Id.
132. U.S. CONST. art. V.
133. Id.
134. Id.
IV. FALLACIES UNDERLYING TWO ARGUMENTS ADVANCED TO JUSTIFY DENYING MARRIAGE EQUALITY TO SAME-SEX COUPLES

A. Religious Freedom Is Already Guaranteed In the U.S. Constitution, and No House of Worship Can Be Forced To Marry A Same-Sex Couple or To Recognize Their Marriage

Many of those who advocate denying marriage equality to same-sex couples cite either explicit or implicit religious rationales to justify the discrimination. However, in light of the religious freedom protections provided by the U.S. Constitution, these rationales do not carry much weight. In part, what stands between opponents of marriage equality for same-sex couples and making their beliefs law is the First Amendment, which already protects religious rights in this country.

Anti-gay activists do not want to talk about the fact that their religious freedom is already guaranteed under the U.S. Constitution, made explicit in First Amendment. The First Amendment reads, in relevant part, "Congress shall make no law respecting an establishment


In citing their disapproval of marriage for same-sex couples and the need to adhere to a strict definition of one man and one woman, many people cite religious convictions as plausible cause to pass a federal marriage amendment. Reverend Richardson, in speaking of the history of marriage reported “it was the religious institutions that started marriage way, way back...And then all of a sudden the secular world comes in...in order to regulate [marriage].”

Reverend Richardson also discussed the important roles that men and women play in relationships and marriage in regards to childrearing. Richardson admitted that he, as a man, was unfit to “braid hair and get children ready for school” but, by inference, his wife, as a “female” is inherently qualified to do so.

In responding to statements from Senator Durbin referencing the religious context of marriage, Reverend Richardson quipped “That’s where it [marriage] started.”

In his testimony before the Senate subcommittee on the Constitution, Reverend Richardson said, speaking of his traditional definition of marriage that “the right of marriage in the religious context precedes anything that -- any laws of the state or country.” Senate Judiciary Subcommittee on Constitution, Civil Rights and Property Rights Hearing on Gay Marriage and the Courts: Senate Committee on the Judiciary, 108th Cong. (March 3, 2004) (statement of Reverend Richard Richardson).
of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .”\textsuperscript{137} Anti-gay religious extremists do not want to talk about the Free Exercise clause of the First Amendment because they know they will have to admit that its existence seriously undermines their arguments against marriage for same-sex couples. The Free Exercise clause ensures that the government cannot require any church, synagogue, mosque or other house of worship to perform holy unions for same-sex couples or to recognize these unions as valid marriages for religious purposes.\textsuperscript{138}

Although some might like to see their personal religious views against (or for) marriage for same-sex couples embedded in the U.S. Constitution, they should not expect to see that happen. Although their right to advocate their views and attempt to influence public policy is protected by the Freedom of Speech clause in the First Amendment,\textsuperscript{139} the First Amendment also makes it explicit in the Establishment Clause that the United States shall not establish a national religion.\textsuperscript{140} In a nation founded in part on the principle of the freedom of religion, and given the plurality of religions in this nation,\textsuperscript{141} no person should expect to see their personal religious views or even the most established religious doctrine become U.S. law.\textsuperscript{142}

\textsuperscript{137} U.S. CONST. amend. I.
\textsuperscript{138} Memorandum from Io C. Cyrus to the Human Rights Campaign, Aug. 20, 2003, in \textsc{Hearing on the Status of Current Law Regarding Civil Marriage for Same-Sex Couples: A Briefing Book Prepared by the Human Rights Campaign (Sept. 2003).}
\textsuperscript{139} U.S. CONST. amend. I.
\textsuperscript{140} U.S. CONST. amend. I.
\textsuperscript{141} In a poll conducted by Gallup in which 1,000 adults in the United States were interviewed, the following information was gathered on the religious composition of the United States: 50% Protestant; 9% Christian non-specific; 23% Catholic; 2% Jewish; 1% Orthodox; 1% Mormon; 3% Other; 10% None. \textsc{Religion, Gallup Poll, PollingReport.com (May 2004), http://www.pollingreport.com/religion.htm (last visited June 23, 2004).}
The "genius" of the balance between the Free Exercise Clause and the Establishment Clause is that the freedom to exercise one's religion is protected while at the same time the independence of government from undue influence from any one particular religious denomination is guaranteed. This means the United States cannot enforce any particular religious view on marriage for same-sex couples on other religions while respecting the practices and views of all religions in deciding how to approach the issue of marriage. The idea that marriage for same-sex couples is a threat to religious liberty ignores First Amendment constitutional principles and only creates unnecessary and unwarranted fear among those concerned with rights of religious freedom.

B. The Best Interests of Children Are Not Served By Denying Marriage Rights To Same-Sex Couples Who Have Children

Anti-gay activists are also attempting to prevent same-sex couples from marrying and their children from being afforded the protections of marriage that flow to marital children by invoking their notion of what is in the child's "best interest." For example, in 2003, hearings before the Senate Subcommittee on the Constitution, Civil Rights and Property, several majority witnesses supporting amending the Constitution to discriminate against same-sex couples said that the purpose of marriage was not love, but procreation. In Massachusetts and Arizona, where state constitutional challenges were brought by same-sex couples seeking the right and freedom to marry, the state's leading argument against permitting marriage between same-sex couples was that restricting marriage to different-sex couples

provides a theoretical optimal environment for raising children.\footnote{Standhardt v. Superior Court, 77 P.3d 451, 461 (Ariz. Ct. App. 2003); Goodridge v. Dep’t of Public Health, 798 N.E.2d 941, 962 (Mass. 2003).} However, scholarly research and writing shows that children raised in same-sex households fare as well, or better, than children raised in households headed by married heterosexuals. If meeting the best interest of children is a rationale of marriage, marriage between people of the same-sex serves rather than undermines this purpose.

Many anti-gay activists give their own interpretations of social science studies to prove that it is better for children not to be parented by lesbians and gays.\footnote{Maggie Gallagher & Joshua K. Baker, Do Moms and Dads Matter? Evidence from the Social Sciences on Family Structure and the Best Interests of the Child, 4 MARGINS 161 (2004). Contrary conclusions were drawn by social scientists Judith Stacey and Timothy Biblarz. Judith Stacey & Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter?, 66 AM. SOC. REV. 159 (2001).} However, these “conclusions” have already been rejected by the leading experts and professionals in the field including the American Academy of Child and Adolescent Psychiatry, American Academy of Family Practitioners, the American Academy of Pediatrics, the Child Welfare League of America, the National Association of Social Workers, the National Council on Adoptable Children, the American Psychological Association, the American Psychiatric Association and the American Psychoanalytic Association.\footnote{See text accompanying notes 145 - 155.} Each of these associations, comprised of actual experts in the well-being of children, has reviewed the social science research that demonstrates conclusively that children raised by lesbian and gay parents do as well by all standard measures, including academically, psychologically, and socially. Most of these academies and associations, after considering this social science research, reached positions in favor of same-sex co-parent adoption\footnote{Co-parent adoptions permit same-sex parents to be the two legal parents of their children. See Sonja Larsen, Annotation, Adoption of Child by Same-Sex Partners, 27 A.L.R. 5th 54 (1995).} and legal recognition of same-sex unions.

The American Academy of Child and Adolescent Psychiatry states that there is no evidence to indicate that gay, lesbian, or bisexual parents lack any of the parenting skills, child-centered concerns, or parent-child attachments that heterosexual parents have.\footnote{AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, GAY, LESBIAN AND BISEXUAL PARENTS, POLICY STATEMENT (June 1999), available at http://www.aacap.org/publications/policy/ps46.htm (last visited April 23, 2004). Furthermore, the American Psychological Association, recognizing that there is no significant difference between same-sex and different-sex couples to justify discrimination, recently resolved that same-sex couples should be afforded the same legal benefits that result from marriage. AM.}
Furthermore, it notes that children in households headed by lesbian or gay parents show no greater instability or developmental dysfunction than do children of households headed by heterosexual parents.\textsuperscript{150} The American Academy of Pediatrics, recognizing children’s need for stable and legally recognized relationships with their parents, has called for increased legal recognition of co-parent or second-parent rights for same-sex partners.\textsuperscript{151} The Academy believes that “[d]enying legal parent status through adoption to coparents or second parents prevents . . . children from enjoying the psychological and legal security that comes from having [two] willing, capable, and loving parents.”\textsuperscript{152}

Co-parent or second-parent adoption guarantees custody rights in case one parent dies or becomes incapacitated, establishes the right to child support if the partners separate, ensures children’s eligibility for health care benefits through both parents, provides legal grounds for both parents to make decisions for the child regarding medical care and education, and secures eligibility for financial entitlements like Social Security survivor benefits.\textsuperscript{153} Support for lesbian and gay parenting has also come from the American Association of Family Physicians,\textsuperscript{154} the Child Welfare League of America,\textsuperscript{155} the National Association of Social Workers,\textsuperscript{156} the National Council on Adoptable


\textsuperscript{151} Am. Acad. of Pediatrics, Coparent or Second-Parent Adoption by Same-Sex Parents, PEDIATRICS, Feb. 2002, at 339.

\textsuperscript{152} Id.

\textsuperscript{153} Id.

\textsuperscript{154} Position Statement, American Association of Family Practitioners (Oct. 2002) (resolving to support legislation promoting safe and nurturing environments for all children regardless of their parents’ sexual orientation).

\textsuperscript{155} Kristen Kreisher, Gay Adoption, CHILDREN’S VOICE, Jan. 2002 (outlining the provision of the Child Welfare League of America’s Standards of Excellence for Adoption Services that states adoption applicants should be assessed on their parenting skills, not their “race, ethnicity of culture, income, age, marital status, religion, appearance, differing lifestyles, or sexual orientation”), available at http://www.cwla.org/articles/cv0201gayadopt.htm (last visited Apr. 23, 2004).

\textsuperscript{156} NAT’L ASS’N OF SOCIAL WORKERS, SOCIAL WORK SPEAKS: NATIONAL ASSOCIATION OF SOCIAL WORKERS POLICY STATEMENTS 2000-2003, at 144 (5th ed. 2000) (“Foster Care and Adoption”) (supporting legislation promoting second parent adoptions in same-sex households).
Children, the American Psychiatric Association, and the American Psychoanalytic Association.  

These statements by the most reputable academies and associations concerned with the well-being of children more than counter questionable conclusions and assertions by non-experts who claim to be defending the best interest of children. Whatever anti-gay activists mean when they claim that the optimal environment for children is in a home with a married mother and father who are the children’s biological parents, they cannot reasonably base their opinions on established scientific facts about children’s well-being. The substantial sociological and psychological evidence reviewed and documented by the above shows that their assertions are unfounded.

By reframing the marriage debate as a discussion over the best interest of children, anti-gay activists are trying to play upon the unfounded fears of the public. As the Massachusetts Supreme Judicial Court correctly concluded, the “marriage as procreation” argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage.” If the well-being of children is to be served – meaning if the children of same-sex couples are to be afforded the same protections under law that marital children have – their families should be legally recognized through the mechanism maintained to create and protect families world-wide: marriage.

V. CONCLUSION

The debate over marriage rights for same-sex couples is in full swing. Millions of stories could be told that illustrate the concerns of


159. AM. PSYCHOANALYTIC ASS’N, POSITION STATEMENT ON GAY AND LESBIAN PARENTING (May 16, 2002) (asserting that gay and lesbian parents are capable of meeting the best interest of the child and should be afforded the same rights and should accept the same responsibilities as heterosexual parents), available at http://www.apsa-co.org/ctti/cgli.parenting.htm (last revised Sept. 15, 2000) (last visited July 3, 2004).

American families – both same-sex couples and families headed by same-sex couples – who are denied the protections, responsibilities, benefits and rights associated with marriage. The fact is that same-sex couples and their children, an estimably large class of people living in the United States, are denied a clearly delineated set of federal and state protections of marriage because of discrimination. This denial hurts real American families. What is not injured in any way, despite what some claim, is the constitutionally guaranteed free exercise of religion in the United States. Furthermore, anti-gay activists who use rhetoric to try to alarm the public about how allowing marriage between same-sex couples is somehow bad for children are ringing a hollow, false alarm. To give families consisting of same-sex couples and their children equal protection under the law and afford them the full rights of American citizenship, the laws of our nation need to be changed in the direction of granting full marriage equality and marriage-related rights, not in the direction of enshrining discrimination against same-sex couples and their children in our nation’s system of laws.

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161. Scott D. Gerber, Don’t Abuse a Rare Process, NAT’L L. J., Mar. 8, 2004 (“It is difficult to deny the force of [the President’s] argument about the need to preserve marriage as a social institution. But it is equally difficult to deny the power of the argument that the constitutional amendment he seeks discriminates against homosexuals.”). Scott Gerber is Assistant Professor of Law at Ohio Northern University Pettit College of Law.