

LEARNING FROM HISTORY: THE FEDERAL UNION AND MARRIAGE

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I. INTRODUCTION

Understanding the legal history of same-sex unions in the United States is vital because it clearly suggests that, short of an unlikely amendment to the United States Constitution requiring the states to recognize same-sex unions, the debate over this controversial issue will not be resolved in the immediate future. While there is substantially greater acceptance of legalizing same-sex unions today than was formerly the case,¹ and while it is likely that the Federal Defense of Marriage Act (DOMA) will eventually be eliminated from law,² each state is likely to

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¹ This trend is reflected in the recent resolution of the American Bar Association that same-sex partners should have the legal right to enter civil marriages. “RESOLVED: That the American Bar Association urges state, territorial, and tribal governments to eliminate all of their legal barriers to civil marriage between two persons of the same sex who are otherwise eligible to marry.” A.B.A. Res. 111 (Aug. 11, 2010), *available at* <http://www.abanow.org/2010/07/am-2010-111/>. The fact that the Federal Office of Personnel Management now accepts same-sex domestic partners within the definition of “family member” of a federal employee for purposes of sick leave, funeral leave, voluntary transfer leave, and emergency leave transfer, is another sign of growing acceptance of same-sex unions. *Absence and Leave; Definitions of Family Member, Immediate Relative, and Related Terms*, 75 Fed. Reg. 33, 491, 33491 (June 14, 2010) (to be codified at 5 C.F.R. pt. 630).

² The Defense of Marriage Act, 1 U.S.C. § 7 (2006), provides that in interpreting any federal statute, ruling or regulation, “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife.” The Act also provides that no state, territory or tribe is required to recognize a same-sex marriage which is treated as a legal marriage under the law of another state. 28 U.S.C. § 1738C (2006). In enacting DOMA, Congress was responding to public debate over the decision of the Supreme Court of Hawaii in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which held that the state’s denial of marriage licenses to same-sex couples is subject to strict scrutiny. H.R. Rep. No. 104-664, at 4 (1996) *reprinted in* 1996 U.S.C.C.A.N.

frame the issue differently without a national consensus; in other words, even if DOMA is repealed or invalidated by court ruling,³ and even if federal recognition of same-sex marriage is achieved,⁴ deep-seated differences of opinion between US states over same-sex marriage are likely to persist.⁵

Throughout the late twentieth century, a number of lawsuits attempting to secure the right of same-sex persons to marry were initially rejected by courts in the United States.⁶ When those early decisions were handed down, the ability of same-sex couples to have children was limited because the science of assisted reproduction was not nearly as well developed as it is today, and unmarried same-sex couples were not

2905-23 (Westlaw). The legality of DOMA was challenged in *Massachusetts v. United States Department of Health and Human Services*, 698 F. Supp. 2d 234 (2010). The court found both that Massachusetts had standing to challenge the constitutionality of DOMA, and that DOMA is unconstitutional in that it violates the Tenth Amendment. *See id.* at 249–53.

³ Court decisions validating same-sex unions have produced popular backlash, as evidenced by California's Proposition 8, a ballot initiative to override the California Supreme Court's decision upholding the legality of same-sex marriage in that state. However, court decisions, even if unpopular, can help to change attitudes about an issue in the long run. *See* Mary Ziegler, *The Terms of the Debate: Litigation, Argumentative Strategies, and Coalitions in the Same-Sex Marriage Debate, 1993-2008*, 2–4 (St. Louis U. Legal Studies, Working Paper No. 2010-19) available at <http://ssrn.com/abstract=1646451> (last visited Aug. 26, 2010) (noting that while critics have been skeptical of using litigation strategies which have produced backlash against same-sex unions, court decisions may have in fact changed the terms of the debate in a way favorable to that cause).

⁴ Federal court challenges to DOMA have achieved some initial success. *See* *Massachusetts v. U.S. Dept. of Health and Human Servs.*, 698 F. Supp. 2d 234, 253 (D. Mass. 2010) (DOMA is unconstitutional under the Tenth Amendment as an improper intrusion into a core area of state sovereignty); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 396–97 (D. Mass. 2010) (federal government denied equal protection and due process of law by denying benefits to same-sex couples married under state law while allowing benefits for similarly situated heterosexual married couples).

⁵ A broad constitutional challenge to state restrictions on same-sex marriage, while somewhat problematic given the present composition of the United States Supreme Court, would accomplish more than the elimination of the federal DOMA law. The significant district court decision in *Perry v. Schwarzenegger*, 702 F. Supp. 2d 1132, (N.D. Cal. 2010) is such a case, but it is based on facts surrounding the repeal of the California same-sex marriage law by the voters of that state supported by a clearly anti-gay bias, and even if affirmed on appeal in the circuit court, it would not necessarily invite further review by the Supreme Court. If the Supreme Court were to reach a decision in *Perry*, it could be narrowly based on the facts of that case.

⁶ *See* *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. 1971).

generally allowed to adopt children.⁷ In the twenty-first century, however, several countries⁸ and some US states began to reappraise rejectionist attitudes about same-sex unions. In the U.S., court decisions in Hawaii,⁹ Alaska,¹⁰ and Vermont¹¹ in the 1990s intimated this shift. The Hawaii

⁷ The reluctance of courts to approve adoptions by unmarried same-sex partners began to change in the 1990's with the recognition of second-parent adoption by one partner of the other partner's birth child. *E.g.*, *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (allowing one female partner in a same-sex relationship to adopt the biological child of the other in part to enable the child to share as a family member in trusts created by the family of the non-birth mother); *see also* Jane S. Schacter, Symposium: *Constructing Families in a Democracy: Court, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 947-49 (2000) (arguing that court decisions that allow second-parent adoption create legal security for same-sex families, encourage those families to be more "visible," and challenge the public's understanding of those types of adoptions).

⁸ By 2010, the marriage of same-sex couples was legal in Argentina, Canada, the Netherlands, Portugal, Spain, South Africa, Sweden, and Norway. Robert Wielaard & Jill Lawless, *Court Rules EU Nations Don't Have to Allow Gay Marriage*, BOSTON GLOBE, June 26, 2010 (noting nations which have recognized same-sex marriage and others that have recognized same-sex partnerships); Matt Moffet & Taos Turner, *Argentina Lawmakers Vote to Legalize Gay Marriage*, WALL ST. J., July 15, 2010, <http://online.wsj.com/article/SB10001424052748704682604575368720072718114.html>. Austria, Czech Republic, Denmark, Finland, France, Germany, Hungary, the United Kingdom, Uruguay, and some Latin American cities, such as Buenos Aires, have stopped short of recognizing same-sex marriage but permit a form of legally recognized same-sex partnerships that include some of the benefits of marriage, such as tax and immigration benefits. *See, e.g., id.*; Alexei Barrionuevo, *Argentina Approves Gay Marriage, in a First for Region*, N.Y. TIMES, July 15, 2010, <http://www.nytimes.com/2010/07/16/world/americas/16argentina.html>; Phil Cain, *Austrians Seek Right to Partnership Created for Gays*, BBC NEWS, May 17, 2010, <http://news.bbc.co.uk/2/hi/europe/8687064.stm> (discussing domestic partnerships in Austria and France and their use by heterosexual couples as well as same-sex couples).

⁹ *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993) (stating that burden is on the state to show there is a compelling state reason to deny marriage licenses to same-sex couples who seek them). Subsequent to this decision, however, the state constitution was amended to define marriage as between a man and a woman, effectively mooted the litigation. *See Baehr v. Miike*, 994 P.2d 566 (Haw. 1999); *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONFERENCE OF STATE LEGISLATURES, tbl. (last updated Sept. 2010) ("Hawaii's constitution was amended in 1998 to read 'The Legislature shall have the power to reserve marriage to opposite-sex couples.' The Hawaii legislature subsequently passed a law prohibiting marriage for same-sex couples.").

¹⁰ *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at *4 (Alaska Super. Ct., Feb. 27, 1998) (right of privacy gives same-sex couples the right to choose life partners). Subsequent amendments to the Alaska Constitution also rendered this decision moot. *See Evelyn Nieves, Ballot Initiative that Would Thwart Gay Marriage Is Embroiling California*, N.Y. TIMES, Feb. 25, 2000 ("Thirty other states have passed definition-of-marriage laws, including Hawaii and Alaska, which did so through ballot initiatives.").

¹¹ *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding that common benefits clause of the Vermont Constitution requires state to allow same-sex couples to have access to same benefits given to opposite-sex couples). After this decision, Vermont enacted a civil union bill

decision influenced Congress to enact DOMA in 1996,¹² which for purposes of federal law defined marriage as “only a legal union between one man and one woman as husband and wife.”¹³

The repeal or judicial invalidation of DOMA would have the obvious benefit of allowing partners in legally recognized same-sex unions to seek the same federal benefits and rights accorded to persons in legally recognized heterosexual unions. Repealing DOMA would also affect the legality of same-sex unions across the many states. As enacted, DOMA contains a provision that precludes the possibility of cases being introduced in state courts to secure the legal recognition of same-sex marriages¹⁴ under the Full Faith and Credit Clause of the U.S. Constitution¹⁵:

“No State, territory, possession of the United States, or Indian tribe is required to give effect to . . . a relationship between persons of the same sex that is treated as marriage under the law of any other state, territory, possession of the United States, or Indian tribe, or to claims arising from such a relationship.”¹⁶

The repeal or invalidation of this section of DOMA would be a powerful symbol of the principle of fairness, but as long as there is a diversity of views in the various states regarding same-sex unions, a national recognition of same-sex unions will not occur.

II. SAME-SEX MARRIAGE

In the twenty-first century, the right of same-sex persons to marry each other began to find some acceptance in a number of US courts and state legislatures. Since Americans began increasingly accepting and applying principles of equality in various aspects of civil life, this development is unsurprising. The civil rights and feminist movements in the twentieth century expanded civil liberties and challenged conceptions

conferring the benefits of marriage on same-sex couples that entered civil unions. Still later, in 2009, Vermont enacted legislation allowing same-sex couples to marry. Keith B. Richburg, *Vermont Legislature Legalizes Same-Sex Marriage*, WASH. POST, Apr. 7, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/07/AR2009040701663.html>.

¹² H.R. Rep. No. 104-664, at 4 (1996), *reprinted in*, 1996 U.S.C.C.A.N. 2905-23.

¹³ The Defense of Marriage Act, 1 U.S.C. § 7 (2006).

¹⁴ *See generally*, Paige E. Chabora, *Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996*, 76 NEB. L. REV. 604 (1997).

¹⁵ U.S. CONST. ART. IV4, § 1.

¹⁶ 28 U.S.C. § 1738C.

of equality on matters such as race, gender, and national origin. The freedom to marry across racial lines, which was read into the Constitution by the Supreme Court in 1967, has now been accepted as unquestionably appropriate throughout the United States.¹⁷ By the early twenty-first century this expansion of the freedom to marry had opened the door to the potential recognition of same-sex marriage. It was a revolutionary development, one that created great debate in the body politic, the courts, and the legislatures.

A basic premise of the historical development underlying the same-sex marriage movement is that, while many view marriage as solely a religious institution, from a legal point of view, marriage is a state-created civil institution subject to changing social needs. Although marriage evolved in part from religious concepts, starting as early as the Plymouth Colony,¹⁸ legal marriage began to detach from its religious origins as the law defined so many benefits to married persons that it increasingly became recognized as a civil institution defined by civil rights and obligations.¹⁹ Eventually, those who had previously been excluded from the right to marry demanded equal access to the legally recognized benefits of marriage.²⁰

Federal law and the laws of every state confer hundreds of specific benefits that flow from marriage, including economic protections of domestic relations law, tax benefits, land titles, descent and distribution of property, family leave benefits, protection of marital communications, homestead rights, worker compensation and personal injury claims, and numerous other benefits.²¹ Modern marriage is a civil institution, the benefits of which enrich its members by numerous statutory laws, and this in turn demands that its civil benefits be available on a non-discriminatory basis.

¹⁷ *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (declaring unconstitutional a Virginia statute that prohibited marriages between persons of different races).

¹⁸ See Charles P. Kindregan, Jr. & Monroe L. Inker, *Marriage in the Plymouth Colony*, in MASSACHUSETTS PRACTICE: FAMILY LAW AND PRACTICE, § 1:3 (3d ed. 2003).

¹⁹ See e.g., Charles P. Kindregan, Jr., *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History*, 38 FAM. L.Q. 427, 437–39 (2004) (noting the evolution of marriage in the United States as a civil institution regulated by the state).

²⁰ See Mary L. Bonauto, *Ending Marriage Discrimination: A Work in Progress*, 40 SUFFOLK U. L. REV. 813, 814 (2007) (examining the need for equality of access to the marriage institution regardless of gender).

²¹ See, e.g., *FAQs: Questions about Same-Sex Marriage*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/issues/5517.htm> (last visited Oct. 12, 2010).

Opponents of same-sex marriage argue that allowing same-sex marriage would change the inherent and immutable nature of marriage.²² In 2003, Massachusetts became the first state to recognize by judicial decision the right of same-sex persons to marry under the state's constitution.²³ This followed just months after the United States Supreme Court decided *Lawrence v. Texas*,²⁴ which, while not involving marriage, appeared to be a step towards acceptance of same-sex marriage²⁵ by declaring unconstitutional a state statute criminalizing same-sex sodomy.²⁶ The governor of Massachusetts at the time complained that by changing the definition of marriage, the court had overturned "3000 years of recorded history."²⁷ This statement, which reflects much popular opinion about same-sex marriage, was premised on the idea that marriage is immutable and therefore forever fixed in history and time.²⁸ In reality, marriage has assumed various forms throughout history, even here in the United States: at various times and in different places, legal disputes have arisen over inter-racial marriage,²⁹ common law marriage,³⁰ plural marriage,³¹ incestuous marriage,³² and covenant marriage.³³ In each case,

²² See e.g., *Special Report: Gay Marriage*, CATHOLIC ANSWERS, http://www.catholic.com/library/gay_marriage.asp (last visited Oct. 12, 2010).

²³ *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (holding that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry an individual of the same sex violates the Massachusetts Constitution).

²⁴ *Lawrence v. Texas*, 539 U.S. 558 (2003) (declaring unconstitutional a Texas statute making sodomy a crime).

²⁵ See *id.* at 563–63; *Goodridge*, 798 N.E.2d at 965 (acknowledging that by determining that same-sex couples were eligible to apply for marriage licenses the court was changing the definition of marriage).

²⁶ *Lawrence*, 539 U.S. at 578–79. Indeed, in *Goodridge* the Massachusetts court cited *Lawrence*, among other cases. *Goodridge*, 798 N.E.2d at 953, 958.

²⁷ Frank Phillips & Rick Klein, *Lawmakers Are Divided on Response*, BOSTON GLOBE, Nov. 19, 2003, at A1 (quoting Governor Romney on the *Goodridge* decision).

²⁸ See e.g., *Why Marriage Matters*, ProtectMarriage.com, <http://www.protectmarriage.com/why-marriage-matters> (last visited Oct. 12, 2010); see also Russell Shorto, *What's Their Real Problem With Gay Marriage? (It's the Gay Part)*, N.Y. TIMES, June 19, 2005, <http://www.nytimes.com/2005/06/19/magazine/19ANTIGAY.html?pagewanted=all>.

²⁹ Compare *Loving v. Virginia*, 388 U.S. 1 (1967) (holding unconstitutional state statutes which prohibit interracial marriages) with *Kinney v. Commonwealth*, 71 Va. 858, 869 (1878) (declaring marriages between persons of different races to be unnatural).

³⁰ *Meister v. Moore*, 96 U.S. 76, 82–83 (1877) (upholding right of persons to enter informal common law marriage unless expressly prohibited by state law).

³¹ *Davis v. Beason*, 133 U.S. 333, 341–42 (1890) (noting that various sects supported

to some extent, public controversy over these different forms of marriage has diminished and some ideas that were once considered radical have come to be tolerated or accepted.³⁴ Even more recently, substantial changes to particular aspects of the “traditional” definition of marriage have been adopted in the United States, including non-marital cohabitation contracts,³⁵ equitable property division,³⁶ parentage by use of non-sexual assisted reproduction,³⁷ recognition of abortion rights,³⁸ legalization of no-fault divorce,³⁹ enactment of covenant marriage laws, and legislative approval of civil unions and domestic partnerships that confer the benefits of marriage on same-sex couples.⁴⁰ These significant developments indicate that historically, the laws governing intimate relations are in a state of constant flux in order to meet the demands of modern life.

Following the decisions in *Baker v. State*,⁴¹ which recognized the right of same-sex couples in Vermont to have access to the benefits of marriage, and *Goodridge v. Department of Health*,⁴² which recognized

polygamous marriage and upholding the power of the government to compel those sects to Christian ideas of marriage).

³² *In re May's Estate*, 114 N.E.2d 4, 6–7 (N.Y. 1953) (recognizing a marriage between an uncle and his niece—who were resident in New York where such a marriage was illegal—as incestuous and void in New York, but legal in Rhode Island where the marriage took place).

³³ Elizabeth S. Scott, *The Legal Construction of Norms: Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1959 (2000) (discussing theory of legislating covenant marriage in which parties covenant not to divorce).

³⁴ See generally Charles P. Kindregan, Jr., *Religion, Polygamy, and Non-Traditional Families: Disparate Views on the Evolution of Marriage in History and in the Debate Over Same-Sex Unions*, 41 SUFFOLK U. L. REV. 19 (2007) (presenting a study of the evolution of different forms of marriage).

³⁵ *Marvin v. Marvin*, 557 P.2d 106, 122–23 (Cal. 1976) (holding that non-married couples could make valid and enforceable contracts between one another).

³⁶ See e.g., CAL. FAM. CODE § 2550 (Deering 2010).

³⁷ See *K.M. v. E.G.*, 117 P.3d 673, 682 (Cal. 2005) (holding in part that both lesbian partners were parents of the children, despite only one being the biological mother).

³⁸ See *Roe v. Wade*, 410 US 113 (1973).

³⁹ See, e.g., CAL. FAM. CODE § 2335.

⁴⁰ See, e.g., CAL. FAM. CODE § 297.5(a) (“Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.”)

⁴¹ *Baker v. State*, 744 A.2d 864 (Vt. 1999) (upholding right of same-sex couples to enjoy the legal benefits of marriage under the Vermont Constitution).

⁴² *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (declaring right of same-sex couples to obtain marriage licenses under the Massachusetts Constitution).

same-sex marriage in Massachusetts, other states began to provide for civil unions of same-sex couples or domestic partnerships.⁴³ In 2008, *Kerrigan v. Commissioner of Public Health* made Connecticut the second state to recognize by court decision the right of same-sex couples to legally marry.⁴⁴ Later, in 2009, Iowa followed suit in *Varnum v. Brien*.⁴⁵

New York has also grappled with the issue of same-sex marriage. To date, the state has not enacted a statute prohibiting same-sex marriage, nor has it authorized same-sex marriages to take place within the state. In 2006, the New York Court of Appeals, the state's highest court, ruled in *Hernandez v. Robles* that, because the statutes governing domestic relations restrict marriage to opposite-sex couples, it is up to the legislature to decide the issue of same-sex marriage.⁴⁶ Additionally, the court of appeals elected not to address the issue of whether the state should recognize marriages of same-sex couples who are residents of New York, but who legally marry elsewhere in another state or nation.⁴⁷

Prior to *Hernandez*, the New York Solicitor General issued an informal opinion stating that, because the state recognized out-of-state common-law marriages, New York should also recognize legal, same-sex marriages contracted in other jurisdictions,⁴⁸ even if they would not be

⁴³ CAL. FAM. CODE § 297.5 (recognizing registered domestic partnerships); N.J. STAT. § 37:1-28 (West 2007) (recognizing civil unions); OR. REV. STAT. ANN. §§ 106.305–340 (2010).

⁴⁴ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008). Subsequently the Connecticut legislature provided same-sex couples the right to obtain marriage licenses. CONN. GEN. STAT. § 46b-20 (2010). Before the decision in *Kerrigan*, Connecticut allowed same-sex civil unions through a statute that conferred all the same benefits, protections, and responsibilities the law gave to heterosexual spouses. CONN. GEN. STAT. §§ 46b-38nn (2005). This statute, however, was repealed by a 2009 statute that recognized same-sex marriage and allowed partners in a civil union to merge that relationship into marriage. CONN. GEN. LAW 09-13 (2009). Effective October 1, 2010, same-sex civil unions that had not been dissolved or annulled automatically become marriages. *Id.*

⁴⁵ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (ruling that Iowa Code section 595.2 be applied to allow same-sex partners full access to civil marriage).

⁴⁶ *Hernandez v. Robles*, 855 N.E.2d 1, 12 (N.Y. 2006) (while the New York Constitution does not require that the state issue marriage licenses to same-sex couples, the court expressed hope that the legislature will address the controversy).

⁴⁷ *Id.*

⁴⁸ Fifteen states and the District of Columbia recognize common law marriage, i.e. marriages not licensed by the state but recognized as valid if the parties consent, cohabit, and hold themselves out as a married couple. See Jennifer Thomas, *Common Law Marriage*, 22 J. AM. ACAD. MATRIM. LAW. 151, 151 (2009) (commenting on the current common law marriage in the United States).

legal if contracted in New York.⁴⁹ The state had previously provided some recognition to same-sex partners without formally recognizing the partnerships as marriage,⁵⁰ and while the legislature engaged in contentious debates over the issue, several New York Court of Appeals decisions opened the door to the possibility that same-sex marriages or civil unions legalized elsewhere between New York residents could be recognized by the state.⁵¹

In 2009, the New York Court of Appeals upheld a civil service commission ruling that, for purposes of health insurance coverage for dependents of public workers, out-of-state marriages between same-sex couples would be recognized.⁵² A year later, the court of appeals recognized the parental status of a same-sex partner based on the fact that she was a partner in a Vermont civil union that defined her as a parent under Vermont law.⁵³ In accordance with evolving New York laws recognizing same-sex unions legalized elsewhere, the Governor of New York issued an executive directive ordering state agencies to afford comity or full faith and credit to same same-sex marriages legalized in other states or countries.⁵⁴

The status of same-sex unions in Rhode Island and New Mexico is unclear. Rhode Island's statutes neither permit such unions⁵⁵ nor bar their recognition if performed elsewhere. In 2007, however, the Rhode Island Supreme Court interpreted a divorce statute as limiting the dissolution of marriage to opposite-sex couples only.⁵⁶ New Mexico has no

⁴⁹ *Id.* at 154; Informal Opinion on N.Y. State Domestic Relations Law, 2004 Ops. Atty. Gen. No. 1, at 35 (2004) (out-of-state legal same-sex marriage partners are to be treated as spouses for purposes of New York law).

⁵⁰ *See, e.g.,* *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49 (N.Y.1989) (stating that surviving same-sex partner was entitled to continue living in the deceased partner's rent controlled apartment); *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001) (permitting unmarried same-sex partners to challenge their exclusion from university housing set aside for married couples).

⁵¹ *See supra*, note 58.

⁵² *Godfrey v. Spano*, 920 N.E.2d 328 (N.Y. 2009) (rejecting taxpayer challenge to civil service ruling that, for purposes of public employment benefits, same-sex marriages created legally in other jurisdictions would be recognized).

⁵³ *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010) (recognizing a parent on basis of her being a partner in a Vermont civil union as provided in the Vermont statute and estopping the birth mother from denying former same-sex civil union partner's parental interests).

⁵⁴ David Nocenti, Executive Directive of Gov. Patterson of New York, May 14, 2008.

⁵⁵ *Cf.* R.I. GEN LAWS § 16-16-26 (2010) (allowing some benefits to domestic partners of public school teachers).

⁵⁶ *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007) (denying divorce to a same-sex couple

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constitutional or statutory ban prohibiting same-sex unions,⁵⁷ but also has no positive law in favor of such unions.

In 2009, Vermont⁵⁸ and New Hampshire⁵⁹ became the first states to legislatively recognize the right of same-sex couples to marry. Shortly thereafter, the issue was also debated in the District of Columbia,⁶⁰ where the City Council eventually enacted legislation approving same-sex marriage in that jurisdiction.⁶¹

Other jurisdictions, however, have suffered set-backs following an initial recognition of same-sex marriages. In Maine, a voter referendum repealed legislation⁶² that had been enacted to authorize same-sex marriage in that state.⁶³ Similarly, in California, a decision by the state's supreme court approving same-sex marriage in that state⁶⁴ was overturned by a voter referendum that amended the California Constitution to define marriage as between only a man and a woman.⁶⁵ The California courts,

married in another state).

⁵⁷ N.M. STAT. ANN. § 40-1-18 (West 2009) (requiring that a marriage license application be signed by a male and a female). It is doubtful that this procedural provision constitutes a legislative denial of same-sex marriage.

⁵⁸ An Act Relating to Civil Marriage, VT. STAT. ANN. tit. 15 § 8 (2010) (recognizing the right of two persons to marry, effective September 1, 2009.).

⁵⁹ N.H. REV. STAT. § 457:1-a (2009) (effective January 1, 2010) (revising section 457 of the New Hampshire Code, and recognizing the right of two people to marry, regardless of gender).

⁶⁰ Ian Urbina, *Washington Legalizes Same-Sex Marriage*, N.Y. TIMES, March 3, 2010, A19.

⁶¹ Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. CODE § 46-401 (2010) (added March 3, 2010).

⁶² An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, L.D. 1020, S.P. 384 (2009) (effective Sept. 14, 2009), *available at* www.legislature.maine.gov/legis/bills/bills_124th/billpdfs/SP038401.pdf (repealed by referendum).

⁶³ Maine Referendum Question 1: People's Veto, November 3, 2009, *available at* <http://maine.gov/sos/cec/elec/2009/intent09.htm>.

⁶⁴ *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (ruling that sections of California's Family Code describing marriage as the union between a man and a woman discriminated on the basis of sexual orientation) *superseded by initiative measure*, Proposition 8, § 2, 2008 Cal. Legis. Serv. 2315 (West) (adding section 7.5 to the California Constitution) *as recognized in* *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009), *but held unconstitutional by* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2009), *question certified by* 2011 WL 9633 (9th Cir. 2011).

⁶⁵ Proposition 8, § 2, 2008 Cal. Legis. Serv. 2315 (West); *see also* Secretary of State of California, Official Voter Information Guide 128 (2008), *available at* <http://voterguide.sos.ca.gov/past/2008/general/pdf-guide/vig-nov-2008-principal.pdf>. Effective November 5, 2008, Proposition 8 amended the California Constitution by adding section 7.5 to define marriage as between a man and a woman. *See Strauss*, 207 P.3d at 59.

however, invalidated the referendum in two legal challenges that followed shortly after its enactment. In the first case, the California Supreme Court ruled that the referendum applied only prospectively: same-sex marriages that took place before the referendum's enactment were valid.⁶⁶ Later, a challenge was brought to the referendum itself, and in 2010, the United States District Court for the Northern District of California found that the referendum failed to advance any rational basis for singling out gays and lesbians and denying them marriage licenses, and ruled that the referendum was unconstitutional under the Due Process and Equal Protection Clauses of the United States Constitution.⁶⁷

III. SAME-SEX MARRIAGE LITE

After the decision in *Baker v. State*,⁶⁸ other states began to follow Vermont's lead in providing for civil unions or domestic partnerships of same-sex couples.⁶⁹ Such statutes provide for the extension of some marriage rights and liabilities to same-sex partners, and thus may appropriately be called a form of "marriage lite." Of course, these unions are not technically "marriage," and are commonly understood as being different from marriage. There are questions about the application of these statutes to particular factual situations; for instance, dissolutions of legally recognized same-sex unions are not yet common enough⁷⁰ to determine with certainty how consequences of dissolution, such as alimony and property division, will be resolved, but it will likely take years of litigation

⁶⁶ *Strauss*, 207 P.3d 48, 119 (Cal. 2009) (holding same-sex marriages solemnized between June 16, 2008 and November 5, 2008 to be valid).

⁶⁷ See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal.) ("Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license"), *stay granted pending appeal* by No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 16, 2010). On January 4, 2011, the Ninth Circuit issued an opinion requesting that the Supreme Court of California "accept and decide the certified question" of standing regarding official proponents of Proposition 8. No. 10-16696, 2010 WL 9633 (9th Cir. 2011).

⁶⁸ *Baker v. State*, 744 A.2d 864 (Vt. 1999) (upholding right of same-sex couples to enjoy the legal benefits of marriage under the Vermont Constitution). Title 15, section 8 of the Vermont Code created a new legal definition of marriage. VT. STAT. ANN. tit. 15, § 8 (2010).

⁶⁹ CAL. FAM. CODE § 297.5 (West 2007) (recognizing registered domestic partnerships); N.J. STAT. ANN. § 37:1-28 (West 2007) (recognizing civil unions); OR. REV. STAT. ANN. §§ 106.305-340 (West 2010); WASH. REV. CODE ANN. § 26.26.010 (West 2008).

⁷⁰ GARY J. GATES, M. V. LEE BADGETT & DEBORAH HO, WILLIAMS INST., MARRIAGE, REGISTRATION AND DISSOLUTION BY SAME-SEX COUPLES IN THE U.S. 14 (2008), *available at* <http://www.law.ucla.edu/williamsinstitute/publications/Couples%20Marr%20Regis%20Diss.pdf>

to determine specific financial and other issues that will inevitably arise as a result of dissolutions of same-sex non-marital unions.

States that are willing to confer at least some benefits on same-sex couples without recognizing their unions as marriage have done so in a number of ways: California,⁷¹ Oregon,⁷² and Washington⁷³ recognize registered domestic partnerships; Colorado permits same-sex couples to enter into designated beneficiary agreements⁷⁴; Hawaii has adopted a reciprocal benefits law⁷⁵; New Jersey recognizes same-sex registered civil unions⁷⁶; and Maine,⁷⁷ Maryland,⁷⁸ Nevada,⁷⁹ and Wisconsin⁸⁰ have enacted domestic partnership laws.

These “marriage lite” statutes vary widely in their treatment of same-sex marriage. They also demonstrate the likely inability of the states to develop any uniform law governing same-sex unions, even among those states which are inclined to accord some legal benefits to same-sex couples but are unwilling or unable, due to state constitutional restrictions or political opposition, to recognize same-sex marriage.

The Oregon domestic partnership law is an example of the general insecurity of state-conferred recognition of same-sex unions that fall short of marriage. After the Oregon Constitution was amended to define marriage as a union of one man and one woman,⁸¹ a Legislative Assembly

⁷¹ FAM. § 297.5. California law also provides for recognition of foreign same-sex unions, which are the substantive equivalent of California’s domestic partnerships, but not marriage. FAM. § 299.2.

⁷² OR. REV. STAT. ANN. § 106.305.

⁷³ WASH. REV. CODE. § 26.60.010.

⁷⁴ COLO. REV. STAT. §§ 15-22-101 to -112 (2009) (all dealing with death of beneficiaries).

⁷⁵ HAW. REV. STAT. § 572C-4 to -5 (1997). In April 2010 the Hawaii legislature approved House Bill 444, which would have broadened the benefits of same-sex partners by creating civil unions, but Governor Lingle vetoed the bill. *Same-Sex Civil Unions Bill Vetoed in Hawaii*, BOSTON GLOBE, July 7, 2010, http://www.boston.com/news/nation/articles/2010/07/07/same_sex_civil_unions_bill_vetoed_in_hawaii/.

⁷⁶ N.J. STAT. ANN. § 37:1-28(d) (West 2007); *see also* N.J. STAT. ANN. § 37:1-34 (West 2007) (stating New Jersey also recognizes civil unions that are registered legally elsewhere).

⁷⁷ ME. REV. STAT. ANN. tit. 18-A, §§ 1-201 (10-A), 2-102, 2-103 (2003).

⁷⁸ MD. CODE ANN., HEALTH-GEN. §§ 5-605(a)(2), 6-101, 6-201(a) (West 2008) (conferring specified limited benefits on same-sex domestic partners). A formal opinion of the Maryland Attorney General permits recognition of same-sex unions and marriages that are legally solemnized elsewhere. 95 MD. OP. ATTY. GEN. 3 (2010).

⁷⁹ NEV. REV. STAT. §§ 122A.200.1(a) (2010).

⁸⁰ WIS. STAT. §§ 770.001 (2010).

⁸¹ OR. CONST. art. XV, § 5a.

finding noted that many “gay and lesbian Oregonians have formed lasting, committed, caring and faithful relationship with individuals of the same sex, despite long-standing social and economic discrimination.”⁸² In order to “further the state’s interest in the promotion of stable and lasting families,” the legislature created domestic partnership contracts to “extend[] benefits, protections and responsibilities to committed same-sex partners and their children that are comparable to those provided to married individuals and the children by the laws of this state.”⁸³ The legislature made clear, however, that Oregon domestic partnerships are not marriage and “may not be effective beyond the border of this state and cannot impact restrictions contained in federal law.”⁸⁴ Thus while Oregon law confers on parties to a certified domestic partnership many of the privileges, immunities, rights, benefits, and responsibilities arising from marriage,⁸⁵ the legislature took note of the basic problem affecting the status of same-sex unions—namely, that same-sex unions, or domestic partnerships are not the true equivalent of marriage, and their status may not be entitled to uniform recognition throughout the United States.

IV. STATE BANS ON SAME-SEX MARRIAGE

While a few states recognize same-sex marriage or other forms of same-sex unions, the majority prohibit such recognition. Some do so by a provision in their state constitutions that defines marriage as solely between a man and a woman, while others do so by restrictive statutes. The states with one or both types of provisions include Alabama,⁸⁶ Alaska⁸⁷ Arizona,⁸⁸ Arkansas,⁸⁹ Delaware,⁹⁰ Florida,⁹¹ Georgia,⁹² Idaho,⁹³

⁸² OR. REV. STAT. ANN. § 106.305(3) (West 2010) (legislative findings).

⁸³ *Id.* § 106.305(5).

⁸⁴ *Id.* § 106.305(7).

⁸⁵ *See id.* § 106.340.

⁸⁶ ALA. CONST. art. I, § 36.03 (voiding and prohibiting same-sex marriage). Alabama law also prohibits the recognition of any same-sex union that replicates marriage, even if licensed in another state. This constitutional prohibition is also replicated in the Alabama Marriage Protection Act. ALA. CODE § 30-1-19 (2009); *see* 2 CRITTENDEN & KINDREGAN, ALABAMA FAMILY LAW § 29:2 (describing the Alabama Marriage Protection Act and an attorney general opinion).

⁸⁷ ALASKA STAT. § 25.05.011(2010); ALASKA CONST. art. I, § 25. Alaska had some case law that was not unfavorable to same-sex unions, but Article 25 of the state constitution changed the definition of marriage to be strictly a union of one man and one woman. This effectively bars full recognition of same-sex unions. *See Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998) (stating that, under Alaska’s privacy law,

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Illinois,⁹⁴ Indiana,⁹⁵ Kansas,⁹⁶ Kentucky,⁹⁷ Louisiana,⁹⁸ Michigan,⁹⁹
 Minnesota,¹⁰⁰ Mississippi,¹⁰¹ Missouri,¹⁰² Montana,¹⁰³ Nebraska,¹⁰⁴ North

persons of the same-sex have a right to choose their life partner). The *Brause* decision was mooted by the subsequent amendment of the state constitution. See *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005) (holding that the state's constitutional definition of marriage does not prohibit private and public employers from providing benefits to persons in long-term intimate relationships that the employer confers on dependents in heterosexual marriages).

⁸⁸ ARIZ. CONST. art. XXX, § 1 (defining marriage as between a man and a woman); ARIZ. REV. STAT. § 25-101C (2010) (declaring same-sex marriages as void and prohibited). Arizona also has a marriage evasion act, which voids the marriage of residents who marry outside the state in violation of the Arizona marriage laws. § 25-112C.

⁸⁹ ARK. CONST. amend. LXXXIII, § 1 (defining marriage as between a man and a woman); ARK. CODE ANN. § 9-11-107 (2010) (voiding same-sex marriages consummated in other states). Arkansas even voids contracts between same-sex partners and will not enforce any rights arising from the termination of a same-sex union. ARK. CODE ANN. § 9-11-208C (2010).

⁹⁰ DEL. CODE ANN. tit. 13, § 101(a). (declaring same-sex marriages to be prohibited and void).

⁹¹ FLA. CONST. art. I, § 27 (defining marriage as between a man and a woman); FLA. STAT. ANN. § 741.212(1) (same-sex marriage not recognized for any purpose). The Florida same-sex marriage statute was upheld against constitutional challenge in *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

⁹² GA. CONST. art. I, § 4, paras. I(a), I(b) (same-sex marriage prohibited and not entitled to the benefits of marriage); GA. CODE ANN. § 19-3-3.1(a) (2010) (same-sex marriage prohibited).

⁹³ IDAHO CONST. art. III, § 28 (defining marriage between a man and a woman as the only domestic legal union valid in the state).

⁹⁴ 750 ILL. COMP. STAT. ANN. 5/212 & 5/213.1 (West 2006) (same-sex marriage is contrary to public policy and is prohibited).

⁹⁵ IND. CODE ANN. § 31-11-1-1(a) (West 2007) (defining marriages as only between males and females).

⁹⁶ KAN. CONST. art. XV, § 16 (defining marriage as between a man and a woman); KAN. STAT. ANN. § 23-101(a) (2010) (all marriages other than between persons of the opposite sex are void).

⁹⁷ KY. CONST. § 233A (defining marriage as between a man and a woman); KY. REV. STAT. ANN. § 402.020(1)(d) (West 2010) (same-sex marriages are void and prohibited); §§ 402.040, 402.045 (West 2010) (same-sex marriages legalized in other states are void in Kentucky).

⁹⁸ LA. CONST. art. XII, § 15 (same-sex marriages and unions substantially similar to marriage are not valid or recognized); see *Forum For Equal. PAC v. McKeithen*, 893 So. 2d 715 (La. 2005) (dissolving a lower-court ordered stay of enforcement of state constitution amendment).

⁹⁹ MICH. CONST. art. I, § 25 (only a union of one man and one woman is recognized as a marriage or similar union for any purpose); MICH. COMP. LAWS ANN. § 551.1 (West 2010) (prohibiting marriage between persons of the same gender).

¹⁰⁰ MINN. STAT. ANN. §§ 517.03(4), 518.01 (West 2009) (prohibiting same-sex marriage).

¹⁰¹ MISS. CONST. art. XIV, § 263A (only marriage between a man and woman is valid); MISS. CODE ANN. § 93-1-1(2) (1997) (same-sex marriages are null and void and prohibited).

Carolina,¹⁰⁵ North Dakota,¹⁰⁶ Ohio,¹⁰⁷ Oklahoma,¹⁰⁸ Pennsylvania,¹⁰⁹ South Carolina,¹¹⁰ South Dakota,¹¹¹ Tennessee,¹¹² Texas,¹¹³ Utah,¹¹⁴ Virginia,¹¹⁵ West Virginia,¹¹⁶ and Wyoming.¹¹⁷ This widespread denial of

¹⁰² MO. CONST. art. 1, § 33 (valid marriage is only between a man and a woman); MO. REV. STAT. § 451.022(4) (West 2010) (same-sex marriage is invalid).

¹⁰³ MONT. CONST. art. XIII, § 7 (defining marriage as between a man and woman); MONT. CODE ANN. § 40-1-103 (2010) (same-sex marriage prohibited). *But see* Snetsinger v. Mont. Univ. Sys., 104 P.3d 445 (Mont. 2004) (state may not prohibit university from giving benefits to same-sex partners of employees).

¹⁰⁴ NEB. CONST. art. I, § 29 (same-sex marriages, civil unions, domestic partnerships, or similar unions not valid or recognized).

¹⁰⁵ N.C. GEN. STAT. § 51-1.2 (2010) (marriages between same-sex partners contracted either in state or elsewhere are not valid).

¹⁰⁶ N.D. CONST. art. XI, § 28 (unless the union is between a man and a woman, it will not be a legally recognized domestic union, however named, and is not recognized as marriage or given equivalent legal effect); N.D. CENT. CODE, § 14-03-01 (2009) (spouse defined as person of the opposite sex who is a husband or wife).

¹⁰⁷ OHIO CONST. art. XV, § 11 (state and its subdivisions will recognize only a marriage between one man and one woman); OHIO REV. CODE ANN. § 3101.01 (West 2010) (stating that same-sex marriage is contrary to public policy; any act, record, or judicial decision of another state conferring benefits of marriage on same-sex couples has no effect in Ohio).

¹⁰⁸ OKLA. CONST. art. II, § 35A (marriage is only between one man and woman); OKLA. STAT. tit. 43, §§ 3, 3.1 (2010) (only qualified persons under this statute are capable of contracting to marry a person of the opposite sex).

¹⁰⁹ 23 PA. CONS. STAT. ANN. § 1704 (2010) (public policy is that marriage is between one man and one woman).

¹¹⁰ S.C. CONST. art. XVII, § 15 (marriage between a man and a woman is the only recognized domestic union); S.C. CODE ANN. § 20-1-15 (2009) (same sex marriages are contrary to public policy and are void ab initio).

¹¹¹ S.D. CONST. art. XXI, § 9 (2010) (only a marriage between a man and a woman is recognized; civil union, domestic partnership or other quasi-marital relationships are not valid).

¹¹² TENN. CONST. art. XI, § 18 (2010) (only a relationship of one man and one woman is a recognized marital contract); TENN. CODE ANN. § 63-3-113 (West 2010) (stating that any policy, law, or judicial decision defining marriage as anything other than a relationship between a man and woman is contrary to public policy).

¹¹³ TEX. CONST. art. I, § 32(a) (marriage is only between a man and a woman); TEX. FAM. CODE ANN. § 6.204 (West 2009) (same-sex marriage or civil union if void).

¹¹⁴ UTAH CONST. art. I, § 29 (marriage is only between a man and a woman and any other domestic union cannot be given legal effect); UTAH CODE ANN. § 30-1-2(5) (West 2010) (same sex marriage is void and prohibited).

¹¹⁵ VA. CONST. art. I, § 15-A (marriage only between a man and a woman); VA. CODE ANN. §§ 20-45.2, 45.3 (2010) (same-sex marriage is prohibited as is a civil union or contract purporting to confer benefits or obligations of marriage).

¹¹⁶ W. VA. CODE § 48-2-104(c) (2010) (marriage licensing statute declares marriage to be between a man and a woman); § 48-2-603 (2010) (same sex marriages performed elsewhere are not given effect in state).

same-sex unions by states suggests the political difficulty of achieving national recognition of such unions in the near future, even if DOMA is repealed or struck down by judicial decision.

V. HISTORY DEMONSTRATES THE PROBLEMS OF
 CREATING A COMMON UNDERSTANDING OF
 MARRIAGE WITHIN THE FEDERAL UNION

Historically, family law has been a source of conflict between the federal and state governments, especially regarding the status of marriage or other domestic unions. There is a basic problem with having different states refusing to recognize a particular marriage or domestic partnership that has been legalized in another state. History demonstrates that this is a basic dilemma inherent in the American Federal Union. In 1858 the Supreme Court disclaimed any family law jurisdiction in the federal courts by announcing the domestic relations exception to federal diversity jurisdiction.¹¹⁸ During the same period of time, the federal courts were embroiled in resolving questions that related to the status of marriage in various states. This was reflected in the national debates on slavery and the controversy over polygamy.

In the famous *Dred Scott* case¹¹⁹ that presaged the Civil War, the issue of marriage was central to the case because the Scotts' legal marriage in Wisconsin was not recognized in Missouri.¹²⁰ Even aside from the issue of slavery, the decision left the country with the odd understanding that a person could be legally married in one part of the Union and not in another. The famous dissenting opinion of Justice Curtis

¹¹⁷ WYO. STAT. ANN. § 20-1-101 (2010) (marriage defined as between a man and a woman).

¹¹⁸ *Barber v. Barber*, 62 U.S. 582, 584 (1859).

¹¹⁹ *Scott v. Sandford (Dred Scott)*, 60 U.S. 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹²⁰ *Dred Scott*, 60 U.S. at 397–98. *Dred Scott*, a slave, was legally married to Harriet Robinson in the Wisconsin Territory when he was taken there by his master. Later Harriet gave birth to a child named Eliza on a ship that was allegedly north of Missouri in Illinois waters. In other words, the marriage and the birth of their child took place in jurisdictions that outlawed slavery. Slaves could not legally marry in slaveholding states. One issue then was whether *Dred* and Harriet were legally married, and whether they and Eliza were free by virtue of having lived in and been married in a free jurisdiction even though they later returned to the slaveholding state of Missouri. What Wisconsin considered a valid marriage, Missouri treated as no marriage at all. The majority of the Supreme Court rejected the Scotts' claim of freedom. *See generally id.*

stated that, because the marriage was valid in Wisconsin, where the marriage took place, it had to be valid everywhere, including Missouri.¹²¹ Curtis stressed that the validity of a marriage is always judged by the law of the place where it occurs and to hold otherwise would impair the contract of marriage and would be inconsistent with “good faith and sound reason, as well as with the rules of international law.”¹²²

At the very start of the Civil War, another decision of the Supreme Court, *Gaines v. Henne*,¹²³ upheld Louisiana’s putative marriage doctrine, which was not recognized in all states. The Court found that, although the marriage of Mrs. Gaines’s parents in Philadelphia was apparently polygamous, her parents had entered the marriage in ignorance of its invalidity, and that as a result of this putative marriage, their daughter was legitimate.¹²⁴

Late in the nineteenth century, the issue of defining marriage within the Federal Union became even more contentious when members of the Church of Jesus Christ of Latter-Day Saints in the Utah Territory came into conflict with the federal government over the issue of polygamous marriage. For several decades, the federal-state conflict over the Mormon practice of plural marriage was the focus of national attention.¹²⁵ While no state recognized plural marriages, Utah was initially denied statehood

¹²¹ *Id.* at 564–633 (Curtis, J., *dissenting*)

¹²² *Id.* at 600. As to the differing views of Justice Curtis and Chief Justice Taney, who wrote the majority opinion in the *Dred Scott* case, see DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 316–19 (1978).

¹²³ *Gaines v. Hennen*, 65 U.S. 553 (1861). Different aspects of this controversial litigation dealing with title to Louisiana real estate were heard by the Supreme Court at various times over several decades. The 1861 decision was intended to settle the matter; however, the prevailing party, Mrs. Gaines, left Louisiana when that state succeeded from the Union, and it appeared unlikely that the Confederate courts would enforce the writ of the Supreme Court. She died before the final settlement. See BRIAN MCGINTY, *LINCOLN AND THE SUPREME COURT* 35–36 (2008).

¹²⁴ *Gaines*, 65 U.S. at 553. The lengthy opinion of the Court reflects the Spanish, French and American law governing marriage in Louisiana, including its analysis of the law of the Spanish Inquisition, the effect of ecclesiastical rulings, the authority of Catholic bishops, etc. The court was badly divided, Chief Justice Taney and Justices Grier and Catron having dissented. Justice Campbell, who shortly afterward left the United States and the Court to join the Confederacy, was rescued because he had previously been involved in the litigation as an attorney.

¹²⁵ See SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA* (2002) (studying the controversy over the conflicting views of marriage arising from the Mormon advocacy of plural marriage).

until it enacted a constitution that expressly prohibited polygamy.¹²⁶ In holding for the anti-polygamy position of the federal authorities, the Supreme Court ruled that Congress had the power to outlaw plural marriage in the territory and in dictum stated that the practice of plural marriage is inconsistent with the values of monogamous marriage that characterize American society and Christian belief.¹²⁷ This decision, however, did not involve a state exercising its power to define marriage; that issue would await the 1995 Congressional enactment of DOMA, which purported to give to each state the right to refuse recognition of a same-sex marriage even if the marriage was legal in another state.¹²⁸

Well into the twentieth century, many states still prohibited marriage between persons of different races, while other states treated such marriages as valid. It was not until 1967, when the Supreme Court declared anti-miscegenation laws unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment that states' power to define marriage in terms of race ended.¹²⁹ The Court later removed more barriers to marriage when it ruled that a state cannot impose an economic test on a person who seeks to marry.¹³⁰

Notwithstanding this history, the states will likely continue to have the ability to define marriage in terms of gender, until an unlikely judicial determination mandates that no state may bar persons of the same sex from marrying. The enactment DOMA was simultaneously an attempt to define marriage as between a man and a woman for federal purposes, and a recognition that the ultimate definition of marriage rests with the states.¹³¹ Disagreements between the federal government and the

¹²⁶ UTAH CONST. art. III, § 1 (forever prohibiting polygamous marriages in Utah).

¹²⁷ *Reynolds v. United States*, 98 U.S. 145, 164–66 (1879) (affirming conviction of a Mormon polygamist for violation of federal law governing the Utah Territory). The Court later upheld a federal revocation of the corporate charter of the Mormon Church because of its teaching on plural marriage. *Late Corp. of the Church of the Latter-Day Saints v. United States*, 136 U.S. 1 (1890).

¹²⁸ 28 U.S.C.A. § 1738C (West 2010).

¹²⁹ *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967). The case involved a man and a woman of different races who were prohibited from marrying in their native Virginia, but were legally married in the District of Columbia. *See id.* at 2–3.

¹³⁰ *Zablocki v. Redhail*, 434 U.S. 374, 389–91 (1978). The case involved a Wisconsin statute which prohibited the issuance of a marriage license to a person who had failed to meet his prior child support obligations unless a judge approved. *See id.* at 376–79.

¹³¹ *See* Defense of Marriage Act, 28 U.S.C. § 1738C (2006) (stating that the separate states need not recognize marriages consummated in any other state); *see also* H.R. REP. NO. 104-664, at 8 (1996), *reprinted in* 1996 U.S.C.A.N. 2905, 2912 (“At bottom, the issue reduces to a

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individual states about the definition and legality of marriage will likely continue in the future, regardless of the ultimate fate of DOMA.

VI. THE END OF THE DEFENSE OF MARRIAGE ACT

While the Defense of Marriage Act may be repealed or struck down by court decision at some point in the future, this would not resolve the status issue that inhibits the recognition of same-sex marriage, except to the extent that it would affect access to federal rights and benefits by those same-sex couples who have been married under the laws of a particular state. Indeed, the removal of federal DOMA may even have the effect of causing greater confusion within the Federal Union by creating greater conflict over the issue of same-sex unions within many of the states. This is not to say that DOMA should not be repealed; I believe its deletion from the law would remove a symbol of bias against gays and lesbians that is not worthy of a great democratic nation. But having said that, it is also important to understand that the removal of DOMA will not solve the differences in state laws on the subject of marriage.

The argument that marriage and the family are immutable has played a significant role in the debate over same-sex marriage. However, the history of modern family law suggests that the argument is not justified. Federal legislative prohibitions on same-sex marriage will likely fail in the long-run. While the various challenges to DOMA are worthwhile in order to test the boundaries of the constitutional roles of the federal government and of the states, even if these tests are successful, the demise of DOMA will not resolve the issues relating to status, dissolution, or parentage; rather, these issues will likely continue to divide the country for many years after DOMA's repeal.

VII. CONCLUSION: THE COMING END OF DOMA

It is important to understand that much of the support for DOMA was motivated by intolerance for gays and lesbians. When DOMA was introduced in Congress, the argument was made that its enactment was essential in order to preserve society from "flames of hedonism, the flames of narcissism, the flames of self-centered morality [that] are licking at the

choice-of-law question: Which law governs—Hawaii's, as represented by the 'marriage' license, or the law of the forum state, which does not recognize same-sex 'marriage'? That is, must a sister State adopt Hawaii's policy, or may it follow its own?").

very foundations of our society: the family unit.”¹³² Such overheated rhetoric reflects an open hostility, hatred, and intolerance for the very existence of gays and lesbians in our society as much as it reflects a defense of traditional heterosexual marriage.¹³³ Anti-gay bias continues to exist in parts of American society, but the acceptance of same-sex marriage and civil unions in some states is proving a strong counterbalance to this bias. As Americans see more same-sex couples enjoying family life, adopting or having children, and contributing to society, Americans are more and more likely to show greater tolerance for equal treatment of same-sex unions under law.

President George W. Bush at one point urged Congress to pass a proposed amendment to the federal Constitution that would have exceeded the scope of DOMA by making a prohibition of same-sex marriage a constitutional mandate rather than a choice to be made by each state.¹³⁴ However, the House of Representatives rejected the proposed amendment that would have banned same-sex marriage throughout the United States.¹³⁵ The paradox of such a proposed amendment is that it would have deprived the states of their traditional power to define marriage for themselves, which proponents of DOMA initially claimed to be the purpose of the law: that is, to preserve the right of each state to define marriage and to prevent one state from imposing its view of marriage on

¹³² 142 Cong. Rec. H7482-05 (daily ed. July 12, 1996) (statement of Rep. Bob Barr).

¹³³ *See Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 378 (D. Mass. 2010). The court noted that the legislative proponents of DOMA justified it by various statements that homosexuality was immoral, depraved, perverted, etc. *See, e.g., id.* (“The House Report further justified the enactment of DOMA as a means to ‘encourag[e] responsible procreation and child-rearing,’ conserve scarce resources, and reflect Congress’ ‘moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.’ In one unambiguous expression of these objectives, Representative Henry Hyde, then-Chairman of the House Judiciary Committee, stated that ‘[m]ost people do not approve of homosexual conduct ... and they express their disapprobation through the law.’” (citing statements throughout H.R. Rep. No. 104-664 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905)). Just as DOMA reflected the views of many of its congressional supporters, proponents of state laws who intended to prevent same-sex marriage appeared to be motivated by bias against gays and lesbians. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 938 (N.D. Cal.) (noting that California’s Proposition 8, which banned same-sex marriage, was motivated in the moral belief that there is something wrong with same-sex couples), *stay granted pending appeal by* No. 10-16696, 2010 WL 3212786 (9th Cir. Aug. 16, 2010), *question certified by* No. 10-16696, 2010 WL 3212786 (9th Cir. 2011).

¹³⁴ President George W. Bush, White House Radio Address (July 10, 2004), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2004/07/>.

¹³⁵ Helen Dewar, *House Rejects Same-Sex Marriage Ban*, WASH. POST, Oct. 1, 2004, at A27.

another state.¹³⁶ Indeed, the paradox of DOMA is that, by its own terms, the statute prevents persons who were validly married under state law from enjoying the benefits of marriage that are granted to heterosexual couples under federal law.¹³⁷ For example, even though legally married same-sex couples in Iowa enjoy the legal benefits of their marriages in their state, they cannot file joint federal tax returns and thus, may pay more taxes than a similarly situated heterosexual married couple living in Iowa.¹³⁸

In contrast, Canada provides an example of evolution beyond the concept that marriage must be restricted to opposite-sex couples only. In 1999, the Canadian House of Commons passed legislation formally defining marriage as “the union of one man and one woman to the exclusion of all others.”¹³⁹ After a number of court decisions,¹⁴⁰ however, it was ruled that the Canadian Charter of Rights and Freedoms reflected a belief that same-sex couples should enjoy the same rights and benefits as heterosexual couples.¹⁴¹ The Canadian federal government then passed legislation that recognized the right of two person to enter civil marriage regardless of their gender.¹⁴² Thus, even if nullifying DOMA will not produce universal recognition of the right of same-sex couples to marry, perhaps Canada’s rather startling positional shift just half of a decade after the legislature voted to recognize only heterosexual marriage foreshadows what can happen in the United States if and when DOMA is abolished.

¹³⁶ The report to the House in support of the Defense of Marriage Act shows that it was intended to protect the ability of individual states to formulate their own policies regarding marriage. H.R. REP. NO. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N 2905, 2906.

¹³⁷ In determining the meaning of any federal statute, “the word ‘marriage’ means only a legal union between one man and one woman.” Defense of Marriage Act, 1 U.S.C. § 7 (2006).

¹³⁸ Mary L. Bonauto, *DOMA Damages Same-Sex Families*, 32 FAM. ADVOC., Winter 2010, at 10, 14.

¹³⁹ Resolution of House of Common, 36th Parliament, (Canada June 8, 1999), *available at* <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=36&Ses=1&DocId=2332947>.

¹⁴⁰ *Halpern v. Toronto*, [2003] 65 O.R. 3d 161 (Can.); *Eagle Can., Inc. v. Canada (A.G.)*, [2003] 13 B.C.L.R. 4th 1 (Can.); *Hendricks v. Quebec*, [2002] R.J.Q. 2506 (Can.).

¹⁴¹ Canada Act, 1982, c.11, § 15 (Can.), stating that each individual is equal before the law.

¹⁴² Canadian Civil Marriage Act, S.C. 2005, c. 33 (Can.).