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INTRODUCTION

At the meeting of the House of Delegates of the New York State Bar Association on January 24, 2003, the House adopted a resolution directing the appointment of a Special Committee on Legal Issues Affecting Same Sex Couples “to explore legislative or private legal solutions to the problems raised by the Association of the Bar of the City of New York report [entitled “Marriage Rights of Same-Sex Couples in New York”], and report back to the House of Delegates with concrete recommendations . . . and that the New York State Legislature thereafter enact legislation that clearly defines the legal rights and responsibilities of same-sex couples.”¹

The discussion about the rights of same-sex couples, including but not limited to the right to marry or enter into other legally-sanctioned relationships, is fraught on all sides with strongly held, sincere and reasoned beliefs that make the issues difficult to resolve. That discussion has unfolded publicly at an astonishing pace. Although the issue has been a topic of limited discussion for years, if not centuries, the last five years have marked a virtual cascade of developments, starting in 1999 with *Baker v. State*, the signal case that led to civil unions in the State of Vermont, and running through the two *Goodridge* decisions in Massachusetts, three recent trial court decisions in the State of Washington as well as one in Arizona, and legislative enactments and judicial determinations in Washington, D.C. and numerous state capitals. The surrounding public discussion, both here and abroad, implicates – in addition to questions of law – issues of social policy as well as matters of religion and morality. Many persons engaged in the

¹ Minutes of the January 24, 2003 Meeting of the New York State Bar Association House of Delegates.

discussion come to it with a strong set of personal beliefs, varyingly informed by history, religion and morality.

Early in the Committee's deliberations, it addressed the question of what it, as a group of lawyers with no special credentials, and no special claim to recognition as social scientists, moral philosophers or theologians, might add to the public debate. The Committee was not created to formulate or to opine on social policy or to express any individual member's personal values or opinions with regard to religious considerations or matters of social justice. The Committee recognized, however, that civil marriage is inherently a legal construct; legal rights and obligations are performed at the core of any discussion of the civil rights of same-sex couples, even if one approaches the discussion from a religious, moral or social perspective. That being the case, the Committee recognized further that it could contribute most usefully to the public discussion by providing a firm legal analysis, one that persons on all sides could use as a resource in the discussion.

Accordingly, the Committee undertook a three part study, reserving its conclusions and recommendations for a fourth and final part. In the first three parts, the Committee has deliberately endeavored to pose questions, to gather and organize facts and to explicate relevant legal considerations, but to refrain from taking positions and providing answers. Our hope is that the deliberate and thoughtful reader will thus be freer to use the first three parts as tools in discussing the issues and reaching his or her own conclusions.

In the first part of this Report, the Committee examines New York's legal treatment of marital relationships and of same-sex relationships and provides a

compendium of differences. In this part, the Report touches on such wide ranging matters as the duty of support, responsibilities to children, property rights, domestic violence and access to the courts, health care concerns and so on.

What we found was a vast array of areas in which the law provides specific rights and benefits – often with correlative obligations – or default mechanisms reserved to married couples (*i.e.*, in New York, heterosexual couples who elect to marry), from which same-sex couples that would marry if they could, are excluded. In other words, we found that same-sex couples are excluded from the broad range of “governmental benefits . . . , property rights . . . , and other, less tangible benefits”² that the Supreme Court has identified as attaching to marriage.

For some of these exclusions, we found that same-sex couples with sufficient means and foresight could hire attorneys to develop private work-arounds, some relatively certain and easy, others more difficult, more problematic and more expensive. In yet other instances, no private work-arounds are possible.

For example, a spouse’s obligation to support his or her spouse is subject to a web of statutory disclosure and enforcement mechanisms. When a dispute over support arises between spouses, the duty to support, as opposed to the amount of support to which one spouse may be entitled from the other, is not usually at issue. Same-sex couples have no statutory or common law right – or duty – to support. They may endeavor to create such a right and duty contractually – if they have the resources to make that effort and are aware of the issue before it becomes one – but the right is then a contractual one, enforceable, if at all, like any other contractual right, in a different court

² *Turner v. Safley*, 482 U.S. 78, 96 (1987).

(Supreme Court rather than Family Court), and subject to different procedures. In the absence of statutory or common law rights and obligations and of efficient enforcement mechanisms, however, timely realization, even realization at all, of the rights sought by contract, is much more problematic.

The laws of intestate succession provide another illuminating example of the exclusions found by the Committee. For married couples without the forethought or means to write wills, the laws of intestate succession establish a default will, based upon the Legislature's necessarily crude but nonetheless reasonable presumptions about what a married couple's testamentary wishes roughly would and would not be and what seems fair and just. One could fairly readily make comparable presumptions about the testamentary wishes of partners in a committed, long-term same-sex relationship, and tailor a form of intestate succession that matches those presumptions. Same-sex partners could, of course, write wills, just as married couples who think ahead can write wills if they choose. But the practical reality is that many couples, whether heterosexual or same-sex, particularly those of limited means, will not do so, and the default provisions applicable to them under the laws of intestate succession are those applicable to unmarried persons and less likely to approximate their particular and expectable desires as a committed couple.

For a third example, one may consider title to real property. In New York, there are three basic structures in which parties can own real property together:

(1) Tenancy by the entirety; (2) joint tenancy; and (3) tenancy in common. Any two or more people may together enjoy a joint tenancy or a tenancy in common, regardless of marital status. A tenancy by the entirety is available, however, only to a couple married

at the time of conveyance. The differences among the three ownership structures are significant, particularly with regard to taxation, credit, and inheritance. The advantages of tenancy by the entirety have been deemed by the Legislature to be sufficiently great to lead it to make tenancy by the entirety the default ownership structure for a married couple who takes title to real property together, even if the instrument of conveyance does not use the operative language that identifies a tenancy by the entirety. Conversely, a same-sex couple may not, by contract, deed or otherwise, become tenants by the entirety. And should they attempt to create a tenancy by the entirety by use of operative language in a deed or contract, the law automatically defeats the attempt and converts their ownership into a joint tenancy. In other words, there is no work-around, at least none known to this Committee.

In the second part of this report, the Committee examines the spectrum of options that have been used legally to recognize same-sex couples, such as marriage, civil union and domestic partnership, as well as legal prohibitions on such unions, ranging from the Defense of Marriage Act (“DOMA”) to a proposed federal constitutional amendment. This section also provides a brief history of marriage, focusing on its development in the United States and the modern reasoning for marriage; traces recent legal history, primarily in the United States but also in other parts of the world; discusses the Sexual Orientation Non-Discrimination Act and other State and local legislative, executive and judicial developments that manifest an evolving public policy in New York with regard to same-sex couples; reviews other approaches that have been taken to extend

limited bundles of rights and obligations to same-sex couples; and concludes with a discussion of DOMA and its analogs enacted in 39 states.³

In the third part of the report, the Committee analyzes the Equal Protection and Due Process constitutional questions implicated by the denial to same-sex couples of the right to marry. This part of the report starts with a discussion of the state of the law in New York. The Report then turns to a broader discussion of the complex constitutional issues involved, with particular attention to four relatively recent Supreme Court opinions that are central to any discussion of the constitutional rights of same-sex couples; thence to a detailed analysis of the State and federal Equal Protection and Due Process clauses; and concludes with a discussion of DOMA and its progeny and the Full Faith and Credit Clause of the federal Constitution.

Throughout the preparation of these first three parts of the Report, the members of the Committee, individually and collectively, have striven to keep their analyses of the issues free from their personal views, whatever they may be. In so doing, it was the Committee's hope and objective to remain true to what it sees as a significant part of its charge: To present an objective legal analysis of the civil institution of marriage and related legal issues affecting same-sex couples that can serve as a legal resource for those engaged in serious discussion of the issues.

Relying upon that foundation and attempting to apply the same standards of lawyerly objectivity, the Committee sets forth its conclusions and recommendations in the final part of this report.

³ This report is current through October 24, 2004.

In the midst of this lawyerly objectivity, warm expressions of thanks and a few concluding words of feeling are in order. Early in its deliberations, the Committee was fortunate to be able to engage in conversation with a number of practitioners with experience with many of the practical issues encountered by same-sex (and other) couples in their day-to-day lives. We are grateful to Judith Turkel, Carol Buell, Erica Bell, and Mark Scherzer, all members of the New York bar, for sharing their time, legal knowledge and practical experience with us. The Committee gained valuable insights about real world issues and how clients and lawyers go about resolving them from our discussions with these respected practitioners. We also received a valuable introduction to the legal setting in which the issues arise from Professor Arthur Leonard of New York Law School and we extend our thanks to him. Later in our deliberations, we had the invaluable opportunity to hear from and to talk with Professor Teresa Stanton Collett of the University of St. Thomas School of Law in Minneapolis, Minnesota, a constitutional scholar and opponent of marriage for same-sex couples, and Evan Wolfson, Esq., Executive Director of Freedom to Marry, an advocacy group seeking the right to marry for same-sex couples. These two scholar/thinker/advocates ably debated the constitutional issues for our benefit. We are grateful to them, as well, for so generously sharing their time and wisdom with us.

We are deeply indebted to Professor Elizabeth Cooper of the Fordham Law School faculty, who has served with unstinting talent, energy and devotion as the Committee's Reporter. We are also grateful to Proskauer Rose, which donated the services of seven of its associates as researchers and drafters and the assistance of countless members of that firm's support staff. We are, of course, grateful to those very

talented and seemingly tireless associates, Jerry Dasti, Jason Husgen, Meredith Miller, Jeremy Mittman, Candace Sady, Matthew Walding and Noa Ben-Asher, to paralegal Bonnie Goshin, and to the other members of the Proskauer support staff who aided, even though their names, for the most part, have remained unknown to us. Lastly, we thank the Fordham Law School, not only for sharing Professor Cooper with us, but also for the research and drafting assistance of three of its dedicated and promising law students, Scott Bowman, Brian Cahill, and Rebecca Ciota, and tip our hats to them. Without the help of such wonderful people, we could not have completed this report.

The work of this Committee has been a journey for its members. Few if any of the members of the Committee have failed to develop new understandings and new perspectives in the course of their work. As a group, we feel privileged and grateful to have had the opportunity on behalf of the State Bar Association to examine so closely such an important issue of our times. We hope that the fruit of our efforts will nourish the public discussion.

PART I

RIGHTS AND DUTIES ARISING FROM MARRIAGE

The Report opens with an exploration of the rights and responsibilities that occur once a couple has decided to unite in marriage. Although marriage is far more meaningful and complex than this collection of benefits and duties, as this part of the Report reveals, marriage brings with it substantial benefits and responsibilities provided by both the government and the private sector. Many of the benefits are so familiar, married couples may almost forget they are contingent on having entered into a state-sanctioned marriage. The discussion begins with some information regarding the estimated number of same-sex couples and same-sex couples with children who live in the United States.

In 1990, for the first time, the category of “unmarried partner” was added to the relationship item of the U.S. Census to measure the “growing complexity” of American households,⁴ thereby allowing cohabitating adult opposite-sex and same-sex partners to self-identify as being part of a committed relationship.⁵ The 2000 Census enumerated a total of 5.5 million unmarried couples living together.⁶ The number of individuals who self-identified as being part of unmarried same-sex partner households

⁴ See Tavia Simmons and Martin O’Connell, *Married-Couple and Unmarried-Partner Households: 2000*, Census 2000 Special Report issued February 2003, CENSR-5, at 2, available <http://www.census.gov/prod/2003pubs/censr-5.pdf> (“Simmons”).

⁵ See Bradford, J., Barrett, K., and Honnold, J.A., *THE 2000 CENSUS AND SAME-SEX HOUSEHOLDS: A USER’S GUIDE*, Section One, 2, The National Gay and Lesbian Task Force Policy Institute, the Survey and Evaluation Research Laboratory, and The Fenway Institute (2002), available at <http://www.ngltf.org/library/census.htm> (“Bradford”).

⁶ See Simmons, *supra* note 4, at 1.

was nearly 1.2 million.⁷ This figure does not include same-sex couples who do not live together; same-sex couples who choose not to so identify themselves to a government agency; lesbian, gay, bisexual and transgender (“LGBT”) youth living with their parents; LGBT seniors living with their children and/or grandchildren; many homeless people; all single LGBT people; and many undocumented LGBT immigrants.⁸

The 2000 U.S. Census data for New York State indicates that members of 46,490 same-sex unmarried partner households self-reported as “unmarried partners.”⁹ Nationwide, 99.3% of U.S. counties reported same-sex cohabitating unmarried partners.¹⁰ In New York State, same-sex couple households are found in every county.¹¹ The New York counties with more than 1,300 same-sex households include: Bronx County, Erie County, Kings County, Monroe County, Nassau County, New York County, Queens County, Suffolk County, and Westchester County.¹²

The 2000 U.S. Census data also provide estimates of the number of unmarried, same-sex couples with children. Of the nearly 600,000 same-sex couples that self-identified in the 2000 Census, 34% of female unmarried-partner households and 22%

⁷ See *id.* (noting that 594,000 households had partners of the same sex). Of these same-sex unmarried-partner households, 301,000 had male partners and 293,000 had female partners. See *id.* Overall, 9 percent of all coupled households were unmarried-partner households. See *id.* at 3. Nationwide, same-sex unmarried partner households represent approximately one percent of all coupled households. See *id.*

⁸ See Bradford, *supra* note 5.

⁹ See Simmons, *supra* note 4, at 4. New York State has 7,056,860 total households. See *id.* Of this total, 3,667,070 (or 52% of all households) are coupled households, or households that include married-couple and unmarried-partner households. See *id.* Put another way, the ratio of same-sex unmarried partner households to the total number of households in New York State is 46,490/3,667,070. See *id.* Same-sex unmarried partners represent approximately 1.3% of all coupled households in New York. See *id.*

¹⁰ See Bradford, *supra* note 5.

¹¹ See *id.*

¹² See *id.*

of male unmarried-partner households had at least one child under the age of 18 living with them.¹³

A. DUTY TO SUPPORT ONE’S SPOUSE FINANCIALLY

1. Statutory Duty of Support

A fundamental duty that arises out of the marital relationship is the duty to support one’s spouse.¹⁴ The New York Family Court Act codifies the long-standing principle that a spouse who is unable to support him or herself is entitled to support from the other.¹⁵ A spouse who has the ability to provide support must do so if the spouse in need is in danger of becoming a “public charge,” that is, requiring the financial support of the state.¹⁶ Married spouses owe this duty from the inception of the marriage¹⁷ and it continues even if husband and wife live apart from one another.¹⁸ The duty to support one’s spouse continues even where the marriage has ceased;¹⁹ although the law allows

¹³ See Simmons, *supra* note 4.

¹⁴ *Garlock v. Garlock*, 279 N.Y. 337, 340 (1939) (“Marriage is frequently referred to as a contract entered into by the parties, but it is more than a contract; it is a relationship established according to law, with certain duties and responsibilities arising out of it which the law itself imposes. The marriage establishes a status which it is the policy of the State to maintain. Out of this relationship, and not by reason of any terms of the marriage contract, the duty rests upon the husband to support his wife and his family, not merely to keep them from the poorhouse, but to support them in accordance with his station and position in life. . .”). In modern times, the duty of one spouse to support the other has been recognized as a mutual obligation, and not just as one that flows from husband to wife. See, e.g., *Brissett v. Ashcroft*, 363 F.3d 130, 137 (S.D.N.Y. 2004) (recognizing that “one spouse [must] support [] the other”).

¹⁵ N.Y. FAM. CT. ACT § 412 (“A married person is chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, may be required to pay for his or her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties.”).

¹⁶ *Id.* § 415. Similarly, if one spouse has become a public charge, the other spouse still has a duty to support. *Id.*

¹⁷ See *Galietti v. Galietti*, 394 N.Y.S.2d 50 (2d Dep’t 1977) (finding the duty to support arose even where duration of marriage was not long in duration).

¹⁸ See *Steinberger v. Steinberger*, 18 N.Y.2d 492 (1966).

¹⁹ N.Y. GEN. OBLIG. LAW § 5-311 (McKinney 2003).

married parties to structure many aspects of their marriage by contract, this duty may not be contracted away.²⁰

The duty to support is “means-based.” Thus, a spouse is entitled to support that is appropriate given the financial abilities of the other spouse. A spouse that enjoys a comfortable lifestyle cannot simply discharge his or her duty by furnishing the spouse in need with bare necessities.²¹

2. Spousal Support Enforcement Mechanisms

New York has established an array of support enforcement provisions to married couples. For instance, a spouse who allegedly has failed to fulfill his or her duty of support is subject to summons by the Family Court to provide full disclosure of his or her current income, assets and expenses.²² The issue of whether a duty of support exists (as opposed to the amount of support) generally is not at issue. Same-sex couples have no statutory or common law right to obtain, or duty to provide, support. Although they can attempt to create these commitments through a contractual promise of financial support,²³ such agreements may be enforced only in civil court where the court first must determine that an enforceable contractual duty of support exists.²⁴ Only after this duty

²⁰ *Id.* See also *Garlock*, 279 N.Y. at 341 (holding that the duty to support cannot be contracted away).

²¹ See Douglas J. Besharov, Practice Commentary to Section 412 of the Family Court Act, 29A *McKinney Consolidated Law of New York Annotated* at 36 (1999).

²² See N.Y. DOM. REL. LAW § 236.

²³ See, e.g., *Morone v. Morone*, 50 N.Y.2d 481, 486 (1980) (“New York courts have long accepted the concept that an express agreement between unmarried persons living together is as enforceable as though they were not living together. . . . [W]hile cohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation, neither does cohabitation disable the parties from making an agreement within the normal rules of contract law.”).

²⁴ See, e.g., *Silver v. Starrett*, 674 N.Y.S.2d 915, 918 (Sup. N.Y. County 1998) (upholding separation agreement providing for financial support, between same-sex couple, after finding “no question as to the

has been established can a court order discovery to determine an appropriate amount of support.

3. Spouse's Right to Reimbursement for "Necessaries"

A spouse may be deemed responsible, by reason of marriage, for expenditures incurred by the other spouse for ordinary goods and services ("necessaries").²⁵ Under the common law doctrine of necessities, a person who extends credit to an individual for necessary goods or services may seek to recover payment from the individual's spouse, so long as such expenses are commensurate with the spouse's means.²⁶ As is the case with the statutory duty to support, no common law duty to provide necessities arises outside the marriage absent an express contract.²⁷ The right of anyone who extends credit to an individual for necessities to recover directly from

existence of an express written agreement worked out by the parties at the termination of their relationship").

²⁵ See, e.g., *Medical Bus. Assocs. v. Steiner*, 183 A.D.2d 86, 90 588 N.Y.S.2d 890, 892 (2d Dep't 1992) (defining "necessities" as "essential goods and services" including "food, clothing, shelter, and medical care"); Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1211 n.20 ("Necessaries are those items reasonably appropriate for living, taking into account financial means available, such as food, clothing, a residence, and medical attention.") (citing Homer H. Clark, Jr. & Carol Glowinsky, DOMESTIC RELATIONS: CASES AND PROBLEMS 545 (4th ed. 1990)).

²⁶ See *Our Lady of Lourdes Mem'l Hosp., Inc. v. Frey*, 548 N.Y.S.2d 109 (3d Dep't 1989). "Although the [non-purchasing] spouse cannot be charged with every expenditure the [purchasing] spouse may choose to make, the [non-purchasing] spouse will be held responsible for all services and purchases found to have been necessary to support the [purchasing spouse] in a style consistent with the [purchasing spouse's] habits and the parties' means." Alan D. Scheinkman, *New York Law of Domestic Relations* § 2.21, at 60 & n.178 (1996) (citations omitted). This common law duty is separate and apart from the statutory duty of support. Full compliance with an order of support, however, completely discharges a non-debtor spouse from any further support obligations, including the duty to provide necessities. See, e.g., *Berkowitz v. Berkowitz*, 373 N.Y.S.2d 184 (2d Dep't 1975).

²⁷ See *supra* note 23.

another person obligated by contract to support would depend upon a finding that the supplier is a third party beneficiary of that contract.²⁸

This common law cause of action originally arose with the now outmoded legal doctrine that since a wife could not own property, and thus could not incur any debts, the husband had a duty to pay her debts if such an occasion arose.²⁹ The underlying assumption was that the only reason a wife would incur such debts is because the husband was not providing her needs; if the husband was not liable to the wife's creditors, then he simply could extricate himself from the situation, leaving his wife and children mired in debt.³⁰

Rather than abolish the doctrine of necessities to conform to more recent cultural and constitutional developments, New York courts have expanded the doctrine to enforce such obligations regardless of the gender of the parties.³¹ In its decision not to jettison the rule, the Second Department in *Medical Business Associates v. Steiner* observed that its sexist origins notwithstanding, the rule made for good policy: if each spouse is liable for the other, third parties such as medical care facilities will be more willing to provide medical care to a sick spouse, knowing that they can recover if misfortune befalls the ill spouse.³² Courts in some other states have rejected the rule as outdated³³ and still others have retained the original rule with its sex-based categories.³⁴

²⁸ See *Our Lady of Lourdes*, 548 N.Y.S.2d at 110 (citing *Star Vacuum Stores v. Bisslessi*, 81 N.Y.S.2d 595 (N.Y. Mun. Ct. 1948))

²⁹ *Medical Bus. Assocs.*, 183 A.D.2d at 892.

³⁰ *Id.*

³¹ *Id.* at 94-96; accord *Our Lady of Lourdes Mem'l Hosp.*, 548 N.Y.S.2d 109.

³² 588 N.Y.S.2d. at 892.

³³ See, e.g., *Mem'l Hosp. v. Hahaj*, 430 N.E. 2d 412 (Ind. 1982); *Marshfield Clinic v. Discher*, 314 N.W.2d 326 (Wis. 1982).

4. Statutory Protections for a Married Individual Entering Into a Support Agreement

Individuals who contemplate marriage can set forth the extent of their support obligations in a pre-nuptial agreement.³⁵ After the marriage ceremony, a married couple can define its support obligations in what sometimes is called a post-nuptial agreement.³⁶ A prenuptial or post-nuptial agreement may be enforced like any other

³⁴ See, e.g., *Shands Teaching Hosp. & Clinics v. Smith*, 497 So. 2d 644 (Fla 1986); Milton C. Regan, Jr., *Unmarried Partners and the Legacy of Marvin v. Marvin*, 76 NOTRE DAME L. REV 1435, 1457 (2001) (noting that “[a] spouse has the legal duty to pay for necessities . . . but a cohabitor does not”); Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555 n.62 (2004) (implying that this Act applies the doctrine of necessities to domestic partners); William A. Reppy, Jr., *Property and Support Rights for Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677, 1716 (1984) (noting that applicability of doctrine of necessities to non-married cohabitants is an issue courts have yet to address and should address in the future).

³⁵ See, e.g., *Edwardson v. Edwardson*, 798 S.W.2d 941, 945-46 (Ky. 1990) (holding that prenuptial agreements in contemplation of divorce are valid where they are formed with full disclosure, where they are not unconscionable at the time of enforcement, and where they are applicable only to property and maintenance); *Barnhill v. Barnhill*, 386 So. 2d 749 (Ala. Civ. App. 1980); *Newman v. Newman*, 653 P.2d 728 (Colo. Sup. Ct. 1982) (hinging right on full disclosure); *Parniawski v. Parniawski*, 33 Conn. Supp. 44, 359 A.2d 719 (1976) (relying on relatively equal status of women and men); *Gross v. Gross*, (1984) (may set the alimony amounts); *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960) (may waive right to alimony); *Unander v. Unander*, 506 P.2d 719 (Ore. 1973) (premarital agreement waiving alimony should be enforced unless unfair under the circumstances). Pre-marital agreements pertaining to child support obligations have generally been found unenforceable. See, e.g., *Campbell v. Moore*, 1 S.E.2d 784, 793-96 (S.C. 1939) (confirming that a premarital agreement, which limited a prospective husband’s support of his child, violated public policy because society has an interest in the fulfillment of the child support obligation); *Gant v. Gant*, 329 S.E.2d 106 (W. Va. 1985) (holding that, although premarital agreements settling property and spousal support rights in the event of divorce are presumptively valid, the birth of children is a factor a court would consider in deciding whether to enforce such an agreement); Unif. Premarital Agreement Act, 9B U.L.A. 369 (1987 & Supp. 1999) (listing 25 states plus the District of Columbia in the “Table of Jurisdictions Wherein Act Has Been Adopted”).

³⁶ See N.Y. DOM. REL. LAW § 236B(3)(3).

A post-nuptial agreement is a contract entered into after marriage by a husband and wife generally involving the property or property rights of the parties Generally, spouses may divide their property presently and prospectively by a post-nuptial agreement, even without its being incident to a contemplated separation or divorce, provided that the agreement is free from fraud, coercion or undue influence, that each party acted with full knowledge of the property involved and his or her rights therein, and that the settlement was fair and equitable.

Angela M. Vallario, *Spousal Election: Suggested Equitable Reform for the Division of Property at Death*, 52 CATH. L. REV. 519, 541 (2003) (citing 41 Am. Jur. 2d Husband & Wife § 134 (1995)).

contract, provided that it is signed and acknowledged like a deed³⁷ and is not the product of fraud or duress.³⁸ Such agreements may be upheld only if the support terms were “fair and reasonable at the time of the making of the agreement” and are not unconscionable.³⁹ The agreement may not be structured, however, so as to relieve the other party of his or her duty of support if and to the extent that either spouse is in danger of becoming a “public charge.”⁴⁰

A married person may seek a modification of the terms of such an agreement if there has been a substantial, unexpected change of circumstances, and he or she can show that extreme financial hardship will result if the original terms of the agreement are enforced.⁴¹ By contrast, a same-sex partner may not seek a modification of a written support agreement (essentially, a civil contract) on the basis of such facts alone.⁴² Thus, although there are numerous requirements necessary to uphold a pre- or post-nuptial agreement, and “New York courts . . . strictly scrutinize such agreements,”⁴³ unmarried persons who enter into civil contracts generally cannot avail themselves of the protection found in pre- and post-nuptial agreements.⁴⁴

³⁷ *Id.*

³⁸ *See Matisoff v. Dobi*, 90 N.Y.2d 127, 132 (1997) (noting that the requirements for postnuptial agreements listed in §236B(3) are to prevent fraud and overreaching).

³⁹ N.Y. DOM. REL. LAW § 236B(3)(3).

⁴⁰ N.Y. GEN. OBLIG. LAW § 5-311; N.Y. FAM. CT. ACT § 463. *See also Innis v. Innis*, 552 N.Y.S.2d 586, 586 (1st Dep’t 1990) (finding postnuptial agreement could be upheld where wife was not in danger of becoming a public charge).

⁴¹ *See* N.Y. DOM. REL. LAW §326B(9).

⁴² *See, e.g., Shultz v. 400 Coop. Corp.*, 736 N.Y.S.2d 9 (2001) (holding that the terms of the contract must have been unfair at the time of execution in order to warrant modification).

⁴³ *Christian v. Christian*, 42 N.Y.2d 63, 73 (1975).

⁴⁴ *See Silver v. Starrett*, 674 N.Y.S.2d at 918 (upholding terms of nonmarital “separation agreement” where there was no evidence of fraud, duress, or overreaching). The one requirement that is applicable to

B. INSURANCE LAW

This section explores the following aspects of insurance law: prohibitions on discrimination based on marital status; the unique attributes of health insurance; the impact of ERISA on the provision of benefits; and the availability of State unemployment insurance.

1. New York Insurance Law Anti-Discrimination Provisions

The New York Insurance Law does not expressly prohibit discrimination on the basis of an insured's sexual orientation,⁴⁵ but certain provisions do protect against discrimination on the basis of marital status.⁴⁶ More specifically, insurance providers may not refuse to issue, cancel, or refuse to renew certain insurance policies because of the insured's marital status.⁴⁷ For example, discrimination on the basis of marital status is prohibited when determining rates for motor vehicle insurance plans unless "supported by and reflective of actuarially sound statistical data."⁴⁸

agreements between married couples and non-married couples is that the contract may not be a product of fraud, as this is a requirement that applies to all civil contracts. *Id.* at 919.

⁴⁵ The Sexual Orientation Non-Discrimination Act ("SONDA"), which became effective on January 16, 2003 and amends the New York State Human Rights Law, Executive Law, and Education Law to prohibit discrimination on the basis of sexual orientation, does not specifically prohibit discrimination in insurance or employee benefits on the basis of sexual orientation. *See generally* Lee F. Bantle, *Sexual Orientation and Discrimination*, 693 PLI/Lit 593 (2003); *see also infra* Section II.B.5.ii discussing SONDA.

⁴⁶ N.Y. INS. LAW §§ 2607 & 2331.

⁴⁷ *Id.* § 2607. In a 1976 opinion letter, the Attorney General concluded that unmarried cohabitating couples were protected by this marital non-discrimination provision reasoning that "cohabitation without marriage clearly involves a matter of 'marital status' within the meaning of [the] Insurance Law, [] which may not be used by an insurance company for the basis for discrimination." 1976 N.Y. Att'y Gen. Op. 58 (Dec. 13, 1976).

⁴⁸ N.Y. INS. LAW § 2331. However, "a health insurance policy which takes into account the applicant's marital status in arriving at premium rates is not discriminatory." 69 N.Y. Jur. 2d INSURANCE § 979, "Discrimination Based on Gender or Marital Status" (citing *Rochester Hosp. Serv. Corp. v. Division of Human Rights*, 401 N.Y.S.2d 413 (Sup. Ct. Monroe County 1977)).

In 1992, this provision was held to prevent an insurance company from rescinding a policy whose beneficiary was the gay male purchaser's partner, particularly because the company would not have challenged the policy had the couple been married.⁴⁹ The court held that the insurer's stated reason for rescission – the insured's misrepresentation of his relationship with his beneficiary, as “business partner” rather than life partner – was merely pretextual and that rejecting the claim “because the insured was a male homosexual . . . constitutes discrimination [] on the basis of . . . marital status.”⁵⁰ The court continued that “[c]ertainly, if [the decedent] and [his partner] were married or if [the decedent's] illness was not one associated with homosexuality no attempt to rescind the policy would have been made. It would have been a violation of New York Insurance Law § 2607 and Executive Law § 296(2) for plaintiff to refuse coverage because [they] were not married.”⁵¹

2. Areas of Permitted Differential Treatment

There are sections of the State Insurance Law, however, that permit differential treatment based on marital status. For example, an automobile insurance or a health insurance policy that takes into account the applicant's marital status in arriving at premium rates is not considered discriminatory.⁵² In addition, insurance companies may

⁴⁹ *New England Mut. Life Ins. Co. v. Johnson*, 589 N.Y.S.2d 736 (Sup. Ct. N.Y. County 1992). The plaintiff insurance company sued the executor of the estate of Jeffrey Duke, after he died from AIDS, claiming that he had misrepresented the nature of his relationship with the beneficiary of his life insurance policy. Duke had purchased the policy and named his life partner as beneficiary, but characterized the relationship as one of “business partners.” *Id.* at 736.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *See* 11 N.Y.C.R.R. § 163.1(2)(d) (detailing that rating factors, which are applied or added to the base rates of automobile insurance policy premiums, include classification factors based on age, sex, and marital status of the insured). *See supra* note 48 for health insurance statutes.

offer specific policies to spouses that they do not, or need not, offer to same-sex couples.⁵³

a. Health Insurance: Contrasting Availabilities

The Insurance Law treats dependent health care coverage in four separate provisions, depending on whether the insurance provider is a commercial or non-profit entity, and whether the type of policy is for a group or individual. When a commercial or non-profit insurer offers a group policy under § 4235(f) or § 4305(c) of the New York Insurance Law, the law allows benefits to cover specified expenses of “the employee or other member of the insured group, his spouse, his child or children, *or other persons chiefly dependent upon him for support and maintenance.*”⁵⁴ When commercial entities offer individual policies, New York Insurance Law § 3216(c)(3) permits the policy to insure “members of a family,” which § 3216(a)(3) defines as husband, wife, dependent children “*or any other person dependent upon the policyholder.*”⁵⁵

In 1993, the New York State Department of Insurance concluded that the State insurance law permitted insurance companies to provide health insurance coverage to same-sex partners. The Department also noted, however, that it could not “require companies to offer coverage to dependents, including domestic partners, any more than it

⁵³ Although New York does not bar tort suits between family members, insurance companies traditionally excluded coverage for tort claims against a spouse. Thus, for instance, a wife could sue a husband if she were injured while he was operating a motor vehicle, but the husband’s insurance policy would exclude coverage for that event. This gap in coverage can now be remedied. Insurance Law § 3420(g)(1) was added in 2002 to provide that, upon written request of an insured and upon payment of a reasonable premium, an insurer shall provide coverage to be known as “supplemental spousal liability insurance.” N.Y. INS. LAW § 3420. Thus, being in a same-sex relationship or an opposite-sex marriage would make a difference in this circumstance, with same-sex couples unfairly benefiting by not being required to purchase supplemental spousal liability insurance.

⁵⁴ N.Y. INS. LAW §§ 4235(f), 4305(c) (emphasis added).

⁵⁵ *Id.* § 3216(c)(3) (emphasis added).

[could] require companies to cover spouses or children if they do not wish to.”⁵⁶ This opinion reversed a 54-year-old policy that prohibited the provision of health benefits to the unmarried partner of an insured.⁵⁷

In 2003, the Department issued an opinion letter reiterating that the provisions discussed herein “do [] not prohibit coverage of domestic partners, provided there is a showing of economic interdependence,”⁵⁸ which heterosexual married couples are presumed to share. The Department noted that the factors for determining the existence of a domestic partnership set forth by the New York Court of Appeals in *Braschi v. Stahl Associates*⁵⁹ should be used to determine whether the “economic interdependence” test is satisfied.⁶⁰

Insurance companies⁶¹ also can issue individual policies, including what is known as a “family contract,” whereby expenses are paid to a “husband and wife, or

⁵⁶ Letter from Salvatore Carizlo, Superintendent of Insurance to Governor Mario M. Cuomo, dated Sept. 26, 1993.

⁵⁷ Martin Bove, *Gay Rights Legislation: The 2001 Elections and the Gay Rights Merry-Go-Round*, 7 CITY LAW 49 (May/June 2001).

⁵⁸ Opinion Letter of the Office of General Counsel, State of New York Insurance Department, issued June 18, 2003, available at <http://www.ins.state.ny.us/rg030616>.

⁵⁹ 74 N.Y.2d 201 (1989); see *infra* Section I.M.1, for a discussion of the factors. Note that these factors require that same-sex couples cohabit, something not required of married couples.

⁶⁰ Opinion Letter of the Office of General Counsel, State of New York Insurance Department, issued June 18, 2003, available at <http://www.ins.state.ny.us/rg030616>. In an earlier, informal opinion letter dated September 7, 2001, the Insurance Department responded to a question posed by an insurer, requesting the removal of “the requirement [that domestic partners] demonstrate proof of financial interdependence, especially since it is not required for married couples.” Opinion Letter of the Office of General Counsel, State of New York Insurance Department, issued Sept. 7, 2001, available at <http://www.ins.state.ny.us/rg109071>. The Department counseled, however, that such proof of economic interdependence “is a necessary criterion for domestic partnership eligibility in New York State.” *Id.* Thus, although insurers are permitted to offer policies to domestic partners, domestic partners do not enjoy the presumption of dependence that accompanies marriage.

⁶¹ Covered companies include an Article 43 company, which is a managed health care company licensed under Article 43 of the New York State Insurance Law, or any health maintenance organization (HMO). See New York State Department of Health Web site, available at <http://www.health.state.ny.us/nysdoh/commish/99/kaiser.htm>, (last visited Mar. 22, 2004).

husband, wife and their dependent child or children.”⁶² In this instance, married couples are able to purchase such a policy together, but unmarried couples may not, even if they are financially interdependent. The Insurance Department confirmed this interpretation in a 2001 opinion letter when it stated that “this statute limits coverage [and] coverage under this section may not be extended to domestic partners.”⁶³

b. Employee Retirement Income Security Act (ERISA)

Under the Employee Retirement Income Security Act⁶⁴ (“ERISA”), which governs federal pension-protection law, if an employer is self-insured⁶⁵ an employee is not protected against discrimination on the basis of sexual orientation or marital status in the disbursement of pension benefits, even if the employer, the state, or the local government has a policy prohibiting discrimination on the basis of sexual orientation or marital status.⁶⁶ Although ERISA is a federal law, its impact on lesbian and gay couples is significant and thus it must be addressed, if briefly.

⁶² N.Y. INS. LAW § 4304(d)(1).

⁶³ Opinion Letter of the Office of General Counsel, State of New York Insurance Department, issued Sept. 7, 2001, available at <http://www.ins.state.ny.us/rg109071>.

⁶⁴ 29 U.S.C. §§ 1001 *et seq.* (2003). See also Employee Benefits, *infra* Section I.C.

⁶⁵ “Health care benefits generally are provided in one of two ways under ERISA plans. When an employer purchases an insurance policy to provide for employees’ health care, the plan is referred to as ‘fully-insured.’ Alternatively, if the employer pays directly for health care services on behalf of employees, the arrangement is known as a ‘self-insured’ plan.” See Diane M. Pedulla & Sid Roche, *Demystifying ERISA: Understanding the Basics of a Complex Law* (1999), available at <http://www.apa.org/practice/pf/apr99/erisa.html>.

⁶⁶ ERISA’s “deemer clause” exempts self-insured ERISA plans from state regulation, such as antidiscrimination laws, directed toward regulating insurance. In broad terms, ERISA preempts state law in the context of self-insured employers. Where employers purchase outside insurance in order to insure their employee benefits plans, ERISA’s “savings clause” allows for state regulation insofar as it regulates insurance. As the Supreme Court has explained, “[s]tate laws that directly regulate insurance are ‘saved’ but do not reach self-funded employee benefit plans because the plans may not be deemed to be insurance companies, other insurers, or engaged in the business of insurance for purposes of such state laws.” See *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990).

In *Rovira v. AT&T*, a deceased employee's same-sex life partner sued her partner's employer to collect her benefits under the employer's life insurance policy.⁶⁷

The employee was Marjorie Forlini, who died of cancer; Sandra Rovira was her life partner. In 1976, the couple "entered into what proved to be a long and committed relationship," in which they were raising together two children birthed by Ms. Rovira.⁶⁸

The United States District Court for the Southern District of New York held that the actual terms of the employee benefit plan, which were governed by ERISA, limited the designation of beneficiaries to "the spouse and the dependent children and all other dependent relatives of the deceased."⁶⁹ The plan, in turn, defined the term "spouse" as an individual who was "legally married to the employee at the time of death."⁷⁰ Thus, because same-sex couples cannot legally marry, Ms. Rovira, despite having lived with her partner for eleven years in a committed relationship and having jointly raised with Ms. Forlini the children of the relationship, "did not meet the eligibility criteria to qualify as a beneficiary under the provisions of the [plan]."⁷¹

Ms. Rovira argued that she was "the functional equivalent of a spouse," but the court rejected this argument.⁷² The court held that, given the plain meaning of the

⁶⁷ 817 F. Supp. 1062 (S.D.N.Y. 1993). See also Deborah Pines, *Lesbian Partner Denied Rights to Pension; Legal Marriage Held Required By Plain Words of AT&T Plan*, N.Y.L.J., Mar. 29, 1993, at 1.

⁶⁸ 817 F. Supp. at 1062. Although *Rovira* was the biological mother, both Forlini and Rovira jointly paid for the children's "tuition, medical bills, food, clothing, housing, entertainment and other expenses." *Id.* Furthermore, the couple "pooled their [financial] resources, shared responsibility for making the important decisions affecting their lives, jointly owned their home . . . [and] took vacations together." *Id.* at 1064.

⁶⁹ *Id.* at 1065.

⁷⁰ *Id.* at 1066.

⁷¹ *Id.* at 1068.

⁷² *Rovira*, 817 F. Supp. at 1070 (citing *Dellacava v. Painters Pension Fund*, 851 F.2d 22, 25 (2d Cir. 1988) (trustees of ERISA plan prohibited from imposing standard not required by plan)).

word “spouse” and also the existence of certain federal laws that define “spouse” as a married individual, she was not a spouse.⁷³ Ms. Rovira further argued that because AT&T had published an anti-discrimination policy that banned discrimination on the basis of marital status and sexual orientation in all areas of employment, she should be entitled to the benefits offered to heterosexual, married employees. The court held, however, that under ERISA, the terms of the employee benefit plan control.⁷⁴ Further, the court concluded that any claims brought under state antidiscrimination laws must necessarily fail, because such claims were preempted by ERISA.⁷⁵ Finally, the court ruled that the children also could not collect under the plan because they did not have a legal relationship with Ms. Forlini.⁷⁶

3. State Unemployment Insurance

Under New York Labor Law § 593(1), when an individual voluntarily leaves his or her job, that individual may not collect unemployment insurance unless he or she has “good cause” to have left.⁷⁷ The State regularly grants unemployment benefits to a married individual who quits his or her job to follow a spouse who must relocate for

⁷³ *Id.*

⁷⁴ *Id.* at 1072.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1068. Because Forlini had not officially adopted the children, the court held that they were not her children in the eyes of the law. *Id.* at 1070. Note, however, that the first second-parent adoption in New York State did not occur until 1992. *See In re Evan*, 583 N.Y.S.2d 997 (Surr. Ct. 1992).

⁷⁷ N.Y. LABOR LAW § 593(1). *See also In re Claim of Gruber*, 652 N.Y.S.2d 589, 591 (1996) (noting that § 593(1) “provides that claimants will be disqualified from receiving unemployment insurance benefits if they voluntarily separate without good cause from their ‘last employment’ prior to the filing of an unemployment claim”).

employment;⁷⁸ upon occasion, these benefits are awarded to unmarried couples who are engaged.⁷⁹

Until recently, such benefits were not available to an individual who voluntarily quit his or her job to follow a same-sex partner. In February 2004, a claimant who voluntarily quit her employment when her same-sex partner's job was relocated, applied for unemployment benefits and was rejected by the Department of Labor, as well as the Unemployment Insurance Appeal Board.⁸⁰

After Governor Pataki asked the Appeal Board to reconsider its decision, however, the Department of Labor announced that it would change its policy and would grant unemployment insurance benefits to a same-sex partner when that claimant makes a showing of good cause⁸¹ and provides proof of a "long-term committed relationship."⁸² In a letter to the Unemployment Insurance Appeal Board, the Labor Department wrote that "there exists[s] in certain long-term committed relationships certain financial, legal, and emotional commitments that justify voluntarily separating from employment to follow a marital partner. However, this rationale can apply equally to persons who are in

⁷⁸ See, e.g., *In re Claim of Di Napoli*, 671 N.Y.S.2d 201, 202 (3d Dep't 1998) (noting that "a married claimant who quits his or her job in order to join a spouse whose employment has required relocation has not left his or her employment under disqualifying circumstances" (citing Labor Law § 593(1)(b), as amended by L. 1987, ch. 418 (deleting resignation due to a claimant's following his or her spouse to another locality as a statutory cause for disqualification)).

⁷⁹ See *In re Claim of Gardner*, 696 N.Y.S.2d 83, 83 (3d Dep't 1999) (finding that plaintiff was disqualified from receiving unemployment benefits because she relocated for personal, noncompelling reasons, not because she was not married to her fiancé).

⁸⁰ Steven Greenhouse, *Labor Department Now Backs Jobless Pay for Gay Partners*, N.Y. TIMES, Feb. 11, 2004, at B5 ("Greenhouse").

⁸¹ Letter from Jerome Tracy, Counsel, New York State Department of Labor, to Richard Rosenbaum, Chairman, New York State Unemployment Insurance Appeal Board (Feb. 9, 2004) ("Tracy").

⁸² *Id.* See also Greenhouse, *supra* note 80, at B5.

a committed unmarried relationship.”⁸³ The remaining distinction, then, is that unmarried couples must present proof of their committed relationship through “objective criteria” such as economic interdependence, legal or emotional commitments, which are all presumptions enjoyed by married couples.⁸⁴

C. EMPLOYMENT BENEFITS AND RETIREMENT PLANNING

Non-cash employment benefits, including health insurance, employer-sponsored pension plans, and accidental death benefits, can account, in some cases, for up to forty percent of an employee’s total compensation.⁸⁵ Although there are no state or federal laws regulating whether and when private employers must provide health or other insurance to either the married or unmarried partners of employees, these benefits often run to the benefit not only of the employee, but also of his or her spouse and dependents.⁸⁶ Where such benefits are provided, however, they generally accrue only to the legal spouse of the employee,⁸⁷ thus creating the potential for a large disparity in compensation based on an employee’s marital status.⁸⁸

⁸³ Tracy, *supra* note 81. See also Greenhouse, *supra* note 80, at B5.

⁸⁴ *Id.*

⁸⁵ Renee M. Scire & Christopher A. Raimondi, Note: *Employment Benefits: Will Your Significant Other be Covered?*, 17 HOFSTRA LAB. & EMP. L.J. 357, 375 (2000) (“Scire”).

⁸⁶ See, e.g., Matthew R. DuBois, *Legal Planning for Gay, Lesbian, and Non-Traditional Elders*, 63 ALB. L. REV. 263, 288 (1999) (“DuBois”) (noting that some employer-based retirement plans may allow employees to designate only spouses or blood relatives as beneficiaries of their benefits). Non-regulated benefits might include gym memberships or tuition-remission plans.

⁸⁷ There are some limited exceptions to this generality. By local law, the City of San Francisco requires all private companies doing business with the city to provide domestic partner benefits to its same-sex employees in all locations in which the company does business. DuBois, *supra* note 86, at 289 n.117; see also Scire, *supra* note 85, at 364. The City of Minneapolis enacted a similar municipal ordinance in 2002. See Steve Karnowski, “Suit Attacks Domestic Partners Benefits Mandate,” DULUTH NEWS TRIBUNE, Apr. 8, 2004, available at <http://www.duluthsuperior.com/mld/duluthsuperior/news/8382840.htm>. New York City is seeking to implement a similar provision. See *infra* note 89.

⁸⁸ A disparity in compensation also exists between married (or same-sex) employees with family benefits and single employees, that issue, however, is beyond the scope of this Report.

Although the provision of domestic partner benefit rarely is mandated,⁸⁹ employers are offering these benefits to the “domestic partners” of employees (either exclusively to same-sex partners or to both same- and opposite-sex domestic partners) with greater frequency.⁹⁰

For example, most New York State employees are eligible for domestic partner benefits under a provision of a 1995 union contract negotiated by the Civil Service Employees Association, which provision remains in effect;⁹¹ in addition, the State University system offers domestic partner coverage under its employee health plans.⁹² Further, New York City extends health benefits to City employees with domestic partners⁹³ and recently has enacted legislation, currently being challenged in court,

⁸⁹ See *supra* note 87 and *infra* note 93 discussing some examples where coverage has been mandated. In general, however, any change to the definition of “marriage” under New York law likely would affect only those employers with a policy of providing such benefits to the “spouses” of employees.

⁹⁰ DuBois, *supra* note 86, at 288-89 (noting that many employers now offer “domestic partner” benefits for their employees). Large private employers in New York offering domestic partner benefits include Citigroup, IBM, Verizon Communications, Altria Group (Philip Morris Companies), AT&T Corp., J.P. Morgan Chase, Time Warner, Pfizer, MetLife, Morgan Stanley, Merrill Lynch, PepsiCo, International Paper, Viacom, and American Express. Human Rights Campaign Foundation, *Work Life: Fortune 500 Companies that Offer Domestic Partner Health Benefits*, at http://www.hrc.org/Template.cfm?Section=Search_the_Database&Template=/CustomSource/WorkNet/WorkplacePolicySearch.cfm&DPHealth=f500&submitted=1&refresh=1.

⁹¹ See New York Laws Affecting GLBT People, Human Rights Campaign Foundation (last viewed Feb. 23, 2004), available at http://www.hrc.org/Template.cfm?Section=Search_the_Law_Database&Template=/CustomSource/Law/StateDisplay.cfm&StateCode=NY&LawFlag=1&StatusInd=lawcurrent.

⁹² See generally State University of New York, Current Employees: Benefits by Negotiating Unit, at <http://www.esc.edu/services/SUNYBenefits.nsf/3cc42a422514347a8525671d0049f395/7b5d245914d6b4b08525692c00143f39?OpenDocument> (last viewed Feb. 24, 2004). An employee must submit proof of financial interdependence and common relationship dating back at least a year to qualify for domestic partner benefits. *Id.*

⁹³ Scire, *supra* note 85, at 362. The initial domestic partnership regulations were instituted when former Mayor Ed Koch signed Executive Order No. 123 in 1989, which required City agencies to recognize domestic partners with regard to City employee sick leave, bereavement leave, and certain other rights traditionally afforded married employees. *Id.* An official domestic partnership registry was created in 1993 by former Mayor David Dinkins, who re-affirmed the 1989 Executive Order, and added additional benefits for the same-sex domestic partners of City employees – including child care leave and visitation rights if a domestic partner or the family member of a domestic partner is incarcerated. *Id.* In 1998, former Mayor Rudolph Giuliani signed the legislation currently in effect, which eliminated a previous temporal

requiring all companies with contracts in excess of \$100,000 with the City to provide domestic partnership benefits to its employees.⁹⁴

1. Tax Consequences

As a general rule, the monetary value of employer-provided health coverage⁹⁵ and reimbursements received by an employee through an employer-provided health plan⁹⁶ is not considered part of the gross income of an employee. This general rule also applies to any such benefits provided to the employee's spouse and dependents.⁹⁷

Since same-sex couples cannot be "spouses" for purposes of the Internal Revenue Code (the "Code"),⁹⁸ however, the value of any such benefits is considered taxable gross income if the beneficiary is not the employee or his or her statutorily-defined "dependent." For this purpose, the Code defines "dependents" to include several

requirement in favor of a requirement that prospective domestic partners must "live together and have been living together" on a continuing basis, but without specifying a length of time. N.Y.C. ADMIN. CODE § 3-240, *et seq.* The law also requires a minimum of at least six months between successive partnerships, and extends health benefits to the domestic partners of city employees. *Id.* While the act of registering as domestic partners has no direct legal effect, it is considered evidence of being a family member for purposes of property rights and succession rights. *Id.*

⁹⁴ See Jennifer Steinhauer, *Gay Rights Leader Quits Bloomberg Panel*, N.Y. TIMES, Oct. 20, 2004, at B8. In May 2004, the City Council passed legislation to require companies who have contracts with New York City for \$100,000 or more to provide the same benefits to employees with domestic partners that they provide to employees with spouses. Mayor Michael Bloomberg vetoed the legislation, noting that he did not want New York City's purchasing power to drive social policy. In June 2004, however, the Council overrode the veto. Mayor Bloomberg, in October 2004, asked the State Supreme Court for an injunction against enforcing the "Equal Benefits Law." The court refused, and set a court date in November 2004 to hear further arguments.

⁹⁵ I.R.C. § 106(a) (2004).

⁹⁶ I.R.C. § 105(b) (2004).

⁹⁷ TREAS. REG. § 1.106-1 (providing that contributions by an employer to accident and health plans are excludible from gross income to the extent that such coverage compensates for the personal injuries or sickness of the employee, his or her spouse, or his or her dependents, as defined in Code Section 152); TREAS. REG. § 1.105-2 (providing that reimbursements for medical expenses by an employer-provided plan are excludible from gross income to the extent that the expenses were incurred for the medical care of the employee, his or her spouse, or his or her dependents, as defined in Code Section 152).

⁹⁸ See PLR 200339001 (Jun. 13, 2003) (citing Rev. Rul. 58-66, 1958-1 C.B. 60 for the proposition that marital status is determined by state law, but explicitly applying Section 3 of the Defense of Marriage Act to preclude any federal recognition of same-sex marriage for federal tax purposes).

categories of relationships to the taxpayer so long as the taxpayer provided more than half of the dependent's support during the tax year in question.⁹⁹ Most of the relationships covered under the definition of dependent arise from blood, marriage, or adoption.¹⁰⁰ An individual who does not fall into any of these categories may still be a dependent if he or she shares the same principal residence with the taxpayer, is a member of the taxpayer's household, and receives more than 50 percent of her support from the taxpayer.¹⁰¹

Thus, to obtain health coverage from an employer without creating additional taxable income for the employee, the non-employee – in this case, a same-sex partner – must receive more than half of his or her support from the employee and must share the same principal place of abode with the employee.¹⁰² Consequently, the value of any benefits extended to the same-sex partner who is not a dependent of the employee

⁹⁹ Working Families Tax Relief Act of Oct. 4, 2004, Pub. L. No. 108-311, 118 Stat. 1166 (Oct. 4, 2004); I.R.C. § 152 (2004).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* In the case of a gay or lesbian couple raising a child, a non-adoptive, non-biological parent can not claim the child as a dependent as a “qualifying child.” However, under the newly revised code, a non-adoptive same-sex partner to a biological or adoptive parent may claim the parent's child as a dependent as a “qualifying relative.” A qualifying relative is an individual who bears a “relationship” with the taxpayer, has a gross income below the threshold amount defined in I.R.C. § 151(d), to whom the taxpayer provides more than one-half of the individual's support, and who is not a qualifying child of such taxpayer or any other taxpayer. A “relationship” exists where the individual, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer's household. If the adoptive or biological parent of child does not claim his or her child as a dependent, then the parent's non-adoptive same-sex parent may claim that child as a dependent. “A child legally related to both of his own or same-sex parents may be claimed as a “qualifying child” by either, but not both parents, same-sex parents, even if not married, cannot file their federal tax returns jointly. See *infra* Section I.D for further discussion of the impact of the defense of Marriage Act.

¹⁰² See I.R.C. §§106(a), 152(a) (2004); see also PLR 200339001 (Jun. 13, 2003) (holding that an employee may extend his or her employer-provided health coverage to his or her same-sex domestic partner without incurring additional income or giving rise to employment tax withholding liability, so long as the same-sex domestic partner satisfies the “dependent” requirements of Code Section 152). See PLR 200339001 (Jun. 13, 2003) (holding that when an employee extends employer-provided health coverage to his or her same-sex domestic partner who does not satisfy the “dependant” requirements of Code Section 152, the excess of the fair market value of the health coverage over the amount paid by the employee for such coverage is includable in the employee's gross income and is subject to income tax withholding and employment taxes).

will be subject to income tax withholding and employment taxes.¹⁰³ As such, the spousal tax benefits for employer-provided health coverage present a very real economic advantage for married couples who rely on one spouse's employer for medical coverage.¹⁰⁴

2. Right to COBRA Continuation Coverage

COBRA, enacted by Congress in 1986, requires employers that offer health benefits to their employees to provide continuing health coverage at group rates for employees and their dependents who otherwise would lose their coverage due to specified events.¹⁰⁵ COBRA protects employees/plan participants, their spouses, and their dependent children;¹⁰⁶ thus, if an employer-sponsored health plan extends coverage to these legally recognized dependents, the employer must offer COBRA continuation coverage to them as well. Even if a plan permits employees to receive coverage for unmarried domestic partners, however, those domestic partners do not have COBRA rights.¹⁰⁷ Although an employer is free to provide contractual "COBRA-equivalent"

¹⁰³ See Rev. Rul. 56-632, 1956-2 C.B. 101 (1956) (holding that excluded benefits are subject to the employment tax withholding requirements of Code Section 3401(a)).

¹⁰⁴ Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F.L. REV. 465, 472-73 (2000) (noting that it is a "rare case" for a same-sex partner to qualify as a dependent under Code Section 152).

¹⁰⁵ Roberta Casper Watson & Jo Anne Rosenfeld, *COBRA Health Continuation Benefits Under the New and Old Regulations*, ALI-ABA Continuing Legal Education, SJ050 ALI-ABA 653, 659 (Oct. 30-Nov. 1, 2003) ("Watson"). Employers that employed fewer than 20 employees during a typical business day in the preceding calendar year, and churches or church associations, are exempt from COBRA requirements. *Id.* at 661, 665.

¹⁰⁶ *Id.* (citing TREAS. REG. § 54.4980B-3 Q&A-1(a); PROP. TREAS. REG. § 1.162-26 Q&A-15(a)).

¹⁰⁷ James P. Baker, *Equal Benefits for Equal Work? The Law of Domestic Partner Benefits*, 14 LAB. LAW. 23, 42 (1998) ("Baker") ("Since domestic partners are not considered the legal equivalent of spouses, they are ineligible for statutory COBRA coverage."); Patricia A. Peard, *Domestic Partnership Benefits: Equal Pay for Equal Work*, 12 ME. B.J. 184, 185 (1997) ("Peard"); Watson, *supra* note 105, at 668.

rights to its employees and their domestic partners, the employer is not statutorily obligated to do so.¹⁰⁸

The primary event that triggers COBRA coverage is termination or cessation of employment, or reduction in hours, so long as such termination is not due to “gross misconduct” on the part of the employee.¹⁰⁹ COBRA coverage also can be triggered for an employee’s spouse upon his or her divorce from the employee or the employee’s death.¹¹⁰ Again, however, the federal COBRA statute makes no provisions for coverage for unmarried domestic partners, even those otherwise covered under (and reliant upon) their partners’ employer-sponsored health plans.¹¹¹

3. Cafeteria Plans

Cafeteria plans are employer-sponsored benefit plans that allow employees to choose which specific benefits they want to receive from their employer.¹¹² Cafeteria plans can be quite beneficial to employees, often saving them pre-tax dollars for

¹⁰⁸ Baker, *supra* note 107, at 42 (noting that the San Francisco ordinance requiring all companies doing business with the City to provide equal benefits to their employees’ same-sex domestic partners also requires those companies to provide “COBRA equivalent” coverage to domestic partners); Peard, at 185 (“[S]ome companies have devised plans that provide continuation of coverage for domestic partners upon the termination or the death of the employee.”). *But see* Debbie Zielinski, Note, *Domestic Partnership Benefits: Why Not Offer Them to Same-Sex Partners and Unmarried Opposite Sex Partners?*, 13 J.L. & HEALTH 281, 315 n.304 (1999) (quoting University of Iowa Domestic Partnership Benefits Policy which states “Federal and state COBRA regulations apply to your domestic partner”).

¹⁰⁹ Watson, *supra* note 105, at 678.

¹¹⁰ *Id.* at 670.

¹¹¹ Despite the lack of a federal requirement, employers are free to craft their own COBRA-type programs for their employees’ domestic partners.

¹¹² A cafeteria plan is a written plan under which (a) all participants are employees and (b) the participants may choose among two or more benefits consisting of cash and qualified benefits. I.R.C. § 125 (2003). Cafeteria-style plans resulted in potential adverse tax consequences until the cafeteria plan rules were established in 1978. Roberta Casper Watson & Jo Anne Rosenfeld, *Flexible Benefits: Cafeteria Plans and Other Fringe Benefits*, ALI-ABA Video Law Review, VMD0409 ALI-ABA 81, 85 (Apr. 9, 2003). Benefits provided under a cafeteria plan can include health care benefits, disability benefits, life insurance benefits, dependent care assistance benefits, and adoption assistance benefits. *Id.* at 88-97.

expenses such as childcare or supplemental health care coverage.¹¹³ Although spouses and other beneficiaries may not be active participants in a cafeteria plan, they may receive benefits under such a plan.¹¹⁴

Elections as to which specific benefits each employee wants to receive must be made prior to a period of coverage, generally the “plan year.”¹¹⁵ Generally these elections are irreversible for the duration of the plan year, but in certain circumstances an employee is permitted to revoke an existing election or to make a new election during the plan year.¹¹⁶ Some of the most common circumstances permitting a mid-year change in election are “change in status” events, such as:

- a change in the legal marital status of the employee;
- a change in the number of an employee’s dependents;
- a change in the employment status of the employee, his or her spouse and/or dependents;¹¹⁷
- an event that causes an employee’s dependent to satisfy or cease to satisfy the dependent eligibility requirements on account of attainment of a specified age, student status or similar circumstance; and
- a change in the place of residence of an employee, her or his legal spouse or dependent.¹¹⁸

¹¹³ A cafeteria plan may include a flexible spending arrangement that permits an employee to make pre-tax contributions to a flexible spending account (“FSA”), generally through a salary reduction agreement. The contributions are used to reimburse the employee for qualifying health care and dependent care expenses. This results in tax-savings to the employee, as the payments to the cafeteria plan are excluded from the employee’s gross (taxable) income. See I.R.C. § 125.

¹¹⁴ T. David Cowart, *Cafeteria Plan Requirements and Related Rules*, ALI-ABA Video Law Review, VMD0409 ALI-ABA 539, 547 (Apr. 9, 2003) (“Cowart”).

¹¹⁵ Watson, *supra* note 105, at 105-06.

¹¹⁶ See TREAS. REG. § 1.125-4; Watson *supra* note 105, at 107-08.

¹¹⁷ Such changes include termination or commencement of employment, strike or lockout, commencement or return from an unpaid leave of absence, a change in worksite, or satisfying or ceasing to satisfy any eligibility requirement that is dependent on employment status.

¹¹⁸ See TREAS. REG. § 1.125-4; Watson, *supra* note 105, at 107-08.

These “change in status” events are governed by federal Treasury Department regulations. In many instances a mid-year change of election is permitted if either an employee or his or her legal spouse undergoes a “change in status” event. If an employee’s unmarried same-sex partner experiences an identical change in status, however, the regulations do not permit such a change in election.¹¹⁹

4. Retirement Plans

a. Spouse’s Right to Receive Retirement or Death Benefits

With regard to retirement benefits, if an employee designates a beneficiary and thereafter gets married, the employee’s new spouse does not take precedence over a previously designated beneficiary unless the employee changes the designation.¹²⁰ If an employee is legally married at the time of designating a beneficiary, State and federal law both require the employee’s legal spouse to consent in writing to the designation of a non-spouse for such designation to be effective.¹²¹ That same consent is not required of a same-sex partner. Therefore, although a person may name a same-sex partner as his or her beneficiary, the partner, in contrast to a legally married spouse, is never provided the

¹¹⁹ See generally TREAS. REG. § 1.125-4 (limiting change in status exceptions to events affecting an employee, his or her “spouse,” and dependents).

There are additional events affecting an employee’s legal spouse which may allow a plan participant to make a mid-year change in election, but which do not make similar allowances for the unmarried partners of employees. These include: (1) a change in the benefits plan of an employee’s spouse, former spouse, or dependent; (2) the occurrence of a COBRA event with respect to the employee, his or her spouse and/or dependent; (3) the loss of prior group health coverage provided to an employee, his or her spouse or dependent under an arrangement sponsored by a governmental or educational institution. Cowart, *supra* note 114, at 571; Watson, *supra* note 105, at 111-12. Additionally, if an employee, his or her spouse and/or dependent becomes eligible for coverage under Medicaid or Medicare, a cafeteria plan may permit the employee to make a prospective election change to cancel or reduce that person’s group health insurance. Cowart, *supra* note 114, at 560.

¹²⁰ *In re Estate of Bloom-Kartiganer*, 599 N.Y.S.2d 188, 188 (3d Dep’t 1993) (holding that decedent’s designation of appellant (her son) as pension beneficiary was not altered or nullified by subsequent marriage to respondent); see also I.R.C. § 417(a)(2) (2003).

¹²¹ *Id.*

right to object to the other partner's designation of someone outside the partnership as the beneficiary of pension proceeds.

Legally married spouses have additional protections that unmarried partners do not. The Court of Appeals has held that vested rights in a noncontributory pension plan are marital property to the extent they were acquired between the date of the marriage and the commencement of a matrimonial action, even if the rights are unmaturred at the time the action is begun.¹²² Therefore, these vested rights will be distributed as part of the marital estate.¹²³ Further, the consent of an employee's spouse must be obtained in writing before the employee can use her or his accrued pension benefits as security for a loan.¹²⁴

A legally married spouse also has strong rights to his or her spouse's death benefits. As with retirement benefits, federal law requires that an employee's spouse consent in writing before an employee can name someone other than her or his spouse as the beneficiary of death benefits.¹²⁵ In the case of death benefits, however, even if the designation of a beneficiary is made prior to a marriage, an employee's new spouse must consent in writing to the previous designation of a non-spouse beneficiary to preserve the new spouse's right to collect death benefits upon the death of the employee.¹²⁶

¹²² *Majauskas v. Majauskas*, 61 N.Y.2d 481, 485-86 (1984).

¹²³ *Id.*

¹²⁴ I.R.C. § 417(a)(4) (2003).

¹²⁵ 29 U.S.C. § 1055(a)(2) (ERISA); I.R.C. § 417(a)(2).

¹²⁶ *Hurwitz v. Sher*, 789 F. Supp. 134 (S.D.N.Y. 1992).

b. Spouse’s Right to Receive Distributions from a Qualified Retirement Plan Pursuant to a Court-Ordered QDRO

A qualified domestic relations order (“QDRO”) is an order (generally made in the context of a matrimonial action) that recognizes the existence of an alternate payee’s right, or assigns an alternate payee a right, to receive all or a portion of the benefits payable to a participant under a pension plan.¹²⁷ A QDRO may grant rights only to vested pension benefits that accrued between the date of the marriage and the commencement of the matrimonial action.¹²⁸ QDROs are most commonly used to divide retirement benefits between former spouses upon divorce; federal ERISA regulations require that a QDRO be in the form of a judgment, decree or order made pursuant to a state domestic relations law.¹²⁹ Since unmarried partners are not given access to State judicial procedures governing the dissolution of a relationship and the division of joint assets,¹³⁰ and may not gain access to family court except when the unmarried couple has a child in common,¹³¹ unmarried partners have little to no chance of enjoying the benefit of a QDRO.

¹²⁷ I.R.C. § 414(p)(1)(A) (2003).

¹²⁸ *Brady v. Brady*, 649 N.Y.S.2d 530, 531 (3d Dep’t 1996).

¹²⁹ Stacey Lynn Anderson, Comment, *The Right to Pension Benefits Under ERISA When a Nonemployee Spouse Predeceases the Employee Spouse*, 67 WASH. L. REV. 625, 625, 630 (1992). Until 1984, QDROs were in conflict with ERISA, which mandated that pension benefits could not be “assigned or alienated.” *Id.* at 625, 634. However, Congress passed the Retirement Equity Act in 1984, which amended ERISA to allow pension benefits to be divided between spouses upon the dissolution of a marriage, eliminating the conflict and alleviating what was alleged to be a disparate and unfair burden on women, who more frequently relied on their spouses’ pension benefits for retirement income. *Id.*

¹³⁰ If the division of assets is based on a contractual relationship between the parties, however, they likely could seek judicial resolution of their contractual dispute. *See* Section I.R.1.

¹³¹ *See infra* Sections I.E and I.S.

c. Surviving and Former Spouses' Rights to Tax-Free Rollover of IRA Distributions

If a distribution from an Individual Retirement Account (“IRA”) is made to the surviving spouse of a decedent employee, the surviving spouse may roll over the distribution into another qualified retirement plan or IRA without creating a taxable event.¹³² A surviving spouse who is the sole beneficiary of the decedent spouse’s IRA also may elect to treat the decedent’s IRA as his or her own.¹³³ The effect of such an election may be to extend significantly the payments of income tax over a period of years. This opportunity is not available to non-spouse beneficiaries.

The Code also provides tax-free rollover treatment for the transfer of an interest in an IRA incident to divorce or separation.¹³⁴ When an individual transfers his or her interest in an IRA to his or her spouse or former spouse pursuant to a divorce or separation instrument, there is no taxable event and the recipient spouse or former spouse may thereafter treat the IRA as his or her own.¹³⁵

There are no comparable provisions for tax-free rollover treatment of distributions from an unmarried, deceased employee’s IRA to his or her surviving same-sex partner, or for transfers of an interest in an unmarried employee’s IRA incident to separation from his or her partner.

D. THE IMPACT OF MARRIAGE ON FEDERAL INCOME TAX BENEFITS

Under current federal tax law, the basic taxable unit is often determined by the primary domestic relationship of the taxpayer. Congress traditionally has left

¹³² I.R.C. § 402(c)(9) (2003).

¹³³ TREAS. REG. § 1.408-8, Q&A-5 (2004).

¹³⁴ I.R.C. § 408(d)(6) (2003).

¹³⁵ *Id.*

defining “the family” to the individual states.¹³⁶ However, in 1996, the definition of “spouse” was defined for all federal purposes to include only heterosexual marital relationships by the Defense of Marriage Act (“DOMA”).¹³⁷

In numerous situations, the Internal Revenue Code (the “Code”) provides different tax treatment for married and unmarried taxpayers. Whether a particular marital status will result in a beneficial or detrimental tax result varies from situation to situation. This section of this Report examines some of the most significant benefits and detriments related to marital status; it is not, however, exhaustive of all the possible situations where marital status could affect a federal income tax result.

One tax benefit that may adhere to the marital relationship occurs when the spouses earn differential income: a married couple with one high-wage earner will benefit from the availability of the joint filing regime, which is unavailable for unmarried cohabitating taxpayers.¹³⁸ Depending on the facts, a married taxpayer may receive a tax benefit by filing as the “head of household”; this filing status would be unavailable, however, for an unmarried taxpayer in similar circumstances. Certain tax credits, such as the Child Tax Credit and the Earned Income Tax Credit, are available only where a legal or biological relationship exists between the taxpayer and a child.

¹³⁶ See Christopher J. Hayes, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 HASTINGS L.J. 1593, 1601-10 (1996) (citing *Boyer v. Commissioner*, 668 F.2d 1382 (4th Cir. 1981) for the proposition that such deference to state law determinations is almost complete). Congressional imposition of a federal income tax was authorized by the Sixteenth Amendment to the U.S. Constitution: “The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.” U.S. CONST. amend. XVI.

¹³⁷ Pub. L. No. 104-100, 100 Stat. 2419 (Sept. 21, 1996). See *infra* Section III.F.3. for a discussion of DOMA.

¹³⁸ The so-called “marriage penalty,” under which a married couple with both spouses earning comparable wages will be liable for more tax than if each was single, will be discussed below.

1. Income Tax Benefits that Accompany Marriage

a. Joint Returns/Joint Filing

Under current federal tax law, the basic taxable unit is determined by the primary domestic relationship of the taxpayer. Under this law, married taxpayers who file a joint return generally enjoy lower marginal tax rates than unmarried taxpayers or married taxpayers who file separate returns.¹³⁹ It is possible under the current joint filing system, however, for two married taxpayers who file a joint return to bear a greater tax burden than if each was single. This potential “marriage penalty” will be discussed below.¹⁴⁰

In its earliest manifestations, income tax law gave married taxpayers the option to split income between the husband and wife or to file both wage income and economic value received from income-producing property as if they were still single. A married couple with disparate incomes could distribute their aggregate annual economic gain equally between themselves to mitigate the effect of high-bracket marginal tax rates.¹⁴¹

Although marginal tax rate changes in 1969 curtailed the extent of the tax benefits available to married couples filing jointly, joint filing status still enjoys

¹³⁹ See I.R.C. § 6013(a) (providing in part that “husband and wife may make a single return jointly of income taxes”). For marginal tax rates applicable to various taxpayers, see I.R.C. § 1.

¹⁴⁰ See *infra* Section I.D.4.

¹⁴¹ The availability of this tax strategy was very controversial during the first several decades of the income tax. Congress attempted to limit the availability of income splitting, but could not do so effectively without either running afoul of state law in community property states or discriminating against taxpayers in non-community property states. *Id.* For a discussion of the leading historical cases dealing with income splitting and joint filing, including *Lucas v. Earl*, 281 U.S. 111 (1930), and *Poe v. Seaborn*, 282 U.S. 101 (1930), see Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 342-348 (January 1994); Angela V. Langlotz, *Tying the Knot: The Tax Consequences of Marriage*, 54 TAX LAW. 329, 329-332 (Winter 2001). Congress abandoned these attempts in 1948, when it amended the Code to allow married couples to split income, either by contract for shared wages or by transfer of income producing property.

the most favorable tax rates of any taxable unit.¹⁴² The option to file a joint return is available only to legally married individuals.¹⁴³ As discussed in further detail *infra*,¹⁴⁴ however, the Defense of Marriage Act (“DOMA”) precludes any federal agency from recognizing marriages of same-sex partners. Thus, absent a successful legal challenge to DOMA,¹⁴⁵ same-sex couples married in Massachusetts or elsewhere will not be permitted to file joint federal tax returns.¹⁴⁶

b. Head of Household

Congress first created “head of household” status in 1951 in an attempt to extend some (but not all) of the marginal tax benefits conferred on married taxpayers to “those single persons – widowers with children, for example – who maintained a family

¹⁴² See Steven C. Thompson and Randall K. Serrett, *Joint Tax Returns Offer Distinct Advantages*, 68 PRAC. TAX STRATEGIES 158 (2002) (“Thompson and Serrett”); see also Langlotz (noting that marginal rate changes for married couples filing jointly decreased in 1969, creating the so-called “marriage penalty”). For further discussion of the “marriage penalty,” see *infra* Section I.D.4.

¹⁴³ See Thompson and Serrett, *supra* note 142, at 162 (“As a general rule, individuals claiming to be joined together in a same-sex economic relationship do not qualify for married filing status.”)

¹⁴⁴ See *infra* Section III.F.3. describing the impact of DOMA and the legal challenges that have been and likely will be raised to its constitutionality.

¹⁴⁵ *Id.*

¹⁴⁶ A gentleman named Robert Mueller twice has challenged the IRS’ denial of his right to file jointly with his same-sex partner. The first time he asserted that his rights to Due Process and Equal Protection under the Fifth Amendment were violated. Both the Tax Court, and later the Seventh Circuit rejected this claim, stating that traditionally, no constitutional violation arises from the tax code’s different treatment of married and unmarried taxpayers and that Mr. Mueller offered “no reason why that analysis does not control here.” *Mueller v. Commissioner*, T.C. Memo 2000-132, *aff’d*, 2001 WL 522388 (7th Cir. Apr. 6, 2001). The Tax Court further noted that Mueller claimed “discrimination not as a homosexual but as a person who shares assets and income with someone who is not his legal spouse placing himself in a class that includes nonmarried couples of the opposite sex, family members, and friends.” *Id.* at *1. This grouping, concluded the court, could not constitute a “suspect class.” *Id.* Mueller again sought to file jointly with his same-sex partner in 1996. The Tax Court and Seventh Circuits again rejected his attempt as well as his challenge to DOMA. Specifically, as DOMA would apply only to a taxpayer in a state that legally sanctioned same-sex marriage, and at that time no state did so, the court rejected Mueller’s claim as theoretical. See *Mueller v. Commissioner*, T.C. Memo 2001-274, *aff’d*, 39 Fed. Appx. 437, 438 (7th Cir. 2002).

household for their dependents.”¹⁴⁷ The head of household rate structure today remains “roughly halfway” between the rate structures applicable to married taxpayers filing joint returns and single taxpayers,¹⁴⁸ attempting to mitigate the economic detriment to children not living in the tax-preferred, two-parent family unit.¹⁴⁹

Under Tax Code Section 2(b), an individual is considered a “head of household” if such individual is not married at the close of the taxable year, is not a surviving spouse, and either (i) maintains as his or her home a place that constitutes the principal abode for more than half the year of a son, stepson, daughter, or stepdaughter, or a descendant of these relationships, or a legal dependent, or (ii) maintains as his or her home a place that constitutes the principal abode for more than half the year of a parent of the taxpayer who is also a legal dependent.

In a 1976 opinion that continues to be good law, the Tax Court narrowly construed the statutory language that defines the requisite relationship for head of household status.¹⁵⁰ In the facts of the case, the court rejected the attempt by a man who provided financial support for his live-in girlfriend’s daughter to claim head of household status. Despite the existence of a practical equivalent to a parent-child relationship, the court found no legal or biological relationship significant

¹⁴⁷ See MARVIN A. CHIRELSTEIN, *FEDERAL INCOME TAXATION*, ¶ 9.04, n.26. (rev. 8th ed.) (“Chirelstein”); I.R.C. § 1(b).

¹⁴⁸ See I.R.C. §§ 1(b) and 1(c).

¹⁴⁹ See, e.g., Patricia A. Cain, *Dependency, Taxes, and Alternative Families*, 5 J. GENDER RACE & JUST. 267, 273 (2001-2002) (“Cain”) (stating that “lower head of household rates are presumably justified because they inhere to the benefit of the dependent child through the person who is supporting that child”).

¹⁵⁰ *Whalen v. Commissioner*, T.C. Memo 1976-137 (1976).

enough to justify access to the lower head of household marginal rates.¹⁵¹ The court relied on limiting language in the Internal Revenue Code, which states that a taxpayer “shall not be deemed a head of household by reason of having as a member of his household a dependent who is unrelated to him.”¹⁵² Accordingly, if an unmarried same-sex partner attempted to claim head of household status based on support provided to the child of his or her partner, the same limited holding should apply.

2. Child Tax Credit

The Child Tax Credit is a relatively new provision of the federal income tax code;¹⁵³ it provides qualifying taxpayers with a dollar-for-dollar tax reduction of up to \$1000 per child.¹⁵⁴ Because the tax credit phases out at higher income levels, its primary beneficiaries are middle and lower income taxpayers.¹⁵⁵ For purposes of this credit, the law does not recognize parental contributions made by a non-biological spouse, absent legal marriage or adoption.¹⁵⁶ Thus, in a same-sex relationship where the biological or adoptive parent stays at home with the child, the tax credit would not be available to relieve the tax burden on the working partner’s income.

¹⁵¹ *Id.*

¹⁵² I.R.C. § 2(b)(3).

¹⁵³ The Child Tax Credit first was enacted as part of the Taxpayer Relief Act of 1997. For a brief history of this credit, *see* Chirelstein, *supra* note 147, ¶ 7.06A.

¹⁵⁴ I.R.C. § 24. This credit amount reflects a recent increase in the child tax credit implemented by the Working Families Tax Relief Act of 2004, Pub. L. No. 108-311.

¹⁵⁵ *See* Chirelstein, *supra* note 147, (explaining that the credit is broadly available, but subject to a phase-out beginning at adjusted gross income levels of \$110,000 for married persons filing jointly and \$75,000 for singles).

¹⁵⁶ As one commentator noted: “[T]o the extent the credit . . . is justified on the grounds that it helps to offset the cost of raising a child generally, the impact of the relationship requirement will deprive some nontraditional families from claiming the credit (*e.g.*, a same-sex couple with a child) when it is available to similarly-situated traditional couples (*e.g.*, the married couple with a stepchild).” Cain, *supra* note 149, at 285.

3. Earned Income Tax Credit

The Earned Income Tax Credit (EITC)¹⁵⁷ is closely related to the Child Tax Credit. The EITC is a refundable credit that can significantly reduce the tax burden for taxpayers on the lower end of the marginal rate structure.¹⁵⁸ An individual or family who is eligible for the EITC determines the credit amount by multiplying his or her earned income (wages, salaries, compensation, and earnings from self-employment) by a credit percentage, which is determined based on the number of his or her “qualifying” children. The credit is subject to a phase-out percentage, which is also determined based on the number of “qualifying” children. The phase-out percentage is multiplied against the amount of the individual’s earned income that exceeds a threshold amount (the “phaseout amount,” adjusted for inflation), and the result of this calculation is the amount by which the individual’s EITC is reduced.¹⁵⁹ Currently, individuals and families who work and have earned income under \$33,692 (\$34,692 for married filing jointly) are eligible for the EITC.

As with the Child Tax Credit, the taxpayer must have a legal or biological relationship to the qualifying child and must share a principal place of residence with the child only for more than half the year.¹⁶⁰ The amount of the credit available increases for individuals with a “qualifying child” or with two or more “qualifying children.” The legal or biological relationship requirement thus has an impact on the amount of EITC that an individual can apply against his or her tax liability.

¹⁵⁷ I.R.C. § 32.

¹⁵⁸ See Chirelstein, *supra* note 147, ¶ 7.07.

¹⁵⁹ I.R.C. § 32.

¹⁶⁰ I.R.C. § 32; *see also* Cain, *supra* note 149, at 283 (discussing application of the EITC).

4. Federal Income Tax Benefits for Same-Sex Couples

Most of the federal income tax benefits that same-sex couples enjoy as a result of their lack of marital status arise from the “marriage penalty.”¹⁶¹ Under the current income tax law a legally-married couple consisting of two individuals who earn comparable wages may have a greater income tax burden than if those same two taxpayers remained single. The penalty occurs primarily as a result of the higher marginal rate that will be applied to the couple’s aggregate wages.¹⁶²

In addition, any tax benefit subject to a phase-out above certain income levels will be more widely available to same-sex or unmarried couples than it will to their married counterparts.¹⁶³ This can have a significant impact on a couple’s final tax burden in contexts such as personal exemptions, itemized deductions, retirement contributions, and student loan interest payments.¹⁶⁴ This result occurs because the phase-out will apply to the aggregate amount of the couple’s income, thus more total income will be subject to the phase-out than if the phase-out were applied against each spouse’s income separately.

¹⁶¹ For a more detailed analysis of the marriage penalty, see Frederick J. Bradshaw IV, *The Earned Income Tax Credit and the Marriage Penalty: New Proposals in Light of the Economic Growth and Tax Relief Reconciliation Act of 2001*, 54 TAX LAW. 701 (Summer 2001); Richard J. Elbert, *Love, God, and Country: Religious Freedom and the Marriage Penalty Tax*, 5 SETON HALL CONST. L.J. 1171 (Summer 1995); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1 (Fall 2002). “Marriage penalty” relief, which decreases but does not entirely eliminate the effect of the “marriage penalty,” was recently extended through 2010 by the Working Families Tax Relief Act of 2004, signed into law by President Bush on September 23, 2004. Same-sex couples married in Massachusetts or elsewhere are prohibited from filing jointly under DOMA. See *infra* Section III.F.3. for a discussion of this statute.

¹⁶² See Ronnie Cohen and Susan B. Morris, *Tax Issues from ‘Father Knows Best’ to ‘Heather Has Two Mommies,’* 84 TAX NOTES 1309, 1314 (Aug. 30, 1999) (“Cohen”).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

Same-sex couples also avoid the joint and several liability for taxes due that attaches to the joint return.¹⁶⁵ Finally, same-sex couples who own stock are not subject to the same imputed ownership rules as married couples.¹⁶⁶ A same-sex couple therefore can hold more shares of a corporation before they face any of the tax consequences that might arise with majority interests or control premiums.¹⁶⁷

E. PARENTAL RESPONSIBILITIES DURING MARRIAGE

Gay and lesbian couples are increasingly becoming parents,¹⁶⁸ adding another contour to the landscape of rights and responsibilities that are affected by current marriage laws. The Committee received testimony from several attorneys who provide legal services to same-sex couples.¹⁶⁹ These practitioners stated that, although same-sex couples can take some measures legally to include children in their familial arrangements, or to provide legal protection for the bonds between children and their parents' same-sex partners, some rights and protections are inaccessible, or significantly more burdensome to procure.

¹⁶⁵ I.R.C. § 6013 (2003).

¹⁶⁶ Cohen, *supra* note 162, at 1317-20.

¹⁶⁷ *Id.* A control premium is the added value that a block of shares has when that block is large enough to control the corporation.

¹⁶⁸ See, e.g., Ginia Bellafante, *Two Fathers, with One Happy to Stay at Home*, N.Y. TIMES, Jan. 12 2004, at A1 available at <http://www.nytimes.com/2004/01/12/national/12DADS.html?hp> (noting 2000 census found that about one-third of all female-couple households, and about one-fifth of all male-couple households, had children); *ABA Annual Meeting Provides Forum for Family Law Experts*, 13 FAM. L. REP. (BNA) 1512, 1513 (Aug. 25, 1987) (estimating that, at the time, approximately six million children nationwide had at least one lesbian or gay parent). But see Timothy J. Dailey, *State of the States: Update on Homosexual Adoption in the U.S.*, Family Research Council, available at <http://www.frc.org/?i=IS02D2> (last viewed Jan. 30, 2004) (disputing published estimates of the number of American children in households headed by a lesbian or gay parent, and positing that the actual number is significantly less than one million children). The actual number of households headed by gay men and lesbians is difficult, if not impossible, to assess. As such, these numbers must be considered estimates. For further discussion of the number of households headed by gay men and lesbians, see *supra* Section I, notes 3-12 and accompanying text.

¹⁶⁹ Commentary provided by three practitioners, Erica Bell, Esq.; Carol Buell, Esq.; Judith Turkel, Esq., to the NYSBA Special Committee on December 15, 2003 and February 11, 2004.

In the absence of marriage or a legal equivalent, same-sex couples often must institute multiple legal actions and enter private contractual arrangements to obtain desired legal protections, if indeed they can be obtained at all through such methods. Further, the cost of retaining attorneys to create these documents may make such protections inaccessible to many same-sex couples.¹⁷⁰ The remainder of this section will focus on three areas: The duty to support the children of one's spouse for the duration of the marriage; the ability jointly to adopt a child not related to either spouse; and recognition of the spouse of an artificially inseminated woman as the natural parent of any child so conceived.

1. Limited Duty of Stepparents to Provide Support

One important right enjoyed by children in low-income families is the limited duty of support stepparents owe to their stepchildren.¹⁷¹ Family Court Act § 415 requires stepparents, to the extent they are financially able, to provide support to their stepchildren if those children are, or are in danger of becoming, recipients of public assistance and the child's biological parents cannot provide the necessary financial support.¹⁷² This important financial safety net is unavailable if the child's parent is unable to marry his or her partner, because the statutory language restricts it to stepparents,¹⁷³

¹⁷⁰ *Id.*

¹⁷¹ Marriage itself creates a legal relationship between a spouse and his/her spouse's children. Such "step-relationships" are not available absent marriage.

¹⁷² See *Commissioner [Anthony M] v. Lawrence F.*, 629 N.Y.S.2d 706, 706 (4th Dep't 1995); *In re Monroe County Dep't of Soc. Servs. [Palermo] v. Palermo*, 596 N.Y.S.2d 252, 253 (4th Dep't 1993); *Rockland County Dep't of Soc. Servs. [Alexander] v. Alexander*, 581 N.Y.S.2d 571, 573-74 (Fam. Ct. Rockland County 1992).

¹⁷³ N.Y. FAM. CT. ACT § 415 ("Step-parents shall in like manner [*i.e.*, if the stepchild is a recipient of public assistance or in danger of becoming a recipient] be responsible for the support of children under the age of twenty-one years.").

and the duty attaches only while the biological parent and his or her partner are legally married.¹⁷⁴

2. Adoption

Heterosexual married spouses may choose not to adopt their spouses' children, but immediately upon marriage become step-parents – with some more limited set of rights and responsibilities to these children. This “middle-ground” is not available to lesbian and gay couples. The language of Domestic Relations Law § 110 permits adoptions only by single, unmarried persons or by married couples. There is no provision in the adoption laws explicitly authorizing (or, for that matter, forbidding) joint adoptions by either same- or opposite-sex unmarried couples.¹⁷⁵ Therefore, although New York State permits unmarried gay men and lesbians as individuals to adopt children,¹⁷⁶ and allows second-parent adoptions¹⁷⁷ by the unmarried same-sex partners of biological children,¹⁷⁸ the ability of an unmarried same-sex couple to adopt jointly is unresolved by the statute.

¹⁷⁴ See *Orellana v. Esalante*, 653 N.Y.S.2d 992, 993 (4th Dep't 1997) (noting that “limited duty of stepparent to support stepchildren does not survive a divorce from the legal parent”).

¹⁷⁵ See *In re Adoption of Joseph*, 684 N.Y.S.2d 760, 760-61 (Surr. Ct. Oneida County 1998) (noting that joint adoption of unrelated child by unmarried couple was unresolved legal question in New York).

¹⁷⁶ See N.Y. DOM. REL. LAW § 110 (permitting single unmarried persons to adopt); 18 N.Y.C.R.R. 421.16[h][2] (2004) (prohibiting discrimination by adoption agencies based on prospective adoptive parent's homosexuality); see also *In re Jacob*, 86 N.Y.S.2d 651, 668 (1995) (allowing adoption by lesbian partner of biological mother, and noting that “New York has not adopted a policy disfavoring adoption by either single persons or homosexuals”).

¹⁷⁷ The phrase “second-parent adoption” is used when the partner of a child's adoptive or biological parent seeks to adopt the partner's child. See *infra* note 178.

¹⁷⁸ See generally *In re Jacob*, 86 N.Y.S.2d 651 (allowing, in separate consolidated cases, adoption of child by biological mother's lesbian partner, and adoption of child by biological mother's unmarried heterosexual partner); *In re Adoption of Caitlin*, 622 N.Y.S.2d 835, 841 (Fam. Ct. Monroe County 1994) (granting adoption petition by lesbian partners of biological mothers in two companion cases); *In re Adoption of Evan*, 583 N.Y.S.2d 997, 1001-02 (Surr. Ct. N.Y. County 1992) (in case of first impression, granting adoption petition by lesbian partner of biological mother, and noting that “[t]he fact that the petitioners here maintain an open lesbian relationship is not a reason to deny adoption. New York law

A number of New York courts have interpreted § 110 to allow unmarried opposite-sex couples to adopt jointly a child who is neither the biological child of nor has been previously adopted by, either parent. These cases follow the reasoning of *In re Jacob*, which allowed the unmarried partners of biological parents to pursue a second-parent adoption of their partners' children.¹⁷⁹ In the reported cases allowing unmarried opposite-sex couples to jointly adopt, courts have focused primarily on the best interests of the child, but take note of some minimal blood or other relationship, such as foster parent status, between the prospective adoptive parents and the child.¹⁸⁰ Presumably, unmarried same-sex couples who wish jointly to adopt a child (whether from birth, a

recognizes that a child's best interest is not predicated or controlled by parental sexual orientation") (footnote omitted). At one point, New York law required the appointment of a guardian *ad litem* in cases where a gay or lesbian person sought to adopt his or her same-sex partner's adopted or biological child, but that requirement has since been abandoned, and the appointment of a guardian *ad litem* is made when same-sex couples seek to adopt pursuant to the same criteria used when opposite-sex couples seek to adopt. See *In re Adoption of J.*, 642 N.Y.S.2d 814, 814-15 (Surr. Ct. N.Y. County 1996); see also Alan D. Scheinkman, Practice Commentary to N.Y. DOM. REL. LAW § 116 (discussing and approving of *In re Adoption of J.*, *supra*, and noting that "[t]here is no reason to believe that any particular form of adoption is inherently suspect or otherwise warrants special scrutiny").

After the decisions in *In re Jacob*, *supra*, and *In re Adoption of J.*, *supra*, the one remaining difference between married and unmarried couples when seeking second parent adoptions is that, generally, a court must wait until three months after a petition for adoption is submitted before granting the adoption, but that waiting period is waived statutorily when the petitioner is the legal spouse of a biological parent and the child has been living with the biological parent and petitioner step-parent for more than three months. N.Y. DOM. REL. LAW § 116(1). A court has discretion to waive this waiting period seemingly in all cases, however, "for good cause shown." *Id.* Therefore, a court would have the discretion to waive the waiting period if the adoptive parent were the unmarried partner of a biological parent.

¹⁷⁹ See *In re Adoption of Emilio R.*, 742 N.Y.S.2d 22, 25 (1st Dep't 2002) (allowing joint adoption of related child by common-law spouses); *In re Adoption of Carl*, 709 N.Y.S.2d 905, 909-10 (Fam. Ct. Queens County 2000) (permitting joint adoption of foster child by unmarried couple); *In re Adoption of Joseph*, 684 N.Y.S.2d at 761 (allowing joint adoption of foster child by unmarried couple).

¹⁸⁰ See *In re Adoption of Emilio R.*, 742 N.Y.S.2d at 25 (holding that adoptive child's maternal great aunt and her common law husband, an unmarried opposite-sex couple, could jointly adopt child on the basis distant blood relationship and best interests of the child); *In re Adoption of Carl*, 709 N.Y.S.2d at 652 (holding that unmarried and cohabitating opposite-sex couple, unrelated by blood to each other or to the child, were suitable adoptive parents and couple's proposed joint adoption of the child was in child's best interests); *In re Adoption of Joseph*, 684 N.Y.S.2d at 761 (holding that unmarried opposite-sex couple may jointly adopt their foster child, unrelated to either member of the couple by blood, where adoption was in the best interest of the child).

foster child, or under other circumstances), would receive equal treatment from a court.¹⁸¹ In fact, one New York appellate court has extended the logic of the unmarried opposite-sex couple adoption cases to the context of unmarried same-sex couples, focusing on the best interests of the child, yet noting the pre-adoptive relationship between the prospective adoptive parents and the child.¹⁸²

The case law regarding joint adoptions by unmarried couples with *no* prior relationship to the child remains unsettled, but the pattern of analysis in the lower and appellate court cases following *In re Jacob* suggests that such joint adoptions would be allowed under § 110, so long as they are in the best interests of the child.

3. Alternative Insemination

Alternative insemination¹⁸³ is a reproductive method often employed by lesbian couples when seeking to reproduce biologically,¹⁸⁴ and may be used by heterosexual couples when fertility problems arise.¹⁸⁵ The marital status of the couple seeking to have a child has a significant impact on the parents' legal relationship to the

¹⁸¹ Cf. *In re Jacob*, 86 N.Y.2d at 668 (noting that New York does not disfavor adoptions by gay men and lesbians).

¹⁸² See *In re Carolyn B.*, 774 N.Y.S.2d 227, 230 (1st Dep't 2004) (holding that unmarried same-sex couple had standing to jointly adopt biological child of neither potential adoptive parent, so long as adoption was in the best interests of the child).

¹⁸³ "Alternative insemination" also is known as "artificial insemination." See, e.g., Helen Smith, *Alternative Insemination*, Lesbian Health Research Center (UCSF Inst. on Health & Aging), at http://www.lesbianhealthinfo.org/your_health/parenthood-alt-insemination.htm (last viewed May 6, 2004).

¹⁸⁴ Artificial insemination similarly could be used by gay male couples seeking to have a biological child of one or the other partner, but any such arrangement likely would require the services of a surrogate, and surrogacy contracts are against public policy and void under New York law. N.Y. DOM. REL. LAW § 122.

¹⁸⁵ Heterosexual couples may turn to alternative insemination, using the semen of the man or a (known or unknown) donor, if the couple is experiencing fertility difficulties.

child.¹⁸⁶ For example, when alternative insemination is performed by a doctor, and written consent of the patient and her spouse is obtained, any child thus conceived is considered the legitimate child of the biological mother and her spouse for all purposes.¹⁸⁷ When a couple is unmarried, however, this legal presumption does not apply. Instead, to become the legal parent of the child, the unmarried partner of an inseminated woman would have to pursue a second-parent adoption,¹⁸⁸ which can be a lengthy and costly process. As with all adoptions, moreover, the possibility exists that a

¹⁸⁶ When a married woman becomes pregnant, the law often automatically presumes the paternity of the father as the husband, regardless of whether the wife was alternatively inseminated. *See, e.g., CAL. FAM. CODE* § 7540 (2004) (“[T]he child of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.”). The question arises as to whether the partner of a pregnant woman would be granted the presumption of maternity of the child. For instance, in *Sharon S. v. Superior Court*, 73 P.3d 554 (Cal. 2003), the former same-sex domestic partner of the appellant sought enforcement of a second-parent adoption agreed to by the parties while they had been in a long-term, committed relationship, in anticipation of the birth of the couple’s second child, conceived through the artificial insemination of the appellant. The couple already shared custody of their first child, similarly conceived, through a second-parent adoption. The former partner did not argue a maternity presumption, or that this was simply a case of *de facto parenthood*, but instead argued for enforcement of the second-parent adoption agreement. *Id.* at 573. Presumably, were the couple not of the same-sex, the child, at birth, would simply have been assumed that of the former partner. Ultimately, the Court upheld the validity of second-parent adoptions in California and remanded to the lower courts questions of fact concerning the adoption agreement and, ultimately, the child’s best interests. *Id.* at 574. *See also T.B. v. L.R.M.*, 786 A.2d 913 (Pa. 2001) (upholding standing of former same-sex partner of appellant to seek partial custody and visitation rights with respect to appellant’s biological child on basis of argument that she had assumed parental status and performed parental duties with respect to the child with the biological parent’s consent, in spite of former partner’s inability under state law to legally adopt child). For a broad argument that, after the Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), consideration of parents’ sexual orientation in child custody proceedings is unconstitutional, *see generally* Matt Larsen, *Lawrence v. Texas and Family Law: Gay Parents’ Constitutional Rights in Child Custody Proceedings*, 60 N.Y.U. ANN. SURV. AM. L. 53 (2004). *But see Lofton v. Secretary of Dept. of Child and Family Services*, 358 F.3d 804, 816 (11th Cir. 2004) (upholding Florida law prohibiting lesbians and gay men from becoming adoptive parents using a rational basis analysis and stating that *Lawrence* failed to identify a fundamental liberty interest and was instead “an opinion whose language and reasoning are inconsistent with standard fundamental rights analysis”).

¹⁸⁷ *See* N.Y. DOM. REL. LAW § 73.

¹⁸⁸ *See supra* Section I.E.2., for a discussion of second-parent adoption.

court will require the consent of the other biological parent (*i.e.*, the sperm donor), if his identity is known.¹⁸⁹

The inability of unmarried couples to receive *de facto* parental status for children born of artificial insemination also means that the sperm donor's parental status is not automatically terminated, leaving open the possibility that he will interfere with the relationship between the mother and her partner and the child. This situation played out in *Thomas S. v. Robin Y.*,¹⁹⁰ wherein Thomas S., the petitioner sperm donor, the respondent mother and her same-sex partner apparently had an oral contract pursuant to which petitioner would supply sperm for respondent's artificial insemination and would not be an active participant in the child's life while she was an infant; when the child grew older and began to ask questions about her biological father, petitioner would meet the child and take a more active role in her life.¹⁹¹ Eventually, petitioner (who lived in California) and the child (who lived in New York with respondent and her partner) established a relationship; he visited with her when in New York on business and they exchanged cards and letters.¹⁹² When petitioner wanted to take the child on a vacation,

¹⁸⁹ N.Y. DOM. REL. LAW § 111 requires the consent of the father of a child born out-of-wedlock before any such child can be adopted, but only if the father provided some sort of payment for the support of the child and had direct contact either with the child, or the person or agency having control of the child. N.Y. DOM. REL. LAW §111(d). An anonymous sperm donor would not be able to enjoy the benefits of this statute, since, by definition, he would not have had any contact with either the child or the biological mother.

This statutory section is one example of the primary importance the law places on biological parenthood (*i.e.*, even a non-anonymous man who merely donates sperm so that another couple may have and raise a child can retain some rights with regard to the child).

¹⁹⁰ 618 N.Y.S.2d 356 (1st Dep't 1994).

¹⁹¹ *Id.* at 358.

¹⁹² *Id.* at 358.

without respondent or her partner, however, respondent objected, and petitioner filed an action for filiation and visitation.¹⁹³

The court ruled in favor of Thomas S., holding that any oral contract between the parties regarding the relationship of each to the child was not enough to terminate petitioner's rights as the biological father.¹⁹⁴ It was undisputed that respondent and her partner had sole responsibility for the costs of respondent's pregnancy and delivery, that they alone cared for the child in her infancy, and that they were a "household" that lived in an apartment building owned by respondent's partner.¹⁹⁵ Despite these undisputed facts and despite a finding by the court of a familial relationship between the child and respondent's partner, the court found that respondent's partner had no parental rights with regard to the child, because she had not instituted an adoption proceeding and there was no developed law concerning the rights of a "gay life partner vis-à-vis a biological parent."¹⁹⁶

In contrast, had respondent and her partner been heterosexual and legally married, respondent's partner would have been considered the legal parent of the child for all purposes,¹⁹⁷ precluding a finding that petitioner was a legal parent of the child and entitled to visitation over the objections of respondent and her partner. Unless the

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 359.

¹⁹⁵ *Id.* at 358.

¹⁹⁶ *Thomas S.*, 618 N.Y.S.2d at 361. At the time of the decision, second-parent adoption by the same-sex partner of a biological parent was a relatively new concept and could not necessarily be relied upon to be available. The Court of Appeals did not sanction second-parent adoption by same-sex partners of biological parents until the decision in *In re Jacob*, which was handed down in late 1995. *See In re Jacob*, 86 N.Y.2d 651. Even under existing law, respondent's partner would have to expend emotional and financial resources to pursue a second-parent adoption – and there is no guarantee it would be granted.

¹⁹⁷ *See* N.Y. DOM. REL. LAW § 73.

statutory presumption were altered if New York permitted same-sex couples to marry, a party in respondent's position also should not face a challenge to her status as a parent so long as she was married to the biological parent of the child.¹⁹⁸ And it would seem, even *absent* either arrangement, that had *Thomas S.* involved a written, rather than an oral contract, the outcome might have been different.

F. PROPERTY AND FINANCIAL INTERESTS

The mechanisms to arrange for concurrent ownership of real property in New York are different for married couples and unmarried couples. Married couples are able to own real property – residential, commercial and cooperative apartments – as tenants by the entirety; by contrast, unmarried couples are limited to a tenancy in common or a joint tenancy. This distinction can have a significant impact on alienation, satisfaction of debts, and inheritance. Use and ownership of real property also are affected by laws barring discrimination. For example, certain federal and state laws protect against discrimination based upon marital status and/or sexual orientation in the areas of zoning, credit, and the sale or rental of real property.¹⁹⁹

Although federal law provides that unmarried couples may not be discriminated against on the basis of marital status with respect to applying for credit, however, unmarried applicants applying for housing may be discriminated against, as the federal Fair Housing Act does not ban discrimination based on marital status.²⁰⁰

¹⁹⁸ *Id.*

¹⁹⁹ For example, under New York State law, when municipalities zone real property they may not discriminate against unmarried couples based upon their marital status. *See McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544 (1985) (“*McMinn*”) (holding that municipal zoning ordinance defining “family” as any number of persons related by blood, marriage, or adoption violate due process clause of State Constitution).

²⁰⁰ The Fair Housing Act (“FHA”) does bar discrimination in housing on the basis of familial status. 42 U.S.C. § 3604 (2004). However, the FHA defines “familial status” in terms of relationships between

1. Purchase and Ownership of Property

New York law recognizes three basic structures through which parties can own property concurrently: (1) tenancy by the entirety; (2) joint tenancy; and (3) tenancy in common. A joint tenancy and a tenancy in common can be enjoyed by two (or more) individuals regardless of marital status. A tenancy by the entirety, on the other hand, is available only to a couple that is married at the time of the conveyance.²⁰¹ As discussed below, the unavailability of a tenancy by the entirety to unmarried couples has significant consequences.²⁰²

New York is one of twenty-one states to recognize a tenancy by the entirety.²⁰³ This tenancy “is a unique sort of concurrent ownership that can only exist between married persons.”²⁰⁴ It is a legal fiction that treats the marital bond as creating a unity; in other words, husband and wife are treated as one person and own the property

minors and their parents or guardians, and is silent on the issue of marital status. *See* 42 U.S.C. § 3602(k) (2004). There may be a plausible argument under the FHA, which does cover sex, that a pattern and practice of renting or selling to unmarried opposite-sex couples but not unmarried same-sex couples constitutes sex discrimination under the FHA.

²⁰¹ *Goldman v. Goldman*, 95 N.Y.2d 120 (2000).

²⁰² In 1995, the New York Estate Powers and Trusts Law was amended to enable a husband and wife to own, as tenants by the entirety, a cooperative apartment; previously, cooperatives apartments could not be owned as a tenancy by the entirety because they were not regarded as real property, but, rather, as shares of stock in a corporation. N.Y. EST. POWERS & TRUSTS LAW §§ 6-2.1 & 6-2.2. Although § 6-2.2(c) establishes that a disposition of a cooperative apartment to a husband and wife results in the presumption of a tenancy by the entirety, § 6-2.2(d) now creates the presumption of a joint tenancy when a disposition of a co-op is made to a couple that is described as a husband and wife but who are not in fact legally married. *See* Robert E. Parella, *Real Property*, 47 SYRACUSE L. REV. 681, 691 (1997) (“Parella”). As with real property, a tenancy by the entirety is the default cooperative ownership arrangement between husband and wife. Parella, at 691 (“[P]resumption of tenancy by the entirety to shares in the cooperative corporation [] promotes . . . greater certainty with respect to this form of property.”). *See also infra* subpart 5 of this Section, concerning housing discrimination.

²⁰³ Hanoch Dagan, *The Craft of Property*, 91 CAL. L. REV. 1517, 1524 (2003).

²⁰⁴ *United States v. Craft*, 535 U.S. 274, 280 (2002) (citing 1 G. THOMPSON, REAL PROPERTY § 4.06(g) (D. Thomas ed. 1994)) (“Thompson”). *See also V.R.W., Inc. v. Klein*, 68 N.Y.2d 560, 563 (1986) (“The bundle of rights associated with defendant’s status as a tenant by the entirety is rooted in ancient common-law principles. Tenancy by the entirety has always been a form of real property ownership available only to those who were *actually married* at the time of conveyance.”) (emphasis added).

together.²⁰⁵ When two persons are legally married and purchase property together, they are assumed to acquire property as tenants by the entirety, even if they do not use the operative language.²⁰⁶

The distinction between a tenancy by the entirety and the other two forms of concurrent property ownership is that unilateral alienation – one spouse selling his or her interest in the estate without the other’s consent – is impossible.²⁰⁷ Generally, the tenancy by the entirety is so strong that, absent the death of a spouse, it may be destroyed only “by certain definitive acts: a conveyance of the property in which both spouses join; a judicial decree of separation, annulment or divorce; or execution of a written instrument²⁰⁸ that satisfies the requirements of the New York General Obligations Law.” One essential advantage of the tenancy of the entirety is that should one spouse pass away, the property passes automatically to the surviving spouse, obviating the need to make testamentary provisions for the property and to pay estate taxes on the property.

Nevertheless, in a tenancy by the entirety, “each tenant may sell, mortgage or otherwise encumber his or her rights in the property, subject to the continuing rights of the other.”²⁰⁹ If a tenant spouse who has sold or mortgaged his or her interest in the property predeceases the spouse whose interest in the property has been retained,

²⁰⁵ *Craft*, 535 U.S. at 280 (citing Thompson, *supra* note 204).

²⁰⁶ *See, e.g., Doyle v. Hamm*, 377 N.Y.S.2d 349 (Sup. Ct. Suffolk County 1975), *rev’d on other grounds*, 383 N.Y.S.2d 373 (2d Dep’t 1976).

²⁰⁷ *See also Craft*, 535 U.S. at 280 (2002) (citing Thompson, *supra* note 204).

²⁰⁸ *In re Estate of Violi*, 65 N.Y.2d 392, 395 (1985).

²⁰⁹ *V.R.W., Inc. v. Klein*, 68 N.Y.2d at 851 (1986) (internal citations omitted). Creditors historically were not able to reach a tenancy by the entirety; this has been somewhat eroded in recent years. *See Craft, supra* (a federal tax lien attaches to the debtor-spouse interests in a property held by a married couple as tenants by the entirety); MORRIS N. HOLTZSCHUE, *NEW YORK PRACTICE GUIDE: REAL ESTATE* § 1.02[1] Pre Contract Matters (citing Mary Johnson, *Why Craft Isn’t Scary*, 37 REAL PROP. PROB. & TR. J. 439 (Fall 2002)).

however, the grantee or mortgagee is left with no interest in the property at all. Conversely, if a tenant spouse who has sold or mortgaged his or her interest in the property *survives* the spouse whose interest in the property has been retained, the grantee or mortgagee acquires full rights to the property, unencumbered by the deceased spouse's former interests.²¹⁰ A lien also may be perfected after the tenancy by the entirety is destroyed, should the parties divorce.²¹¹

Under New York law, if an unmarried couple who held themselves out as married²¹² but have not legally married were to attempt to purchase real property as tenants by the entirety using the operative conveying language, the arrangement would nevertheless be treated as a joint tenancy.²¹³ If two unmarried people not setting themselves forth as being married purchased property, they would hold it as a tenancy in common unless they expressly declared it to be a joint tenancy.²¹⁴

If an unmarried couple holds property as tenants in common, each partner owns a portion of undivided property, which may be unilaterally alienated through gift, sale or may be encumbered.²¹⁵ Thus, creditors of one owner can foreclose upon the property interests of the other owner, resulting in an action of partition and “ouster from the family home.”²¹⁶

²¹⁰ *Id.*

²¹¹ *In re Laborde*, 231 B.R. 162 (Bank. W.D.N.Y. 1999).

²¹² For example, on occasion a couple will hold themselves out as married even if they have reconciled following a divorce but have not legally remarried.

²¹³ N.Y. EST. POWERS & TRUSTS LAW § 6-2.2(d).

²¹⁴ N.Y. EST. POWERS & TRUSTS LAW § 6-2.2 (“A disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared to be a joint tenancy.”).

²¹⁵ *Id.* See also *Craft*, 535 U.S. at 280.

²¹⁶ Peter M. Carrozzo, *Tenancies in Antiquity: A Transformation of Concurrent Ownership for Modern Relationships*, 85 MARQ. L. REV. 423, 462 (Winter 2001) (“Carrozzo”).

Further, if one of the tenants in common were to die intestate, the surviving partner would not have an automatic right to possess the property as a whole. Instead, the decedent's heirs would take the decedent's former half. When such a situation arises, the surviving partner residing in the couple's home can be forced out as a result of a partition action, unless the surviving partner buys out the interest of the heirs.²¹⁷ Additionally, the decedent's creditors could attach both the deceased partner's share of the property as well as the surviving partner's share and bring an action for partition.²¹⁸ Thus, "[u]ltimately, the creation of a tenancy in common is an unsatisfactory option for a cohabiting couple."²¹⁹

An unmarried couple also may hold property as joint tenants, which affords more protection than the default tenancy in common. While no special language is needed to create a joint tenancy, a discernable intent to create a joint tenancy in the deed or devise must be present.²²⁰ The joint tenancy carries with it a right of survivorship, which means that, when one partner dies, the surviving partner automatically receives the deceased partner's share of the property. Because the transfer of the deceased partner's share is automatic, and transfers by way of the deed to the property itself and not through the laws of intestacy, the heirs of the deceased partner are not granted any interest in the property and, thus, may not contest the transfer.²²¹

²¹⁷ Carrozzo, *supra* note 216, at 462.

²¹⁸ *See id.* Although the execution of a will could abrogate some of the consequences of a tenancy in common, at least one commentator has noted that it is possible that, even when such a will has been executed, it still may be subject to a contest and, even if the surviving partner wins the will contest, the legal battle could prove costly.

²¹⁹ *Id.*

²²⁰ *See* JOSEPH RASCH, NEW YORK LAW AND PRACTICE OF REAL PROPERTY § 14.38 (1991).

²²¹ N.Y. REAL PROP. ACTS. LAW § 341.

Although this right of survivorship may alleviate some of the problems with the tenancy in common, the joint tenancy may create other problems. For example, in a joint tenancy, the heirs of the first joint tenant to die are placed at a disadvantage in relation to the heirs of the subsequent partner's heirs, because the heirs of the latter are in a position to inherit the entire estate. This disparity is alleviated only if the couple has a child that the non-biological or non-adoptive parent also adopts,²²² for then the child stands to inherit the predeceased spouse's share.

A joint tenancy is also subject to partition. This becomes significant if one member of the joint tenancy has creditors. Judgments might be taken against that joint tenant, and a lien placed against her/his portion of the real property. In the event of the death of that joint tenant, her/his interest is subject to the debt and the judgment creditor could petition for a partition action and/or sale of the premises, thereby defeating the right of survivorship of the surviving joint tenant. This is a disadvantage not faced by married couples able to hold property as tenants by the entirety.

2. New York Roommate Law

Under New York Real Property Law § 235-f, also known as the "Roommate Law,"²²³ a landlord may not restrict the occupancy of a residential premises to a tenant and the tenant's family members only.²²⁴ Prior to the enactment of the Roommate Law in 1983, "landlords regularly used . . . lease restrictions to evict

²²² See *infra* Section I.E.2., for a discussion of second-parent adoption.

²²³ See, e.g., *Capital Holding Co. v. Stravrolakes*, 662 N.Y.S.2d 14, 15 (1st Dep't 1997).

²²⁴ N.Y. REAL PROP. LAW § 235-f(8) provides: "Nothing in this section shall be construed as invalidating or impairing the operation of, or the right of a landlord to restrict occupancy in order to comply with federal, state or local laws, regulations, ordinances or codes." *Id.*

nonmarried couples, including lesbian and gay couples.”²²⁵ The Legislature “passed the Roommate Law specifically to prohibit landlords from evicting these families based on their marital status.”²²⁶ Thus, in addition to being allowed to have one’s family occupy the premises, every tenant is allowed to have a roommate who is not family in the traditional sense,²²⁷ which may include an unmarried same-sex partner.²²⁸ Several New York courts have observed that the law was enacted to protect the human rights of unrelated residential tenants²²⁹ and to “protect all residential tenants from evictions as a result of their life-styles.”²³⁰

The Roommate Law has also been applied to protect unmarried partners who live together in a cooperative apartment.²³¹ In *Sherwood Village Cooperative A, Inc. v. Slovik*, a cooperative apartment board sought to evict a member of the co-op who

²²⁵ Lambda Legal, *Lambda Argues New York Housing Law Harms Lesbian and Gay Couples*, available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=933>.

²²⁶ *Id.*

²²⁷ See *Capital Holding*, 662 N.Y.S.2d at 15.

²²⁸ Existing case law suggests that unmarried same-sex couples also might be considered “family members” under the Roommate Law and, as such, they would not be prohibited from living with an additional roommate in a residential dwelling. See *Rent Stabilization Ass’n v. Higgins*, 563 N.Y.S.2d 962, 968 (1st Dep’t 1990) (holding that newly enacted regulations by the State Division of Housing and Community Renewal governing lease succession rights and antieviction protections (which applied *Braschi v. Stahl Assocs.*, 74 N.Y.2d at 206, to expand the definition of “family” to include two adult lifetime partners in a long-term relationship and who were both emotionally and financially committed to each other) did not conflict with the Roommate Law). But see *Yorkshire Towers Co. v. Harpster*, 538 N.Y.S.2d 703 (1st Dep’t 1986) (reversing without opinion Civil Court ruling, 510 N.Y.S.2d 976 (Civ. Ct. N.Y. County 1986), that an unmarried same-sex couple in a long-standing, quasi-marital relationship would be deemed “de facto family members” under the Roommate Law). Thus, post-*Braschi*, the courts may – or may not – define “family” members under the Roommate Law to encompass more than married couples and blood relatives.

²²⁹ *Sherwood Village Coop. A, Inc. v. Slovik*, 513 N.Y.S.2d 577, 578 (Civ. Ct. Queens County 1986); see also *Capital Holding*, 662 N.Y.S.2d at 1009.

²³⁰ See, e.g., *Sherwood Village Coop.*, 513 N.Y.S.2d at 578.

²³¹ *Id.* at 577; see also *Southridge Coop. Section No 3, Inc. v. Menendez*, 535 N.Y.S.2d 299, 303 (Civ. Ct. Queens County 1988) (an occupancy agreement which contained a provision restricting occupancy to the “[m]ember [] himself and his immediate family” is void and unenforceable as being against public policy pursuant to Real Property Law §235-f”).

cohabitated with another male who was not related to him.²³² The co-op board relied upon a provision of the proprietary lease which stated that “a member shall occupy the dwelling unit by this agreement as a private dwelling with his immediate family.”²³³ The Civil Court, Queens County held that the Roommate Law applied to cooperative apartments, and, on the facts presented, the tenant was wrongfully evicted because he did not have the opportunity to present the fitness of his same-sex roommate to the co-op board.²³⁴

3. Zoning Restrictions

Municipalities have the power to create and order residential districts, and restrict those districts from uses “which would conflict with a stable, uncongested single-family environment.”²³⁵ While municipalities may restrict housing to single-family dwellings, they may not limit the definition of “family” to exclude couples who are not related by blood or marriage.²³⁶ In *McMinn v. Town of Oyster Bay*, the Court of Appeals addressed the constitutionality of a zoning ordinance which limited the number and age of unrelated persons who could dwell in a single-family home to two persons, 62 years of

²³² *Sherwood Village Coop.*, 513 N.Y.S.2d at 578.

²³³ *Id.* at 577.

²³⁴ *Id.* at 579.

²³⁵ WARREN WEED’S NEW YORK REAL PROPERTY § 2.02 (2003) (quoting *Village of Freeport v. Association for the Help of Retarded Children*, 406 N.Y.S.2d 221 (Sup. Ct. Nassau County 1977), *aff’d*, 400 N.Y.S.2d 724 (2d Dep’t 1977)).

²³⁶ *See McMinn*, 66 N.Y.2d 544 (1985). *See also Baer v. Town of Brookhaven*, 73 N.Y.2d 942 (1989) (finding zoning ordinance unconstitutional under State Due Process Clause because it unconstitutionally restricted “functional” families from definition of “family” under ordinance); 1997 N.Y. Op. Att’y Gen. 19 (Aug. 25, 1997) (noting that “[t]o be upheld, an ordinance must have been enacted in furtherance of a legitimate governmental purpose and there must be a reasonable relation between the end sought to be achieved by the regulation and the means used to achieve that end”) (quoting *McMinn*, 66 N.Y.2d 544).

age or older.²³⁷ The plaintiffs, four unrelated males, challenged the zoning restriction on the grounds that it violated the New York State Constitution.²³⁸

The Court held that “[m]anifestly, restricting occupancy of single-family housing based generally on the biological or legal relationships between its inhabitants bears no reasonable relationship” to the purposes of residential zoning ordinances.²³⁹ The Court found the ordinance in question to be “fatally overinclusive” because it prohibited an unmarried couple from occupying a multi-family residential dwelling.²⁴⁰ Thus, while a municipality may legitimately enact zoning regulations to maintain a neighborhood with solely single-family units, it may not further limit the neighborhood only to individuals related by blood or marriage, and thereby, exclude unmarried couples. As the court noted, “[z]oning ‘is intended to control types of housing and living and not the . . . intimate internal family relations of human beings.’”²⁴¹

4. Denial of Housing Based on Marital Status and/or Sexual Orientation

Discrimination in housing is governed by both federal and State law. The federal Fair Housing Act²⁴² (the “FHA”) prohibits discrimination in the sale or rental of residential housing based on race, color, religion, sex, familial status, national origin, or handicap.²⁴³ The FHA does not prohibit discrimination on the basis of marital status or

²³⁷ See *McMinn*, 66 N.Y.2d at 549.

²³⁸ See *id.* at 548. Similar zoning restrictions had been upheld as constitutional by the United States Supreme Court. See, e.g., *Moore v. East Cleveland*, 431 U.S., 494, 499-500 (1977).

²³⁹ *McMinn*, 66 N.Y.2d at 549.

²⁴⁰ *Id.* at 549.

²⁴¹ *Id.* at 551 (quoting *City of White Plains v. Ferraioli*, 34 N.Y.2d 300, 305 (1978)).

²⁴² 42 U.S.C. §§ 3601-3619 (2002).

²⁴³ 42 U.S.C. § 3604 (2002).

sexual orientation.²⁴⁴ As a result, landlords are not prohibited from discriminating against unmarried cohabitants, regardless of whether they are a same-sex or an opposite-sex couple. For example, in *Neithamer v. Brenneman Property Services*,²⁴⁵ the U.S. District Court for the District of Columbia ruled that a housing applicant who was gay and HIV-positive could not make out a *prima facie* case for sexual orientation discrimination against a landlord who denied his rental application because the FHA did not include sexual orientation as a protected characteristic.²⁴⁶ Numerous bills have been introduced in the Congress to amend the FHA to include sexual orientation as a protected class, but none have been passed.²⁴⁷

The New York State Human Rights Law, unlike the federal FHA, prohibits discrimination in housing on the basis of marital status and, with the enactment

²⁴⁴ See U.S. Dep't of Justice Civil Rights Division Housing and Enforcement Section Frequently Asked Questions, available at <http://www.usdoj.gov/crt/housing/faq.htm> ("Does the Fair Housing Act prohibit discrimination on the basis of a person's sexual orientation? When sexual orientation is the only basis of discrimination, no."). See also Hilary E. Ware, *Celebrity Privacy Rights and Free Speech: Recalibrating Tort Remedies for "Outed" Celebrities*, 32 HARV. C.R.-C.L.L. REV. 449, 489 (Summer 1997) (noting that the Fair Housing Act does not cover sexual orientation discrimination); Eric K. M. Yatar, *Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence* 12 LAW & SEX. 119, 146 (2003) ("Yatar") (noting that the Fair Housing Act's protection does not extend to homosexuals who are discriminated against in the provision of housing and other real estate-related services on the basis of their sexual orientation).

²⁴⁵ *Neithamer v. Brenneman Prop. Servs.*, 81 F. Supp. 2d 1 (D.D.C. 1999).

²⁴⁶ *Id.* at 10. The plaintiff was able to proceed and withstand defendant's summary judgment, however, on the theory that he was discriminated against as a result of his HIV-positive disability status. *Id.* at 10-11.

²⁴⁷ See, e.g., *Legislative Watch*, 6 HUM. RTS. BR. 31 (1999) (detailing proposed Civil Rights Amendments Act of 1999, H.R. 311, to amend the Fair Housing Act to "prohibit discrimination based on 'affectional or sexual orientation' defined as 'homosexuality, heterosexuality, and bisexuality by orientation or practice, by and between consenting adults.' The amendment provides protection in areas such as public facilities, programs receiving federal assistance, employment opportunities, housing sale and rental, residential real estate transactions, and brokerage services."); see also Adrene Plummer, *A Few New Solutions to a Very Old Problem: How the Fair Housing Act Can Be Improved to Deter Discriminatory Conduct by Real Estate Brokers*, 47 HOW. L.J. 163, 193 (2003) (citing H.R. 214, 108th Cong. (1st Sess. 2003)) (detailing how on January 7, 2003, a bill was "introduced in the House of Representatives proposing 'to amend the Civil Rights Act of 1964 and the Fair Housing Act to prohibit discrimination on the basis of affectional or sexual orientation, and for other purposes'").

of the Sexual Orientation Non-discrimination Act (“SONDA”), sexual orientation.²⁴⁸ Specifically, the law provides that it is an unlawful discriminatory practice to “deny to or withhold from any person . . . a housing accommodation because of . . . sexual orientation [or] marital status.”²⁴⁹ The same prohibition applies with equal force to commercial properties.²⁵⁰ To date, no cases alleging sexual orientation discrimination in housing have been brought under SONDA.

5. Denial of Credit Based on Marital Status

Under both New York and federal law, it is unlawful to discriminate against an individual by refusing to issue credit on the basis of marital status. Under federal law, the Equal Credit Opportunity Act (the “ECOA”), forbids discrimination in the granting of all types of credit on the basis of race, color, national origin, sex, marital status or the receipt of public assistance income.²⁵¹ Further, “[i]n making credit decisions, creditors may not treat joint applicants differently based on the existence, the absence, or the possibility of a marital relationship between two parties.”²⁵²

²⁴⁸ N.Y. EXEC. LAW § 296(2)(a) (Consol. 2004). *See infra* Section II.B.5.b.ii., discussing SONDA.

²⁴⁹ N.Y. EXEC. LAW § 296(2)(a)(5-a) (Consol. 2004). *See Bachman v. State Division of Human Rights*, 104 A.D.2d 111, 114-15 (Sup. Ct. N.Y. County 1984) (remanding the case of two unmarried women seeking to purchase shares in a cooperative apartment building to the State Division of Human Rights, concluding that there was *prima facie* evidence of discrimination on the grounds of marital status and directing the Department to make a more thorough investigation). *But see Hoy v. Mercado*, 266 A.D.2d 803, 804 (Sup. Ct. N.Y. County 1999) (holding in a pre-SONDA dispute that when a landlord refuses to rent an apartment to an unmarried, cohabiting couple (genders unidentified by the court), such a denial is not deemed discrimination on the basis of marital status; rather, there is a difference between “discrimination based on an individual’s status as married or unmarried (single, divorced, separated, or widowed) and discrimination based on the identity of the person to whom the individual is or is not married”).

²⁵⁰ N.Y. EXEC. LAW § 296(2)(a)(5-b) (Consol. 2004).

²⁵¹ 15 U.S.C. §§ 1691(a)-1691(f) (2004).

²⁵² OCC Bulletin 94-52 (Sept. 23, 1994) (special bulletin issued by the Office of the Comptroller of the Currency, the federal enforcement agency under the ECOA).

Although it is illegal for lenders to discriminate against unmarried cohabitants who apply to obtain credit to purchase real estate,²⁵³ there is no bar against discrimination based on sexual orientation.²⁵⁴ In other words, the antidiscrimination provisions of the ECOA would only protect a same-sex couple if they were discriminated against based upon marital status, but not because they are gay or lesbian.²⁵⁵

Under the ECOA, lenders must conduct a fact-specific inquiry, not one based on assumptions that may attach to one's marital status. Further, when an unmarried couple applies for a joint mortgage, a lender must aggregate the couple's income as it would a married couple's when evaluating their creditworthiness to obtain a mortgage.²⁵⁶ Aggregation of income is significant because it increases the couple's creditworthiness in the eyes of the lender which, in turn, can affect the size of and interest rate on the loan. Despite these legal protections, concerns remain that lenders might continue to favor the loan applications of married couples simply because the income of married couples usually are aggregated without hesitation.²⁵⁷

²⁵³ See 15 U.S.C. § 1691(a)(1) (2004); 12 C.F.R. 202.1(b)(1996) ("The purpose of this regulation is to promote the availability of credit to all creditworthy applicants.").

²⁵⁴ See Yatar, *supra* note 244, at 146 (noting that the Equal Credit Opportunity Act does not extend protections to homosexuals who are discriminated against because of their sexual orientation).

²⁵⁵ See Laura Eckert, *Inclusion of Sexual Orientation Discrimination in the Equal Credit Opportunity Act*, 103 COM. L.J. 311, 329 (1998) ("Eckert"). Thus, even if two persons of the same sex were able to marry legally, it would be permissible under the federal law for a lender to discriminate against the couple based upon their sexual orientation.

²⁵⁶ See *Markham v. Colonial Mortgage Serv. Co.*, 605 F.2d 566 (D.C. Cir. 1979), *aff'd*, 659 F.2d 252 (1981) (reversing district court decision and holding that the law clearly forbids a mortgage agency from treating an unmarried couple differently from a married couple when deciding whether to aggregate incomes; the district court had emphasized the special bonds of marriage and had relied on the premise that unmarried couples are less stable than married couples, thus constituting a greater risk).

²⁵⁷ Eckert, *supra* note 255, at 330. One commentator has noted that because of lender tendency to favor married couples, "this is one credit area where legalizing same-sex marriage may affect sexual orientation discrimination." *Id.*

The ECOA provides, in addition, that if a guarantor is needed to sign a credit application, a lender may not require that he or she stand in a certain relationship to the applicant; rather, the lender may require only that the guarantor is sufficiently creditworthy.²⁵⁸ As such, the guarantor may be a same-sex partner, as well as a married spouse.²⁵⁹

The New York State Human Rights Law also expressly prohibits discrimination on the basis of sex or marital status, *inter alia*, in the granting, withholding, terminating, or stating of the terms and condition of any form of credit²⁶⁰ and with the enactment of SONDA,²⁶¹ specifically prohibits discrimination against individuals on the basis of their sexual orientation in all matters that are credit related.

G. FEDERAL TRANSFER TAXES

Federal transfer taxes are excise taxes on the transfer of wealth, and they include the gift tax, the estate tax, and the generation-skipping transfer tax, each

²⁵⁸ See 12 C.F.R. § 202.7(d) (2004).

²⁵⁹ See Eckert, *supra* note 255, at 330 (citing 12 C.F.R. § 202.7(d) (2004)).

²⁶⁰ N.Y. EXEC. LAW § 296(2)(a)(1-b) (Consol. 2004). There are only limited circumstances where a lender may lawfully ask a credit applicant about his or her marital status. Title 3 of the New York Codes, Rules and Regulations, Part 408.1 states that:

For purposes of Executive Law, section 296-a(1)(c), it shall not be considered an expression of limitation, specification or discrimination on the basis of sex or marital status if:

- (a) a creditor requires an applicant to disclose the name or names by which he or she has previously been known, provided that this information is used solely to determine the applicant's identity and previous credit history;
- (b) where application is made for a mortgage and the creditor determines that the signature of the spouse is required in order to pass clear title in the event of a default, a creditor requests information concerning marital status, provided that the information disclosed by such inquiry is used solely for the purpose of perfecting title;
- (c) a creditor inquires as to the number of the applicant's dependents, provided that the information disclosed by such inquiry is used solely to determine costs and expenses payable by the applicant.

²⁶¹ See *infra* Section II.B.5.ii. on the Sexual Orientation Non-Discrimination Act (SONDA). To date, the question of lender discrimination against a same-sex couple or gay individual. See N.Y. EXEC. LAW § 296-a (Consol. 2004) (reporting no cases on point).

discussed in turn below. The tax consequences of a transfer of wealth depend upon the type of transfer²⁶² and its timing.²⁶³ The Internal Revenue Code (the “Tax Code”) shields wealth transfers from tax liability to the extent that they do not exceed certain threshold amounts and available credits. As a result, the following discussion of the transfer tax benefits available to married taxpayers applies only to taxpayers who make substantial transfers of wealth during their lifetime or at death.

There are numerous transfer tax consequences that are affected by the marital status of the taxpayer. Married taxpayers may choose from a much broader range of transfer tax planning alternatives and may defer or avoid a significant amount of transfer tax liability as compared with similarly situated unmarried taxpayers.²⁶⁴ An unmarried couple can mitigate their increased transfer tax liability through careful estate and tax planning,²⁶⁵ but such planning requires foresight, can be very costly, and does not eliminate the advantages available to married couples.²⁶⁶

²⁶² The rate of tax and the exemption amounts for the three transfer taxes are related but not identical. For a basic overview of the rates and exclusions for the gift tax and the estate tax, *see* IRS Publication 950, Introduction to Estate and Gift Taxes (rev. Mar. 2002), *available at* <http://www.irs.gov/publications/p950/index.html>. The generation-skipping transfer tax rate is linked to the maximum estate tax rate. I.R.C. § 2641 (2004).

²⁶³ The timing of a transfer is particularly important in light of recent changes introduced by the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA 2001”), Pub. L. 107-16, 115 Stat. 38 (2001). For the years 2002 through 2009, maximum gift tax rates and estate tax rates will both gradually decrease from 50% to 45%; the gift tax exemption amount will be increased to \$1 million; and the estate tax exemption amount will gradually increase from \$1.5 million to \$3.5 million. For the year 2010 only, the gift tax rate will be 35% and the estate tax will be completely repealed. The transfer tax modifications of EGTRRA 2001 will expire in 2011, when all gift tax and estate tax rates and exemption amounts will revert to their pre-EGTRRA 2001 forms unless Congress intervenes. For a thorough discussion of EGTRRA 2001 and its impact on federal transfer taxes, *see* Karen C. Burke and Grayson M.P. McCouch, *Estate Tax Repeal: Through the Looking Glass*, 22 VA. TAX REV. 187 (2002).

²⁶⁴ *See, e.g.*, Terence Dougherty, *Economic Benefits of Marriage Under Federal and Massachusetts Law*, at 9-11 (2004) THE NATIONAL GAY AND LESBIAN TASK FORCE POLICY INSTITUTE (providing a brief overview of the federal transfer tax regime and showing its potentially detrimental impact on same-sex couples).

²⁶⁵ *See* DuBois, *supra* note 86, at 313-32 (providing specific planning techniques related to estate administration and taxation); for a more general discussion of estate planning issues facing unmarried

When a particular federal transfer tax result depends upon the marital status of the taxpayer, the Tax Code generally only distinguishes between married taxpayers and unmarried taxpayers. Whether an unmarried couple is heterosexual or homosexual is largely superfluous to the general analyses in the Tax Code. It should be noted, however, that federal transfer taxes are a matter of federal law, and, therefore, the Defense of Marriage Act renders irrelevant to this discussion any legal recognition of same-sex relationships by state, local, or foreign governments or the private sector.²⁶⁷

1. Gift Tax

a. Gifts to Spouse

A transfer of property between spouses is not a taxable event under the Tax Code.²⁶⁸ The full amount of any gift transferred from one spouse to the other is eligible for a deduction equal to the value of the gift.²⁶⁹ The transfer of property from one spouse to the other results in a carry-over basis for the gift in the recipient's hands²⁷⁰

couples, *see* Erica Bell, *Special Issue in Estate Planning for Non-marital Couples and Non-traditional Families*, 283 PLI/Est 859 (1999) (providing a detailed overview of several planning alternatives for non-traditional families, such as health care proxy, nomination of guardian, and affidavit of cremation).

²⁶⁶ *See, e.g.*, Diana Hastings Temple, *Estate Planning for the Non-Traditional Family*, 295 PLI/Est 1145 (2000).

²⁶⁷ *See* Defense of Marriage Act (DOMA), Pub. L. 104-199, 110 Stat. 2419 (1996), DOMA § 3 (providing that in determining the meaning of any Act of Congress, any ruling, regulation, or interpretation of the U.S. administrative bureaus and agencies, 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); DOMA § 2 (providing that no State, territory, U.S. possession or Indian tribe is required to give effect to any public act, record, or judicial proceeding of another such organization with respect to a relationship between persons of the same sex that is treated as a marriage under the laws of such other organizations or a right or claim arising from such relationship). *See also infra* Section III.F.3., for a more complete discussion of DOMA.

²⁶⁸ I.R.C. § 2523 (2004).

²⁶⁹ *Id.*

²⁷⁰ I.R.C. § 1041(b) (2004). Generally speaking, a taxpayer's basis for property reflects either the historical cost of the property or its value when acquired, subject to certain adjustments reflecting taxable events relating to the property. The concept of basis allows for the deferral of certain tax results while preserving the taxpayer's actual stake in the property. When a donor makes a gift of property, the recipient

with no income tax liability incurred by the recipient.²⁷¹ On the other hand, a transfer of property between unmarried partners is subject to gift tax liability for the donor to the extent that the aggregate value of all gifts from one partner to the other within a year exceeds the annual gift tax exclusion. The amount of the annual gift tax exclusion was increased to \$11,000 per donee in 2002, indexed to increase with inflation based on the Consumer Price Index.²⁷² The amount of the current annual gift tax exclusion remains at \$11,000, since there were no inflation adjustments to the annual gift tax exclusion in 2003 or 2004.²⁷³ Therefore, once the aggregate value of gifts given by one unmarried partner to the other exceeds \$11,000 for this calendar year, the value above \$11,000 is subject to the gift tax.²⁷⁴

b. Doubling the Annual Gift Exclusion

A married person who wishes to make a gift to a third party can double his or her Section 2503(b) gift tax exclusion (currently \$11,000)²⁷⁵ in two ways. First, one spouse may give half of the gift to his or her spouse of half the property that will be given to a third party. This transfer is not subject to the gift tax, since transfers between spouses are never subject to the gift tax.²⁷⁶ After completing the first transfer, each

takes a “carry-over basis” for the property, which means that the recipient takes a basis for the property identical to the donor’s basis immediately before making the gift.

²⁷¹ I.R.C. § 1041(a) (2004).

²⁷² See I.R.C. § 2503(b)(2) (2004). See also RICHARD B. STEPHENS, GUY B. MAXFIELD, STEPHEN A. LIND, DENNIS A. CALFEE, AND ROBERT B. SMITH, FEDERAL ESTATE AND GIFT TAXATION, ¶ 9.04[1] (8th ed. 2002 & Supp. 2003) (“Stephens”) (explaining the inflation index for the annual gift tax exclusion).

²⁷³ The amount of the annual gift tax exclusion for a given year is available on the IRS Web site, www.irs.gov.

²⁷⁴ See I.R.C. §§ 2010, 2505. The amount of gift tax credit used in a lifetime will reduce the total amount of the “unified” credit applied against the estate tax, discussed below.

²⁷⁵ I.R.C. § 2503(b) (2004).

²⁷⁶ I.R.C. § 2523 (2004).

spouse gives his or her respective half of the gift property to the intended recipient. Since a taxpayer is entitled to a separate annual gift tax exclusion amount for each person to whom the taxpayer transfers property in a given year, a separate annual gift tax exclusion amount will be applied to each spouse's transfer of his or her respective half of the gift. This effectively doubles the amount of the transfer that will not be subject to gift tax.²⁷⁷ Second, and alternatively, one spouse may give the full gift of \$22,000, and the other spouse may take responsibility for half of that amount on her taxes.

Unmarried couples may not avail themselves of this tax-halving strategy, because the unlimited gift tax deduction under Section 2523 is available only to married taxpayers.²⁷⁸

c. Split Gifts by Husband and Wife

A tax-halving strategy similar to that previously discussed also is available to married couples under the gift-splitting provisions of Section 2513 of the Tax Code. Under Section 2513, a married couple may treat a gift made by one spouse to a third party as if the gift was made one-half by each spouse, thus doubling the available Section 2503(b) annual gift tax exclusion for that gift. Gift-splitting does not require an actual intra-marital transfer of one-half of the gift prior to making the gift to a third party. If a married taxpayer avails himself or herself of the tax benefits of gift-splitting under Section 2513, however, he or she must file a gift tax return with regard to the transfer

²⁷⁷ In other words, cooperative married taxpayers may plan their annual gift giving in a manner that doubles the available gift tax exclusion for a gift to a third party since (i) transfers between spouses are not subject to the gift tax, and (ii) gifts made by a married person to a third party are not imputed to the married person's spouse. The married couple need not file a gift tax return for the intra-marital transfer that precedes the double gift to the third party. *See* I.R.C. § 6019(a)(2) (2004).

²⁷⁸ According to the statutory language, Section 2523 applies only to gifts to a "spouse."

regardless of whether the total value of the transfer exceeds the annual gift tax exclusion amount.²⁷⁹

The tax benefits of gift-splitting under Section 2513 are available only to married couples.²⁸⁰ Unmarried couples do not have any comparable options to maximize the Section 2503(b) annual gift tax exclusion that applies to gifts from a couple to third parties.

d. Transfers Incident to Divorce

Transfers between spouses that are made incident to divorce do not result in gain or loss to the recipient for tax purposes.²⁸¹ Rather, such a transfer is treated as a gift, and the recipient takes the transferor's basis for the property.²⁸² When unmarried partners dissolve their relationship, however, transfers incident to the dissolution do not enjoy the protection of Tax Code Section 1041.²⁸³ The tax results of transfers made in connection with this dissolution will depend upon the particular circumstances of each unmarried taxpayer and the particular characteristics of the transferred property, but it is possible that one or both of the taxpayers could face gift tax or income tax liability as a result of the division of property.²⁸⁴

²⁷⁹ I.R.C. § 2513(b) (2004); TREAS. REG. § 25.2513-2 (2004). This is an exception to the general rule that a taxpayer is not required to file a gift tax return unless aggregate transfers to a particular recipient exceed the annual gift tax exclusion amount.

²⁸⁰ The language of Section 2513 is expressly limited to married taxpayers (“husband,” “wife,” or “spouse”).

²⁸¹ I.R.C. § 1041(a)(2).

²⁸² I.R.C. § 1041(b). For a general explanation of the concepts of basis and carryover basis, *see supra* note 267.

²⁸³ By its terms, I.R.C. § 1041 applies only to transfers made between spouses incident to divorce.

²⁸⁴ Gift tax liability could arise if the aggregate value of all property transferred from one unmarried partner to the other exceeds the annual gift tax exclusion amount. I.R.C. § 2503(b) (2004). Income tax liability could arise for each unmarried partner with respect to property that he or she receives in

2. Estate Tax

a. Unlimited Marital Deduction

The Tax Code imposes an estate tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.²⁸⁵ The Tax Code provides an unlimited marital deduction, however, that reduces the value of the taxable estate for any interest in property that passes or has passed from the decedent to the surviving spouse.²⁸⁶

The unlimited marital estate tax deduction does not apply to unmarried couples.²⁸⁷ Thus, only married taxpayers may defer estate tax liability through use of this unlimited deduction.²⁸⁸ According to the Supreme Court, the unlimited marital estate tax deduction is to be “strictly construed and applied.”²⁸⁹ In 1976, the IRS followed the Supreme Court’s direction and refused to extend the tax benefits of the marital estate tax deduction to transfers made to the surviving spouse of a common law marriage.²⁹⁰ In reaching its conclusion, the IRS looked at both the statutory language and legislative

connection with the dissolution of the relationship, unless there is an applicable exception to the general rule that gross income is *all* income. I.R.C. § 61 (2004).

²⁸⁵ I.R.C. § 2001(a) (2004). The gross estate generally includes the value of all property held by the decedent at the time of death, life insurance proceeds, the value of property transferred within three years of death, and trusts in which the decedent retained certain powers. If the value of the gross estate does not exceed the applicable exclusion amount for the year of death (currently \$1,500,000), then no estate tax liability arises and an estate tax return is generally not required. For a general discussion of the estate tax, *see* Stephens.

²⁸⁶ I.R.C. § 2056(a) (2004). In order for the marital deduction to apply, the interest in property must have been includible in the gross estate of the decedent.

²⁸⁷ *See* I.R.C. § 2056.

²⁸⁸ The unlimited marital deduction in Tax Code Section 2056 makes it possible for a married couple to defer estate tax liability until the death of the surviving spouse. Because of the time value of money, postponing estate tax liability until the death of the surviving spouse increases the total economic value of the property that eventually will be distributed from the gross estates of both spouses.

²⁸⁹ *Commissioner v. Bosch*, 387 U.S. 456 (1957).

²⁹⁰ Rev. Rul. 76-155; 1976-1 C.B. 286 (1976).

history of Section 2056 but found no explicit definition of “surviving spouse.”²⁹¹ Absent such a provision, the IRS held that the “normal usage” of the phrase “denotes a legal status that arises from the termination of a lawful marital union by the death of the other mate.”²⁹² Consequently, non-married couples with taxable estates face “real and significant costs” that are not imposed upon married couples of similar means.²⁹³

b. The Terminable Interest Rule and the QTIP Election

Under the terminable interest rule,²⁹⁴ the unlimited marital deduction does not apply when the decedent spouse has given an interest in the terminable property to another beneficiary in addition to the surviving spouse and where the other beneficiary may come into possession or enjoyment of the property upon the termination of the surviving spouse’s interest.²⁹⁵ However, the Tax Code carves out certain exceptions to the terminable interest rule, most notably the provisions for making a qualified terminable interest property (“QTIP”) election.²⁹⁶ The primary function of the QTIP election is for the decedent to be able to control the disposition; otherwise, the decedent would be able to get the same tax benefits by leaving it to his or her spouse outright.

²⁹¹ *Id.*

²⁹² Rev. Rul. 76-155; 1976-1 C.B. 286.

²⁹³ DuBois, *supra* note 86, at 329.

²⁹⁴ A “terminable interest” exists “[w]here, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail.” I.R.C. § 2056(b)(1). In other words, the unlimited marital estate tax deduction generally allows for estate tax deferral with regard to property interests that pass outright from a decedent spouse to a surviving spouse, but this general rule of deferral does not apply when the interest that passes to the surviving spouse is “terminable,” *i.e.*, it may fail due to a contingency. Absent such a rule, married taxpayers could utilize the unlimited marital estate tax deduction to defer estate taxation in situations where the surviving spouse is not the ultimate beneficiary of the transfer.

²⁹⁵ *Id.*; *see also* Stephens, *supra* note 272, ¶ 5.06[7][a] (providing a general overview and examples of the terminable interest rule).

²⁹⁶ I.R.C. § 2056(b)(7); *see also* Stephens, *supra* note 272, ¶ 5.06[8][d][iii] (outlining the characteristics and application of the QTIP election).

A QTIP election makes the unlimited marital deduction available for otherwise excluded transfers when the following requirements are met: (1) the income generated by the property is payable annually to the surviving spouse; (2) the surviving spouse is the sole non-charitable beneficiary of the income for his or her lifetime; and (3) the executor of the decedent's estate makes an election to treat the property as QTIP.²⁹⁷

Because QTIP treatment is elective, proper planning allows a married couple to decide whether to subject certain property to taxation in the estate of the decedent spouse or the surviving spouse.²⁹⁸ Depending upon the couple's circumstances, this option can provide married individuals with significant tax savings or deferral. There is no tax strategy analogous to the QTIP election available to non-married couples.

3. Generation-Skipping Transfer Tax

The Tax Code imposes an additional tax on generation-skipping transfers,²⁹⁹ *i.e.*, gifts or devises to a person two or more generations younger than the transferor.³⁰⁰ Congress intended this tax to backstop the estate tax, since many wealthy families were avoiding estate tax liability by arranging for transfers that skipped generations.³⁰¹

²⁹⁷ I.R.C. § 2056(b)(7).

²⁹⁸ The QTIP election provides for tax deferral rather than tax exemption, since the terminable interest property will eventually be subject to tax in the surviving spouse's estate if the election is made.

²⁹⁹ I.R.C. § 2601 (2004).

³⁰⁰ I.R.C. § 2613(a) (2004). The generation-skipping transfer tax also applies to gifts or devises to a trust where the only trust beneficiaries are persons two or more generations younger than the transferor.

³⁰¹ See Stephens, *supra* note 272, ¶ 12.01[1] (briefly outlining the history and policy of the generation-skipping transfer tax and explaining how generation-skipping transfers were used to place property beyond the scope of the estate tax). The generation-skipping tax equals the taxable amount multiplied by the "applicable rate." I.R.C. § 2641 (2004). The applicable rate is the product of the maximum federal estate tax rate and the inclusion ratio with respect to the transfer. I.R.C. § 2641.

The marital status of the taxpayer can determine whether a transfer to the child of the taxpayer's spouse or partner is subject to the generation-skipping transfer tax.³⁰² For transfers between persons who are not related by blood or marriage, the generation-skipping transfer tax applies if the transferee is at least 37 ½ years younger than the transferor.³⁰³ Married persons are presumed to be of the same generation, however, for purposes of the generation-skipping transfer tax.³⁰⁴

Just as married taxpayers are presumed to be of the same generation regardless of the actual facts and circumstances, the children of the taxpayer's spouse are presumed to be only one generation younger than the taxpayer. Accordingly, transfers to the children of a spouse are not subject to the generation-skipping transfer tax, regardless of whether the children are more than 37 ½ years younger than the transferor. In contrast, no similar presumption applies for unmarried couples or their children, and transfers made to the children of an unmarried partner could give rise to generation-skipping transfer tax liability if the transferee is more than 37 ½ years younger than the transferor.³⁰⁵ Therefore, as a practical matter, the economic effect of the marital

"Maximum Federal estate tax rate" means the maximum tax rate applicable to the estate of the decedent's date of death. The rate is imposed by I.R.C. § 2001; *see also* I.R.C. § 2641.

³⁰² I.R.C. § 2651.

³⁰³ I.R.C. § 2651(d).

³⁰⁴ I.R.C. § 2651(c)(1).

³⁰⁵ For example, assume X and Y are married, and Y has a child from a previous marriage, Z, who is 40 years younger than X. If X transfers property to Z, there is no generation-skipping transfer tax liability: X and Y are presumed to be of the same generation and X and Z are presumed to be less than 37 ½ years apart in age. The general rule that transfers to persons more than 37 ½ years younger result in taxation does not apply here because of the statutory presumption that children of spouses are one generation younger. In effect, the Tax Code defers to the legal relationship between X and Y and preempts the application of the general chronological analysis for determining tax liability. Since the Tax Code does not offer similar deference to unmarried relationships (often with unclear or non-existent legal status), no similar statutory presumptions would apply if X and Y were not legally married. Rather, the transfer from

presumptions in the generation-skipping transfer tax could be to reduce the net value of the transferred property interest by the amount of the maximum estate tax rate solely because the recipient's parent is not married.³⁰⁶

H. TORTS AND CIVIL PROCEDURE

The inability to marry serves as a procedural bar to recovery in various areas of New York State law. For example, the status of marriage affects an individual's standing to bring a wrongful death action, to sue for loss of consortium, to seek compensation from the Crime Victims' Compensation Board, and to exercise the spousal testimonial privilege. Each of these examples is discussed, in turn, below.

1. The Right to Bring a Wrongful Death Action

In most states, the surviving partner in a same-sex couple does not have standing to commence a wrongful death action.³⁰⁷ Currently, only California, Hawaii and Vermont allow a wrongful death action to be brought on behalf of a surviving same-sex partner.³⁰⁸ With the exception of a recent New York Supreme Court decision giving full

X to Z would be subject to generation-skipping transfer tax liability since X and Z are actually more than 37 ½ years apart in age.

³⁰⁶ I.R.C. § 2651. Further, I.R.C. § 2651(b)(3)(A) provides that a relationship by legal adoption shall be treated as a relationship by blood. Thus, if a decedent partner had adopted the child of a surviving partner, that surviving partner could utilize the generation-skipping transfer tax to maintain the full value of the transferred property interest.

³⁰⁷ See John G. Culhane, *A "Clanging Silence": Same Sex Couples and Tort Law*, 89 KY. L.J. 911 (2001) (discussing the unavailability of certain tort remedies to same-sex partners) ("Culhane").

³⁰⁸ See Shannon Minter, *Expanding Wrongful Death Statutes and Other Death Benefits to Same-Sex Partners*, 30 HUM. RTS. 6 (Summer 2003) (discussing California decision allowing same-sex partner to bring wrongful death claim and laws recognizing the relationships of same-sex partners after September 11, 2001). The Superior Court of California was the first to allow a same-sex partner to sue for wrongful death; the court allowed a lesbian to sue for wrongful death on behalf of her partner, who was mauled to death by their neighbors' dogs. See *Smith v. Knoller*, n.o.r., Index No. 319532, Superior Court, San Francisco (Aug. 9, 2001).

faith and credit to a Vermont civil union,³⁰⁹ New York has not allowed a surviving same-sex partner to commence a wrongful death action because same-sex partners are not considered “spouses” under the wrongful death statute.³¹⁰

New York Estate Powers & Trust Law (“EPTL”) § 5-4.1 (the wrongful death statute) confers upon the personal representative of an estate the right to sue for damages for the decedent’s death on behalf of the decedent’s distributees who suffered pecuniary loss because of the decedent’s death.³¹¹ “Distributees” are defined as those individuals who would be entitled to a share of the decedent’s property if the decedent died intestate.³¹² The eligible distributees include the surviving spouse and various enumerated types of blood relatives (*e.g.*, parents, issue, brothers and sisters).³¹³

Pursuant to EPTL 5-1.2, a distributee may be disqualified in certain, specified situations.³¹⁴ EPTL 5-1.2 states that “[a] *husband or wife* is a surviving spouse”

³⁰⁹ See *Langan v. St. Vincent’s Hosp.*, 765 N.Y.S.2d 411 (Sup. Ct. Nassau County 2003) (appeal pending) (“*Langan*”). See *infra* this Section for further discussion of this case.

³¹⁰ See *Raum v. Restaurant Assocs., Inc.*, 675 N.Y.S.2d 343 (1st Dep’t 1998), *appeal dismissed*, 92 N.Y.2d 946 (1998) (“*Raum*”). See *infra* this Section for further discussion of this case.

³¹¹ N.Y. EST. POWERS & TRUSTS LAW § 5-4.1(1) provides in pertinent part:
The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent’s death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued.

³¹² N.Y. EST. POWERS & TRUSTS LAW § 1-2.5.

³¹³ N.Y. EST. POWERS & TRUSTS LAW § 4-1.1.

³¹⁴ N.Y. EST. POWERS & TRUSTS LAW § 5-1.2 (“Disqualification as surviving spouse”) provides:

(a) A husband or wife is a surviving spouse within the meaning, and for the purposes of 4-1.1, 5-1.1, 5-1.1-A, 5-1.3, 5-3.1 and 5-4.4, unless it is established satisfactorily to the court having jurisdiction of the action or proceeding that:

(1) A final decree or judgment of divorce, of annulment or declaring the nullity of a marriage or dissolving such marriage on the ground of absence, recognized as valid under the law of this state, was in effect when the deceased spouse died.

(2) The marriage was void as incestuous under section five of the domestic relations law, bigamous under section six thereof, or a prohibited remarriage

unless the parties are divorced or separated, the marriage was void, or the survivor abandoned or refused to support the decedent.³¹⁵ As discussed below, two New York decisions have taken different approaches in interpreting the effect of the “husband or wife” language of this provision.

In *Raum v. Restaurant Associates*,³¹⁶ a surviving same-sex partner attempted to commence a wrongful death action for pecuniary losses due to his partner’s death. The First Department held that the term “spouse” in the EPTL does not include a surviving partner in an unmarried couple.³¹⁷ The Court held that the wrongful death statute did not discriminate against same-sex partners “in spousal-type relationships” because all survivors in unmarried couples, regardless of sexual orientation, were excluded from bringing a wrongful death claim.³¹⁸ The majority wrote:

[T]he wrongful-death statute (EPTL 5-4.1), which, by its terms (EPTL 1-2.5, 4-1.1., 5-1.2), does not give individuals not married to the decedent (other than certain blood relatives) a right to bring a wrongful-death action, operates without regard to sexual orientation, in that unmarried couples living together, whether heterosexual or homosexual, similarly

under section eight thereof.

(3) The spouse had procured outside of this state a final decree or judgment of divorce from the deceased spouse, of annulment or declaring the nullity of the marriage with the deceased spouse or dissolving such marriage on the ground of absence, not recognized as valid under the law of this state.

(4) A final decree or judgment of separation, recognized as valid under the law of this state, was rendered against the spouse, and such decree or judgment was in effect when the deceased spouse died.

(5) The spouse abandoned the deceased spouse, and such abandonment continued until the time of death.

(6) A spouse who, having the duty to support the other spouse, failed or refused to provide for such spouse though he or she had the means or ability to do so, unless such marital duty was resumed and continued until the death of the spouse having the need of support.

³¹⁵ *Id.* (emphasis added).

³¹⁶ 675 N.Y.S.2d 343.

³¹⁷ *Id.* at 344.

³¹⁸ *Id.*

lack the right to bring a wrongful-death action, and, as such, the statute does not discriminate against same-sex partners in spousal-type relationships.³¹⁹

Accordingly, under the majority holding in *Raum*, because same-sex partners cannot legally marry, they cannot be “spouses” and, therefore, cannot gain the necessary status of “distributee” in order to have a wrongful death action brought on their behalf. To the extent that *Raum* treats unmarried same-sex couples as similarly situated to unmarried opposite-sex couples, the decision does not acknowledge that opposite-sex couples (unlike same-sex couples) may marry and gain the status of distributees.

The dissent in *Raum* favored a functional rather than a literal approach, and would have conferred standing to a surviving same-sex partner in a “spousal-type” relationship.³²⁰ In an approach that the majority labeled “unduly strained,” the dissent, among other things, argued that the “husband or wife” language of EPTL 5-1.2 does not limit the class of individuals who can be considered surviving “spouses,” but, rather, provides that a “husband or wife will be presumed to be a member of this class unless certain things have occurred.”³²¹ This interpretation of the term “husband and wife,” as

³¹⁹ *Id.*

³²⁰ *Id.* at 344. The dissent relied on *Braschi v. Stahl Associates Co.*, 74 N.Y.2d 201, 206 (1989) (“*Braschi*”), a Court of Appeals decision holding that a deceased tenant’s same-sex partner could be considered a “family member” with succession rights to the tenant’s rent-controlled apartment. *See infra* Section I.M.1. The dissent argued that *Braschi* provided precedent for “preferring a functional over literal interpretation of a statute whose purpose is to promote the public welfare, so that homosexual couples will not be disadvantaged by their inability to give their relationship a legal status.” *Raum*, 675 N.Y.S.2d at 345. The majority, on the other hand, understood the holding of *Braschi* as involving the interpretation of the word “family” not the word “spouse,” noting that the term “family” was inherently more inclusive than the term “spouse.” *Id.* at 344-45.

³²¹ *Id.* at 345.

descriptive rather than exclusionary, was adopted by the Nassau County Supreme Court in its decision in *Langan*.³²²

Where the *Raum* decision lacked factual detail concerning the relationship between the decedent and his surviving partner, the *Langan* court provided a clear picture of the life shared by the claimant and his deceased partner. Neil Conrad Spicehandler and John Langan met in 1986 when they were in their mid-twenties.³²³ They lived together until Spicehandler died at age 41.³²⁴ The two men provided each other with health care proxies; each was the sole beneficiary on the other's life insurance policy; they were joint owners on homeowner's insurance; and they were the sole legatees under each other's wills.³²⁵ In an attempt to describe the union between Spicehandler and Langan, the court quoted the testimony of various friends and family who attested to the strength of the love between Spicehandler and Langan and their commitment to one another.³²⁶

Shortly after Vermont enacted a civil union statute, in a formal ceremony before a Justice of the Peace, Spicehandler and Langan exchanged vows and solemnized their union in Vermont.³²⁷ Tragically, shortly after their civil union, Spicehandler was struck by an automobile in Manhattan, taken to Saint Vincent's Hospital with a broken

³²² 765 N.Y.S.2d 411.

³²³ *Id.* at 412.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at 413.

³²⁷ *Id.* at 412. The civil union statute was enacted in 2000, during the period between *Raum* and *Langan*.

leg, and died in the hospital from an embolus of “unknown origin.”³²⁸ Langan commenced a medical malpractice and wrongful death action against the hospital to recover pecuniary losses for Spicehandler’s death.³²⁹

The difference between *Langan* and *Raum* was the intervening enactment of the Vermont civil union statute, and the fact that Spicehandler and Langan had availed themselves of that statute.³³⁰ Thus, the court needed to determine, first, whether to accord full faith and credit to the couple’s Vermont civil union and, if so, second, whether the civil union made Spicehandler and Langan “spouses” within the meaning of New York’s wrongful death statute.³³¹

The limited purpose of commencing a wrongful death action, the court accorded full faith and credit to the couple’s civil union.³³² The court recognized that if Spicehandler and Langan had a “validly contracted marriage in the State of Vermont, and if the Vermont civil union does not offend public policy . . . it will be recognized in the State of New York for the purposes of the wrongful death statute.”³³³ The court held that the Vermont civil union statute did not violate New York public policy because, among other things:

- New York has not enacted a “mini-Defense of Marriage Act,”

³²⁸ *Id.* While at the hospital, Spicehandler underwent two surgeries on his leg.

³²⁹ *Id.* at 413; *see also* Leigh Jones, *Beyond Borders: Appeal Challenges Applicability of Vermont Civil Union*, 230 N.Y.L.J. at 16 (Nov. 18, 2003).

³³⁰ *Id.* Notably, the *Raum* decision did not address whether the couple was registered as domestic partners.

³³¹ *Id.* at 415.

³³² *Id.* at 413.

³³³ *Id.* at 414.

- both the State of New York and the City of New York recognize same-sex domestic partnerships for employment benefits,
- at least with respect to rent control laws, the New York Court of Appeals has interpreted the term “family” as inclusive of same-sex couples,
- New York allows second parent adoptions,
- same-sex partners are entitled to recompense as those aggrieved by the loss of life on September 11, 2001,
- New York City has amended its domestic partner registry to include automatically same-sex couples who have entered into marriages or unions in other jurisdictions, and
- New York enacted the Sexual Orientation Non-Discrimination Act to prohibit discrimination against gay men and lesbians in employment, education and housing accommodations.³³⁴

The court next assessed whether entering into a civil union would satisfy the requirements of the EPTL statute. The court began by noting that although “the Vermont legislature withheld the title of marriage from application to the union,”³³⁵ a Vermont civil union is “indistinguishable from marriage.”³³⁶ The court found that although Vermont “explicitly reserves the title ‘marriage’ for a union between a man and a woman, it does not so reserve the title ‘spouse’, as a civil union partner, like a husband or a wife, is a spouse for all purposes under Vermont law, and the meaning of the term spouse is the only issue here.”³³⁷ Accordingly, the court framed the “ultimate issue” as “whether EPTL 4-1.1 excludes spouses who are in every material way sanctioned in a

³³⁴ *Id.* at 414-16.

³³⁵ *Id.* at 417-18.

³³⁶ *Id.* at 417.

³³⁷ *Id.* at 417-18.

union for life because they may not be properly described as a husband or a wife, or more pointedly, because they are both men or both women.”³³⁸

Turning to the language and purpose of the New York wrongful death statute, the court first interpreted the “husband and wife” language in EPTL 5-1.2 as “descriptive rather than exclusionary.”³³⁹ The court then noted that “spouse is a gender neutral word and it applies to [Langan] under the Vermont civil union” statute.³⁴⁰ The court concluded that it would be impossible under equal protection principles to justify any other interpretation of the term “spouse” under the EPTL.³⁴¹ The court distinguished *Raum* on the basis that the Vermont statute made Langan the literal spouse of Spicehandler, not a “functional or virtual one” – a status that was entirely unavailable to the same-sex partners in *Raum*.³⁴² *Langan* is the first New York decision to consider whether to accord full faith and credit to a Vermont civil union, and the first New York decision to allow a same-sex surviving partner to commence a wrongful death action.³⁴³ The matter is currently under appeal.

2. The Right to Sue for Loss of Consortium

As with standing to sue for pecuniary losses due to a partner’s wrongful death, most states deny same-sex partners standing to seek redress for loss of

³³⁸ *Id.* at 418

³³⁹ *Id.* at 420 (consistent with the dissent in *Raum*, 675 N.Y.S.2d at 345).

³⁴⁰ *Id.* 420.

³⁴¹ *Id.* at 420-21.

³⁴² *Id.* at 422

³⁴³ *Langan* does not speak to whether marriages or unions in other countries (such as certain provinces of Canada or some European countries) similarly will be accorded the same full faith and credit in New York; however, there is no reason to believe they will not be similarly recognized. *See infra* Section III.F.2., concerning full faith and credit and civil unions and Section II.B., concerning the development of marriage and other mechanisms to recognize same-sex partnerships globally.

consortium.³⁴⁴ In New York “a cause of action for loss of consortium does not lie if the alleged tortious conduct and resultant injuries occurred prior to the marriage.”³⁴⁵ There is no reported decision in New York, however, that directly addresses a same-sex partner’s claim for loss of consortium.³⁴⁶

3. The Right to Receive a Financial Award from the Crime Victims’ Board

The New York State legislature has recognized that “many innocent persons suffer personal physical injury or death as a result of criminal acts” and that “such persons or their dependents may thereby suffer disability, incur financial hardships, or become dependent on public assistance.”³⁴⁷ The State Crime Victims’ Compensation Board hears and determines crime victims’ claims for government financial assistance.³⁴⁸ Generally, the victim of the crime, a surviving spouse, parent or child of a victim who has died as a direct result of the crime or “any other person dependent for his principal support upon a victim of the crime who has died as a direct result of the crime” is eligible to receive compensation from the Crime Victims’ Board.³⁴⁹ Thus, a married spouse

³⁴⁴ See Culhane, *supra* note 307, at 975-77 (discussing the unavailability of certain tort remedies to same-sex partners).

³⁴⁵ *Anderson v. Eli Lilly Co.*, 79 N.Y.2d 797, 798 (1991).

³⁴⁶ In *Langan*, Spicehandler’s surviving partner did not raise any derivative claims for loss of consortium. 765 N.Y.S.2d at 412.

³⁴⁷ N.Y. EXEC. LAW § 620 (McKinney 2003).

³⁴⁸ *Id.* §§ 620, 621, 622, 623.

³⁴⁹ *Id.* § 624 provides in pertinent part that “the following persons shall be eligible for awards” from the Crime Victims Board:

- (a) a victim of a crime;
- (b) a surviving spouse, grandparent, parent, stepparent, child or stepchild of a victim of a crime who died as a direct result of such crime;
- (c) any other person dependent for his principal support upon a victim of a crime who died as a direct result of such crime;
- (d) any person who has paid for or incurred the burial expenses of a victim who died as a direct result of such crime, except such person shall not be eligible to receive an award for other

automatically is entitled to compensation,³⁵⁰ but a surviving same-sex partner is eligible to receive victim's compensation only if he or she was principally dependent on the decedent.³⁵¹

This was the conclusion reached by the First Department in *Secord v. Fischetti*.³⁵² In *Secord*, the same-sex partner of a crime victim filed a claim with the Crime Victims' Board for compensation as a spouse, or alternatively, as a dependent.³⁵³ The court upheld the Crime Victims' Board's interpretation of the term "surviving spouse" as not extending to "homosexual life partners,"³⁵⁴ and its finding that the partner

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- than burial expenses unless otherwise eligible under paragraph (a), (b) or (c) of this subdivision;
 - (e) an elderly victim of a crime;
 - (f) a disabled victim of a crime;
 - (g) a child victim of a crime;
 - (h) a parent, stepparent, grandparent, guardian, brother, sister, stepbrother or stepsister of a child victim of a crime;
 - (i) a surviving spouse of a crime victim who died from causes not directly related to the crime when such victim died prior to filing a claim with the board or subsequent to filing a claim but prior to the rendering of a decision by the board. Such award shall be limited to out-of-pocket loss incurred as a direct result of the crime; and
 - (j) a spouse, child or stepchild of a victim of a crime who has sustained personal physical injury as a direct result of a crime.

³⁵⁰ The surviving marital partner of a crime victim is eligible to receive compensation from the Crime Victims' Board regardless of his or her contribution to the household income – essentially, a presumption of principal dependence comes with the status of marriage. *See id.* § 624.

³⁵¹ Notably, regardless of marital status, the claimant must demonstrate compensable losses. *See generally id.* at § 631. A married spouse whose spouse dies as a result of a crime will receive compensation from the Crime Victim's Board for statutorily covered expenses so long as the surviving spouse can demonstrate compensable losses – regardless of whether s/he was dependent on his/her spouse. A same-sex partner whose partner dies as a result of a crime will receive compensation from the Crime Victim's Board only if s/he was principally dependent on his/her partner and s/he can establish that s/he has compensable losses for statutorily covered expenses. *Id.* *See infra* note 355 for a discussion of the term "principally dependent."

³⁵² 653 N.Y.S.2d 551 (1st Dep't 1997).

³⁵³ *Id.* Section 624(1)(b) of the Executive Law allows the "surviving spouse" to apply for compensation, and section 624(1)(c) allows a dependant who relies on the victim for principal support to apply for compensation.

³⁵⁴ *Id.* (citing *In re Cooper*, 592 N.Y.S.2d 797, and N.Y. EXEC. LAW § 624(1)(b)).

of the victim had relied principally on his own income, not the income of the victim and, thus, was not eligible for an award pursuant to section 624(1)(c).³⁵⁵

4. Testimonial Privileges and Immunities

CPLR 4502(b) provides that, in general, neither “husband” nor “wife” is required or permitted to disclose a confidential communication that was made to the other during the marriage.³⁵⁶ Traditionally, the rationale of the spousal communications privilege was to foster domestic harmony, on the theory that the disclosure of confidential communications between spouses would undermine “the trust and mutuality of exchange necessary for the successful nourishment of marriage.”³⁵⁷ More recently, the privilege has been justified by society’s general concern for marital privacy.³⁵⁸

In *Greenwald v. H & P 29th Street Associates*,³⁵⁹ the First Department declined to extend the testimonial privilege to same-sex partners in a “spousal relationship.” In that case, a same-sex couple brought an action against a building owner and the building’s managing agent for refusing to aggregate their incomes to meet

³⁵⁵ The court determined that, because the income the victim’s partner contributed to the household was a majority of the household income (\$31,000 of a total \$45,700 household income), the victim’s partner was not principally dependent upon the victim. *Id.* In an exception to this general policy, Governor Pataki issued an Executive Order suspending the provisions of the Executive Law pertaining to crime victims’ awards for persons dependent upon victims of the September 11, 2001 attack and redefined the parameters of “principal support.” The Crime Victims’ Board has interpreted “principal support” as 75% or more; Governor Pataki changed this percentage to 50% or more for such victims. *See* Executive Order No. 113.30, issued by Governor Pataki on October 10, 2001, and *infra* Section II.B.5.b.i for further discussion of this Executive Order.

³⁵⁶ CPLR 4502(b) provides that “[a] husband and wife shall not be required, or, without consent of the other, if living, allowed, to disclose a confidential communication made by the other during marriage.”

³⁵⁷ VINCENT C. ALEXANDER, PRACTICE COMMENTARIES, CPLR 4502, C4502:1 (McKinney 2003) (citing 8 J. WIGMORE, EVIDENCE § 2332 (McNaughton re. ed. 1961) and *Poppe v. Poppe*, 3 N.Y.2d 312, 315 (1957) (privilege is “[d]esigned to protect and strengthen the marital bond”).

³⁵⁸ *Id.* (citing *Prink v. Rockefeller Center, Inc.*, 48 N.Y.2d 309, 317-318 (1979) and Black, *The Marital and Physician Privileges – A Reprint of a Letter to a Congressman*, 1975 DUKE L.J. 45, 48-49).

³⁵⁹ 659 N.Y.S.2d 473, 473 (1st Dep’t 1997).

minimum income guidelines.³⁶⁰ In the context of this action, the couple moved for a protective order limiting disclosure to matters not privileged pursuant to CPLR 4502(b).³⁶¹ The First Department held that “CPLR 4502(b), which, by its terms, protects confidential communications between a ‘husband’ and ‘wife’ ‘during the marriage’, does not extend . . . ’to homosexuals in a spousal relationship.’”³⁶²

I. THE FAMILY AND MEDICAL LEAVE ACT

1. Benefits Provided under the Family and Medical Leave Act

The Family and Medical Leave Act of 1993 (“the FMLA,” or “the Act,”),³⁶³ signed into law on February 5, 1993, is the first federal initiative³⁶⁴ to create a

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.* at 307-08. The court distinguished *In re Jacob*, 86 N.Y.2d 651 (1995) (allowing adoption of child by biological mother’s lesbian partner) (discussed *supra* in Section I.E.2) because, unlike CPLR 4502, the Domestic Relations Law in *In re Jacob* was “open to two differing interpretations.” The court noted, “[g]iven that section 117 [of the D.R.L.] is open to two differing interpretations as to whether it automatically terminates parental rights in all cases, a construction of the section that would deny children . . . the opportunity of having their two de facto parents become their legal parents, based solely on their biological mother’s sexual orientation or marital status, would not only be unjust under the circumstances, but also might raise constitutional concerns in light of the adoption statute’s historically consistent purpose—the best interests of the child.” *Id.* at 667. The court went on to hold that “the Legislature that last codified section 117 in 1938 may never have envisioned families that ‘include[] two adult lifetime partners whose relationship is . . . characterized by an emotional and financial commitment and interdependence.’” Nonetheless, it is clear that section 117, designed as a shield to protect new adoptive families, was never intended as a sword to prohibit otherwise beneficial intrafamily adoptions by second parents.” *Id.* at 668-69 (1995) (quoting *Braschi*, 74 N.Y.2d at 211). The *Greenwald* court then distinguished *Braschi*, 74 N.Y.2d 201 (1989) (allowing deceased tenant’s same-sex partner succession rights to tenant’s rent-controlled apartment) (discussed *infra* in Section I.M.1) because the operative term in *Braschi* was “family,” not “spouse.”

³⁶³ 29 U.S.C. §§ 2601-2654 (2004), Pub. L. 103-3, 107 Stat. 6 (1993).

³⁶⁴ Prior to the enactment of the federal Family and Medical Leave Act of 1993, New York employers had no obligation to provide employees with sick or personal time. See JONATHAN L. SULDS, NEW YORK EMPLOYMENT LAW § 19.03[1], 19-10 (2d ed. 2003). City and state employees who are domestic partners receive some FMLA-like benefits. For example, residents of New York City who are city employees and register as domestic partners are eligible to obtain the right to insurance benefits, sick leave, maternity/paternity leave and other privileges; and, regardless of their place of employment, both spouses and domestic partners have a right to hospital and prison visitation. See 3 N.Y.C. ADMIN. CODE § 3-244(a) (2003) (discussing certificate of domestic partnership registration and benefits of same); 51 N.Y.C.R.R. §§ 4-01 to 4-04 (rules and regulations governing domestic partnership registration); *Slattery v. City of New York*, 686 N.Y.S.2d 683, 746 (Sup. Ct. N.Y. County 1999), *aff’d as modified*, 697 N.Y.S.2d 603 (1st Dep’t

policy to protect working families.³⁶⁵ The first of the five express purposes of the FMLA includes the intention to promote the stability and economic security of families and to promote national interests in preserving family integrity.³⁶⁶ To this end, the FMLA provides up to twelve weeks of unpaid leave per year for employees to care for newborn or newly adopted infants, seriously ill children, parents or spouses.³⁶⁷ The FMLA also allows time for employees to recover personally from a serious health condition³⁶⁸ if they are unable to perform the functions of their position.³⁶⁹ In order for employees to receive benefits under the FMLA, they must have worked for the employer for at least one year and for at least 1,250 hours during the previous year.³⁷⁰ Not all employers are required to

1999). City employees who are registered as domestic partners also are eligible for bereavement leave and child care leave of absence. *See* N.Y.C. ADMIN. CODE § 3-244(a) (2003) (“[A certificate of domestic partnership registration] shall constitute notice of a registered domestic partnership when persons apply for rights or benefits available to domestic partners, including but not limited to: Bereavement leave and child care leave of absence for city employees . . .”). New York State employees have been able to extend their health insurance benefits to their domestic partners. *See Slattery* at 604 (noting that New York State extended certain derivative health benefits to domestic partners of state employees and allows non-State agencies that participate in the State’s health insurance program to offer the same coverage to the domestic partners of their employees); *see also* Human Rights Campaign Web site, *available at* http://www.hrc.org/Template.cfm?Section=Search_the_Law_Database&Template=/CustomSource/Law/StateDisplay.cfm&StateCode=NY&LawFlag=1&StatusInd=lawcurrent (“New York offers partner benefits to most state employees through a 1995 union contract negotiated by the Civil Service Employees Association, which remains in effect.”).

³⁶⁵ *See* Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: the Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 78 (2000) (noting same).

³⁶⁶ *See* 29 U.S.C. § 2601(b) (2004) (“It is the purpose of this Act . . . to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. . .”).

³⁶⁷ *See* 29 U.S.C. § 2612 (2004) (discussing leave).

³⁶⁸ A serious health condition is one requiring in-patient care in a hospital, hospice or residential care facility or continuing treatment by a health care provider. *See* 29 C.F.R. § 825.118 (2004).

³⁶⁹ *See* 29 U.S.C. § 2612 (discussing leave).

³⁷⁰ *See* 29 U.S.C. § 2611(2) (A) (2004).

give leave under the Act; private employers fall within the Act only if they employ at least fifty employees within a seventy-five-mile area.³⁷¹

One significant benefit that FMLA-eligible employees receive is the ability to maintain their health benefits during the leave period. Although the employer does not have to pay the employee during a leave taken under the FMLA, the employer must maintain any group health benefits provided to the employee prior to the FMLA leave.³⁷² The Act also intends to provide job security when an employee has to leave work to care for him or herself or a statutorily identified family member. An employee who takes leave under the Act is entitled to return to the position of employment held when the leave commenced or to an equivalent position with equivalent employment benefits, pay and terms and conditions of employment.³⁷³ As previously noted, the categories of persons that an employee may take care of under the FMLA include the employee's "spouse," "son," "daughter," or "parent."³⁷⁴ Currently, employees in same-sex households who seek to take leave from work in order to care for their sick partner

³⁷¹ See *id.* (defining eligible employee); 29 U.S.C. § 2611(4) (defining employer); 29 U.S.C. § 2612 (discussing leave). Note that Federal officers or employees covered under subchapter V of chapter 63 of Title 5 are not eligible for leave under the Act. 29 U.S.C. § 2611(2) (B). Additionally, an employer is eligible only if it employs 50 or more employees "for each working day during each of 20 or more calendar workweeks in the current or preceding year." 29 U.S.C. § 2611(4).

³⁷² See 29 U.S.C. § 2614(c).

³⁷³ See *id.*

³⁷⁴ See 29 U.S.C. § 2612(a) (1993). Note that "parent" does not include parents "in law." See 29 C.F.R. § 825.113(b) (1993) ("The term [parent] does not include parents 'in law'"). Son or daughter is defined as "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in 'loco parentis,' who is either under age 18, or age 18 or older and 'incapable of self-care because of a mental or physical disability.'" See 29 C.F.R. § 825.113 (c).

are not protected under this Act.³⁷⁵ Whether such employees may take time off to care for their partner's children has not been litigated.

2. Definition of "Spouse" under the Act

Without the protection of the FMLA, individuals in same-sex couples risk losing their employment if they take time off from work in order to care for an ill partner.³⁷⁶ The Act itself defines spouse as "a husband or wife, as the case may be,"³⁷⁷ and the regulations promulgated under the Act define spouse as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized."³⁷⁸ Because the Defense of Marriage Act ("DOMA")³⁷⁹ defines spouse for the purposes of Federal law as "a person of the opposite sex who is a husband or wife," however, same-

³⁷⁵ Representative Carolyn Maloney, D-N.Y., introduced the "The Family and Medical Leave Inclusion Act" bill on March 25, 2003. See Thomas legislation Web site, All Bill Summary and Status Info link for H.R. 1430, 108th Cong. (2003), available at <http://thomas.loc.gov/cgi-bin/query/D?c108:1:/temp/~c108jAxweS::>. The Family and Medical Leave Inclusion Act is a bill that would amend the Family and Medical Leave Act of 1993 to allow an employee to take up to 12 weeks of unpaid leave from work if his or her domestic partner has a serious health condition. See *id.* It also would permit employees to take unpaid leave to care for a "parent-in-law, adult child, sibling or grandparent." See *id.* The bill currently has 90 co-sponsors, with seven new sponsors added in 2004. *id.* Upon being introduced, the bill was referred to the Committees on Education and the Workforce, Government Reform and House Administration. The only subsequent action on the bill was that the House Education and Workforce Committee referred it to the Subcommittee on Workforce Protections on April 14, 2003 and the Government Reform Committee referred it to the Subcommittee on Civil Service and Agency Organization on April 2, 2003. See *id.* This bill has not received a lot of attention from the press and because of the relative inaction over the last year, it is not known whether it will move out of committee/subcommittee or stagnate.

³⁷⁶ See Kimberlie Kranich, *Fired Urbana Nurse Continues Fight, Gets Help From Chicago*, at <http://www.ucimc.org/feature/display/7906/index.php> (lesbian nurse fired after being denied family and bereavement leave to take care of and recover from the death of her same-sex partner of 18 years).

³⁷⁷ See 29 U.S.C. § 2611(13).

³⁷⁸ See 29 C.F.R. § 825.113(a) (2004).

³⁷⁹ See 1 U.S.C. § 7 ("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.").

sex partners in New York would not be permitted to gain access to the benefits of the FMLA to take time off from work to care for a sick partner, even if same-sex marriage were sanctioned in New York. However, marriage would permit the same-sex couple to gain access to any benefits provided under a State FMLA and would permit the couple, should it desire, to raise a constitutional challenge to DOMA.³⁸⁰

3. Definition of “Son” or “Daughter” under the Act

Son or daughter is defined as “a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in ‘loco parentis,’ who is either under age 18, or age 18 or older and ‘incapable of self-care because of a mental or physical disability.’”³⁸¹ This broad definition of “son or daughter,” encompassing many familial relationships involving the care of children, may not protect unmarried, non-biologically-related, non-adoptive parents who seek to take time off to care for their

³⁸⁰ See Mark Strasser, *Some Observations about DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U.L. REV. 363, 364-73, and 364 n.8 (2002) discussing DOMA and Full Faith and Credit generally, and noting the various reasons that DOMA could be unconstitutional, including that: (1) it abridges privileges and immunities guarantees; (2) it involves a bill of attainder; (3) it violates Equal Protection and Due Process guarantees; and (4) it involves an overreaching by Congress with respect to its power to amend the Full Faith and Credit Clause); Sylvia Law, *Access to Justice: the Social Responsibility of Lawyers: Families and Federalism*, 4 WASH. U. J.L. & POL’Y 175, 219-20 & n.205 (2000) (discussing in context of federal laws affecting families the possible unconstitutionality of DOMA under Equal Protection and citing Cass R. Sunstein, *The Supreme Court 1995 Term Forward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 97 & n.492 (1996) (suggesting that DOMA violates Equal Protection and the “impermissible selectivity” principle of *Romer*); Mark Tanney, Note, *The Defense of Marriage Act: A “Bare Desire to Harm” an Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 T. JEFFERSON L. REV. 99, 143-46 (1997) (suggesting that DOMA violates the constitutional principles of Due Process and Equal Protection); and Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997) (suggesting that DOMA violates the constitutional principles of Due Process and Equal Protection and discussing the unconstitutionality of its purpose, which he describes as a bare desire to harm a politically unpopular group)) (remainder of citations omitted). DOMA was recently upheld, albeit reluctantly, by a Federal bankruptcy court in Washington State. See *In re Kandou*, 315 B.R. 123, 145-48 (Bankr. W.D. Wash. 2004) (upholding DOMA against equal protection and due process challenges using a rational basis standard of review) (“*Kandou*”).

³⁸¹ See 29 C.F.R. § 825.113(c).

partner's child who has a serious health condition.³⁸² For example, the "stepchild" provision technically does not apply to children in same-sex-parent headed households where the non-biological parent does not formally adopt his or her partner's children. By definition, because same-sex couples generally are not permitted to marry, their respective children cannot become "stepchildren," a status that requires marriage, and that is covered by the relevant regulation. Further, even those same-sex couples married in Massachusetts may be considered outside of the protective scope of the FMLA because of DOMA.³⁸³

As noted, a person standing "in loco parentis" is also eligible for leave.³⁸⁴ Under the regulations, "[p]ersons who are 'in loco parentis' include those with day-to-day responsibilities to care for and financially support a child"; "a biological or legal relationship is not necessary."³⁸⁵ This broad definition of "in loco parentis" appears on its face to encompass same-sex partners, but the issue has not been litigated. Although the regulations suggest that a non-adoptive, non-biological parent would stand *in loco*

³⁸² One commentator notes that lesbians and gay men often carry additional burdens when seeking to establish the existence of a parental relationship, a critical step toward obtaining many parental benefits outside of those accorded to eligible employees under the FMLA. See Ryiah Lilith, *Caring for the Ten Percent's 2.4: Lesbian and Gay Parents' Access to Parental Benefits*, 16 WIS. WOMEN'S L.J. 125 (2001). The relative ease or difficulty depends not only on state law and employer policies, but also the gender of the parent, whether he or she is a biological or adoptive parent, and the parent's relationship status. *Id.* at 126. For example, the female partner of a lesbian birth mother (who does not adopt her partner's child) may not be afforded the parental benefits offered by her own employer to married parents, even if she has functionally been the child's parent since birth. *Id.* If the couple separates, the non-biological lesbian mother probably would have an even more difficult time gaining parental benefits from her employer, even if that employer provided continuing benefits to the children of non-custodial divorced parents. *Id.* at 127. For gay men, the situation may further be compounded by gendered expectations that men should not take parental leave or function as primary caregivers for their children. *Id.*

³⁸³ See *supra* Section II.2 for a discussion of the FMLA and DOMA.

³⁸⁴ See 29 C.F.R. § 825.113(c)(3).

³⁸⁵ *Id.*

parentis to a partner's child, some commentators conclude that the FMLA provides no protection for the category of employees who take time off in this context.³⁸⁶

One commentator notes that the restrictions on which family members are included within the FMLA have been strictly construed; if a child's biological parents are alive and involved with the child (as the case may be where only one partner in a same-sex couple is related biologically or legally to the child), another person who also has caretaking responsibility for the child may be precluded from taking leave to assume such responsibilities.³⁸⁷ Until same-sex partner cases are litigated, the decision is relegated to the discretion of the non-biologically related/non-adoptive parent's employer.³⁸⁸

J. PUBLIC BENEFITS

1. Social Security

The purpose of Social Security is to provide a "safety net" for those who no longer have significant earning power.³⁸⁹ An individual may apply for Old Age, Survivors, and Disability Insurance program (OASDI), based on his or her own earning record. An Individual who is not covered by Social Security may apply for benefits based on the eligibility of his or her spouse.³⁹⁰ To seek Social Security benefits based on

³⁸⁶ See Sylvia Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 387 n.120 (2002) (noting that gay and lesbian partners are not entitled to leave under the FMLA to care for one another or children that they co-parent and citing Ruth Colker, *The Anti-Subordination Principle: Applications*, 3 WISC. WOMEN'S L.J. 59 n.46 (1987)).

³⁸⁷ See Lisa Bornstein, *Inclusions and Exclusions in Work-Family Policy: the Public Values and Moral Code Embedded in the Family and Medical Leave Act*, 10 COLUM. J. GENDER & L. 77, 111 (2000) ("Bornstein").

³⁸⁸ See Bornstein, *supra* note 387, at 111 (citing Christine A. Littleton, *Does It Still Make Sense to Talk About "Women"?*, 1 UCLA WOMEN'S L.J. 15, 33-34 (1991)).

³⁸⁹ See United States Social Security Administration, Basic Facts, available at <http://www.ssa.gov/pressoffice/basicfact.htm>. See also *Denying Access to Marriage Harms Families: Social Security*, *Lambda Legal*, (July 17, 2002), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1086>.

³⁹⁰ 20 C.F.R. §§ 404.335-36 (2004).

one's partner's coverage, one must be married, or in certain circumstances, divorced or widowed.³⁹¹ To determine the marital status of the applicant and the insured, the Social Security Administration looks to state law.³⁹² Because New York currently does not allow two people of the same sex to be married, same-sex partners are unable to obtain these broader Social Security benefits.³⁹³

Even if New York did allow same-sex couples to marry, the federal Defense of Marriage Act (“DOMA”)³⁹⁴ would bar access to these benefits.³⁹⁵ DOMA defines marriage as “a legal union between one man and one woman” and further provides that a spouse refers “only to a person of the opposite sex who is a husband or a wife.”³⁹⁶ The Act also mandates that both “marriage” and “spouse” as defined in the statute be used “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

³⁹¹ See *infra* this Section.

³⁹² See, e.g., *Fontana v. Callahan*, 999 F. Supp. 304 (E.D.N.Y. 1998) (reversing ruling of Social Security Administration (“SSA”) and finding that under New York State law, ex-wife’s annulment was equivalent to a divorce under the SSA and she was entitled to benefits on the same basis as if she was a divorced legal spouse); Maria Newman, *Survivor in Gay Union Appeals Denial of Benefits to Boy*, N.Y. TIMES, Oct. 15, 2003, at B4 (reporting comment of SSA official that “we are bound by the state laws on the definition of marriage. . .”).

³⁹³ Entering into a “civil union” would not make same-sex couples eligible for spousal benefits. “Civil unions grant couples most of the rights of state civil marriages, except the name, but provide none of the federal benefits of marriage, such as Social Security benefits.” Rose Arce, *Massachusetts Court Upholds Same-Sex Marriage*, CNN LAW CENTER, February 6, 2004, available at <http://www.cnn.com/2004/LAW/02/04/gay.marriage/>. Similarly, even same-sex couples married in Massachusetts will not be eligible for this benefit, unless DOMA ultimately is found unconstitutional. See *infra* Section III.F.3 for a discussion of DOMA.

³⁹⁴ DOMA, 1 U.S.C. § 7. For a discussion of DOMA, see *infra* Section III.F.3.

³⁹⁵ See Albert B. Crenshaw, *No Gay Marriage at the Federal Level*, WASHINGTON POST, Dec. 21, 2003, at F4. See also Craig Sloane, Note, *A Rose By Any Other Name: Marriage and the Danish Registered Partnership Act*, 5 CARDOZO J. INT’L & COMP. L. 189, 191 n.9 (1997).

³⁹⁶ DOMA, 1 U.S.C. § 7 (2004).

United States.”³⁹⁷ Although some question the constitutionality of DOMA, it remains intact.³⁹⁸

The United States General Accounting Office has characterized the recognition of marriage as central to the design of the Social Security program: “[W]hether one is eligible for Social Security payments, and if so, how much one receives, are both dependent on marital status.”³⁹⁹ The various types of benefits that may depend on marriage under the rubric of Social Security include not only retirement benefits, but also disability protections and spousal death benefits, which include a one-time death benefit available for a surviving spouse.⁴⁰⁰

a. Old-age or Disability Benefits

Under the Social Security regulations, if a married couple meets certain requirements (the couple has been married for at least a year and the lower-wage earner is 62 years or older), the lower-earning spouse is entitled to receive half of the higher-earner spouse’s old age benefit amount while both are still living and married or if they were married for at least 10 years and then divorced.⁴⁰¹ A lesser-earning spouse also would be able to claim the same half-sum if he or she cared for a disabled or minor child who is

³⁹⁷ *Id.*

³⁹⁸ For a discussion of the constitutionality of DOMA, *see infra* Section III.F.3. The one court to consider DOMA’s constitutionality reluctantly upheld the statute, applying a rational basis standard of review. *See Kandu*, 315 B.R. at 145-48 and *infra* Section III.F.3 for further discussion of this case and the constitutionality of DOMA.

³⁹⁹ Letter Report General Accounting Office, Defense of Marriage Act, Jan. 31, 1997, *available at* <http://www.buddybuddy.com/mar-fedb.html>. The GAO conducted this report in response to a request by Congress.

⁴⁰⁰ 42 U.S.C. § 402(i) (2004).

⁴⁰¹ 20 C.F.R. §§ 404.330, 404.333 (2004).

entitled to receive benefits.⁴⁰² Thus, a married couple can increase their benefits: The insured is able to claim his or her share, and the lower wage-earning spouse is able to increase his or her share due to the fact that they are married, thus increasing the amount that the couple receives overall from Social Security.

Example: Fannie and Marcus are married for 30 years. Marcus was a successful executive, which entitled him to Social Security benefits of \$1500 a month upon retirement. Fannie was an artist. Together, they decided that Fannie would stay at home, work on her art, with which she had only moderate financial success, and assume primary childcare duties. Upon retirement she would be entitled to \$525 per month based on her own earning history. However, because Fannie can claim on Marcus' earning history, she would be entitled to \$750/month (half of Marcus' \$1500 and \$225/month more than her own claim); as a result, she would receive an additional \$2700/year than if she were not married. Assuming Fannie begins to collect benefits at age 65 and lives until age 80, she will collect an additional \$40,500. If, instead, Marcus and Myles, partners of 30 years, together decided on the same work allocation as Marcus and Fannie, and assuming Myles also began receiving benefits at 65 and lived until 80, he would receive \$2700 less per year than Fannie, totaling a \$40,500 differential in benefits.⁴⁰³

b. Widow or Widower Benefits

When one spouse has died, disparity in benefits available to married couples and unmarried couples may be greater. Under the regulations, if a surviving spouse was married to the now-deceased insured for at least nine months, or if the couple had a child together during their marriage, and if the surviving spouse is 60 years of age (or 50 and disabled), the surviving spouse may apply for the *full* value of the deceased's benefits.⁴⁰⁴ Alternatively, if a married couple divorces before the time of death of the greater earner (*e.g.*, Marcus, from the prior example), the surviving spouse (*e.g.*, Fannie)

⁴⁰² *Id.*

⁴⁰³ *See, e.g., Lambda Legal, Denying Access to Marriage Harms Families: Social Security*, July 17, 2002, available at <http://www.lamdalegal.org/cgi-bin/iowa/documents/record?record=1086>.

⁴⁰⁴ 20 C.F.R. § 404.335 (2004).

also may apply for full benefits so long as the marriage lasted for at least 10 years or if the surviving spouse is caring for the deceased spouse's child.⁴⁰⁵ These benefits, which are particularly important if a child is involved, are not available to same-sex couples.

c. Parental Benefits

A surviving spouse or divorced spouse⁴⁰⁶ is entitled to apply for parental benefits if the insured dies and the insured's child is under age 16 and in the care of the surviving spouse (or surviving divorced spouse), or is disabled.⁴⁰⁷ In this case, the surviving spouse can receive 75% of the deceased insured's benefits (unless he or she would be eligible to receive more money in widow's or widower's benefits) to assist in raising the child.⁴⁰⁸ Without having married the parent of the child, however, the survivor who cares for the child receives no such benefits.

2. Food Stamps

The Food Stamp Program is federally funded and is administered by the U.S. Department of Agriculture in conjunction, in New York, with the Office of Temporary and Disability Assistance.⁴⁰⁹ The purpose of the program, enacted in 1964, is

⁴⁰⁵ 20 C.F.R. § 404.336 (2004).

⁴⁰⁶ See 42 U.S.C. § 402(g)(1)(F)(ii) (2004) (noting that a divorced spouse is entitled to receive parental benefits; however, "[e]ntitlement to such benefits shall [] end, in the case of a surviving divorced parent, with the month immediately preceding the first month in which no son, daughter, or legally adopted child of such surviving divorced parent is entitled to a child's insurance benefit on the basis of the wages and self-employment income" of the deceased parent). For the law regarding surviving spouses, see generally 42 U.S.C. § 402 (g)(1).

⁴⁰⁷ 20 C.F.R. § 404.339(e) (2004). See also §§ 404.348 and 404.349 (further defining when a child "is in the care of" a surviving spouse or surviving divorced spouse).

⁴⁰⁸ 20 C.F.R. §§ 404.339, 404.432 (2004).

⁴⁰⁹ Although the Food Stamp Program is fully funded by the federal government, the administrative costs are borne equally by the federal government and the states. See New York State Office of Temporary and Disability Assistance, available at <http://www.otda.state.ny.us/otda/default.htm>. Thus, although New York State apportions food stamps through the State Office of Temporary and Disability Assistance, it nonetheless defers to the "rights, entitlements, duties and obligations" outlined in the federal program. See 18 N.Y.C.R.R. 387.1, available at <http://www.nls.org/regs/387.1>.

to “alleviate hunger and malnutrition among the more needy segments of our society.”⁴¹⁰ Eligibility for food stamps is centered upon the “household,”⁴¹¹ the composition of which is gender and sex neutral. The size of the household is based on “food units,”⁴¹² which “consist[] of individuals customarily purchasing food and preparing meals together for home consumption.”⁴¹³ A “household” also can consist of one individual, such as an individual living alone, or an individual who lives in a group home (*e.g.*, as an assisted-living facility) who purchases and prepares his or her food individually.⁴¹⁴ A group of individuals who live together (whether because they are living in a familial arrangement or otherwise) and purchase and prepare their meals together also can constitute a “household.”⁴¹⁵ To be eligible for food stamps, households may have up to \$2,000 in “countable resources,” such as a bank account.⁴¹⁶ Households also must meet an income test, which is based on the number of people in the household. For instance, members of a household consisting of two people that together earn more than a gross monthly income⁴¹⁷ of \$1,313 (or a net monthly income⁴¹⁸ of \$1,010) are ineligible to receive

⁴¹⁰ *United States Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 529 (1973) (quoting the Food Stamp Act of 1964, 7 U.S.C. § 2011).

⁴¹¹ See Food Stamp Program: Basic Facts and Dates, available at http://www.frac.org/html/federal_food_programs/programs/fsp.html (“[W]ith certain exceptions, a household that meets the eligibility requirements is qualified to receive [food stamp] benefits.”).

⁴¹² New York State Office of Temporary Disability and Assistance, Food Stamp Source Book, revised 10/15/02, available at <http://www.otda.state.ny.us/otda/fs/fssb=2.pdf>.

⁴¹³ *Id.*

⁴¹⁴ *Id.*

⁴¹⁵ *Id.*

⁴¹⁶ See U.S. Department of Agriculture, Food and Nutrition Service, *Fact Sheet on Resources, Incomes, and Benefits*, available at http://www.fns.usda.gov/fsp/applicant_recipients/fs_Res_Ben_Elig.htm (delineating income requirements for households).

⁴¹⁷ A gross monthly income is defined as “a household’s total, nonexcluded income, before any deductions have been made.” U.S. Department of Agriculture, Food and Nutrition Service, *Fact Sheet on*

benefits; if a household consists of eight people, the maximum gross income of the household must be only \$3,354 or below (or, \$2,580 net) for the household to qualify for food benefits.⁴¹⁹

This “household” approach to allocation of Food Stamp benefits was affirmed by the Supreme Court in 1973 in *Department of Agriculture v. Moreno*.⁴²⁰ In this case, plaintiffs challenged a regulatory provision limiting the definition of “household” to only “related” individuals, as violative of the Equal Protection Clause of the U.S. Constitution.⁴²¹ The Court concluded that this provision created two distinct classes of people: “one class is composed of people who are all related to each other and all in dire need; and the other class is composed of households that have one or more persons unrelated to the others but have the same degree of need as those in the first class.”⁴²² The Court struck down the law, ruling that it violated the Equal Protection Clause because it failed rational basis review.⁴²³ As a result, unrelated people living

Resources, Incomes, and Benefits, available at http://www.fns.usda.gov/fsp/applicant_recipients/fs_Res_Ben_Elig.htm.

⁴¹⁸ A net monthly income is defined as “gross monthly income minus allowable deductions,” such as for dependent care, medical expenses for elderly or disabled members of the household, and legally owed child support payments. U.S. Department of Agriculture, Food and Nutrition Service, *Fact Sheet on Resources, Incomes, and Benefits, available at http://www.fns.usda.gov/fsp/applicant_recipients/fs_Res_Ben_Elig.htm.*

⁴¹⁹ U.S. Department of Agriculture, Food and Nutrition Service, *Fact Sheet on Resources, Incomes, and Benefits, available at http://www.fns.usda.gov/fsp/applicant_recipients/fs_Res_Ben_Elig.htm.* When a household consists of more than eight people, the maximum allowable gross income for each additional person is \$341 (\$262 net).

⁴²⁰ 413 U.S. at 529-30.

⁴²¹ *Id.* at 531.

⁴²² *Id.* at 540. Although one of the households who sued the government consisted of two women and a child, the Court did not comment on sexual orientation.

⁴²³ The Supreme Court’s striking down of the law on rational basis grounds is unusual, as rational basis review has often been called “strict in theory but usually fatal in fact.” *Bernal v. Fainter*, 467 U.S. 216, 219 (1984). *See also Lawrence*, 539 U.S. at 580 (*Lawrence* cited to *Moreno* when it noted that it had previously struck down laws that “inhibit[ed] personal relationships”).

together may constitute a “household” under Food Stamp and receive such benefits, should they otherwise qualify.

3. Welfare

The federal welfare law, formally known as “The Personal Responsibility and Work Opportunity Reconciliation Act” (PRWORA),⁴²⁴ was signed into law by President Clinton in 1996. The Act transformed the welfare system so that individuals in need receive only time-limited assistance and have to work in exchange for their benefits. The centerpiece of the legislation is the Temporary Assistance for Needy Families (TANF) program, which effectively decentralizes the welfare system by giving welfare money to the states to distribute. New York State responded by enacting its own new program, the Welfare Reform Act of 1997 (“WRA”). The WRA divides welfare benefits into two main classes: Family Assistance and Safety Net Assistance. The former covers households with children, the latter does not.⁴²⁵

The PRWORA expressly favors marriage. The Act states that “marriage is the foundation of a successful society” and that a successful society “promotes the interests of children.” The Act further states that promotion of children’s interests requires the “promotion of responsible fatherhood and motherhood.”⁴²⁶ Thus, as one

⁴²⁴ PRWORA, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 42 U.S.C.).

⁴²⁵ New York State Office of Temporary and Disability Assistance, *Welfare Reform in New York State: Effects on Work, Family Composition, and Child Poverty*, Feb. 2002, available at <http://www.otda.state.ny.us/otda/WelfareReformandPovertyReport.pdf>.

⁴²⁶ PRWORA, Pub. L. No. 104-193, § 101(6), 110 Stat. at 2110. Both the language of the statute and the date of its enactment leads to a reasonable interpretation that Congress was addressing heterosexual marriage. See also Megan Weinstein, *The Teenage Pregnancy Problem: Welfare Reform and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 12 BERKELEY WOMEN’S L.J. 117, 126 (1998); Susan Thomas, *Ending Welfare As we Know It, or Farewell to the Rights of Women on Welfare?*, 78 U. DET. MERCY L. REV. 179, 188 (2001) (“Thomas”).

commentator has noted, under the Act, “married parenting is the only form of responsible parenting.”⁴²⁷

To receive its earmarked share of federal money, a state must identify in writing the ways in which it intends to reduce non-marital pregnancies.⁴²⁸ As further incentive, the Act offers millions of dollars in bonus funds to the five states that reduce their “illegitimacy” rates the most.⁴²⁹ When an unmarried teenager has a child, he or she must either live with a parent or attend school to receive funds under the Act.⁴³⁰ If the State does not find that the living arrangement is acceptable, it will require the teenage parent to obtain what it thinks is an appropriate living arrangement.⁴³¹

Although receipt of public assistance is not conditioned upon a legal marriage per se, parents who are not married are at a distinct disadvantage. A married parent may remain at home if another person in her household works, but an unmarried parent cannot remain at home; he or she must work in order to continue to receive benefits.⁴³²

Notably, however, over 30 years ago, the Supreme Court addressed whether the receipt of family welfare benefits could be contingent on marriage. In *New*

⁴²⁷ Megan Weinstein, *The Teenage Pregnancy Problem: Welfare Reform and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 13 BERKELEY WOMEN’S L.J. 117, 126 (1998) (“Weinstein”). Moreover, “states must first and foremost discourage non-marital childbearing among women in poverty.” *Id.* See also Thomas, *supra* note 426, at 188 (the Act “permits full-time care giving where a woman is legally married, but forbids it when she is not”).

⁴²⁸ See PRWORA, Pub. L. No. 104-193, § 103, 110 Stat. at 2135-37.

⁴²⁹ See 42 U.S.C. 603(a)-(b).

⁴³⁰ See PRWORA, Pub. L. No. 104-193, § 103, 110 Stat. at 2135-37. See also Weinstein, at 124.

⁴³¹ See PRWORA, Pub. L. No. 104-193, § 103, 110 Stat. at 2136. The State is required to provide assistance in finding an appropriate living situation for the teenager and child. See § 408(a)(5)(B)(i).

⁴³² 42 U.S.C. 601(a)(4). Thomas, at 188.

Jersey Welfare Rights Organization v. Cahill,⁴³³ two unmarried parents⁴³⁴ challenged a New Jersey welfare statute which limited benefits only to families whose children were “legitimate.” The statute, called “Assistance to Families of the Working Poor,” provided that benefits would be given only to families “which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child . . . of both, the natural child of one and adopted by the other, or a child adopted by both.”⁴³⁵ The Court struck down the law as violating the Equal Protection Clause of the U.S. Constitution, because it discriminated on the basis of marital status. “Visiting [society’s] condemnation [of illegitimacy] on the head of an infant,” the Court wrote, “is illogical and unjust.”⁴³⁶

New York uses money received from the federal government to invest in a variety of support programs. The programs include child care subsidies, the Earned Income Tax Credit, Child Health Plus, Medicaid, as well as housing and transportation subsidies.⁴³⁷ New York now ranks second in the nation in providing child care subsidies, spending almost nine hundred million dollars per year to subsidize 72,000 children.⁴³⁸ The Earned Income Tax Credit, offered both by the State and the federal government, also is an important tool in the welfare system. The credit was adopted by Congress in 1975, and subsequently expanded three times since; New York has a similar tax credit,

⁴³³ *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973).

⁴³⁴ The Court did not mention the sex of the parents anywhere in the text of the opinion.

⁴³⁵ *Id.* at 619 (citing N.J. Stat. Ann. § 44:13-3(a)).

⁴³⁶ *Id.* at 620.

⁴³⁷ New York State Office of Temporary and Disability Assistance, *Welfare Reform in New York State: Effects on Work, Family Composition, and Child Poverty*, Feb. 2002, available at <http://www.otda.state.ny.us/otda/WelfareReformandPovertyReport.pdf>.

⁴³⁸ *Id.*

the State Earned Income Tax Credit (EITC) program, which is now pegged at 27.5% of the federal credit.⁴³⁹ The tax credit functions as a wage subsidy “with the highest subsidies paid to the lowest paid workers”; its purpose is “to make work a more attractive alternative to [traditional] welfare.”⁴⁴⁰ To qualify for either the state or the federal program, earned income must have been less than \$27,413 for a working parent with one child, \$31,152 for a working parent with two or more children, or \$10,380 for a worker without children.⁴⁴¹ The average credit given out, taking into account a combination of the state and federal tax, is \$1,849.⁴⁴²

Child Health Plus is another important program, and “serves uninsured, low-income children not eligible for Medicaid. In October 2000, approximately 530,000 children were enrolled in the program.”⁴⁴³ New York also has an adult plan called Family Health Plus, similar to Child Health Plus, available to low income New Yorkers who are not eligible for Medicaid.⁴⁴⁴ Single adults with or without children, couples without children, and couples with children that meet certain limited income requirements are eligible for the program.⁴⁴⁵

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ See http://www.health.state.ny.us/nysdoh/fhplus/what_is_fhp.htm.

⁴⁴⁵ See http://www.health.state.ny.us/nysdoh/fhplus/who_can_join.htm.

The availability of these support programs to same-sex couples is uncertain, though there is evidence that same-sex couples are often, and should be able, to take advantage of them.⁴⁴⁶

K. RIGHTS AND DUTIES UPON THE INCAPACITY OF A SPOUSE

1. Right to Medical Information or Medical Status

A patient's right to gain access to his or her medical information and medical status, as well as the right to protection of that information from unwarranted use or disclosure to third parties, are products of both federal and state law.⁴⁴⁷ The Health Insurance Portability and Accountability Act of 1996 ("HIPAA") prohibits health care providers from releasing a patient's confidential medical information to third parties except under very limited circumstances.⁴⁴⁸ Regulations promulgated under HIPAA include safeguards to protect the security and confidentiality of medical information.⁴⁴⁹ The New York Public Health Law⁴⁵⁰ governing the privacy of a patient's confidential medical information is more stringent than HIPAA. Although under the federal law, a health care provider may send confidential information without the patient's consent to another provider for purposes relating to "treatment, payment or healthcare operations,"⁴⁵¹ New York law permits a health care provider to disclose such records

⁴⁴⁶ The Pataki Administration has expressed the desire to make these programs as inclusive as possible with respect to same-sex couples. Telephone Interview with Ross Levi, Director of Public Policy and Governmental Affairs, Empire State Pride Agenda (Oct. 26, 2004).

⁴⁴⁷ See Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, Aug. 21, 1996, 110 Stat. 1936 (1996); N.Y. PUB. HEALTH LAW § 18 (New York State law regulating access to patient information).

⁴⁴⁸ See Pub. L. No. 104-191, 110 Stat. 1936 (1996).

⁴⁴⁹ See 45 C.F.R. § 164 (2004).

⁴⁵⁰ See N.Y. PUB. HEALTH LAW § 18 (New York State law regulating access to patient information).

⁴⁵¹ See 45 C.F.R. § 164.506(A), 164.501 (2004).

only with the patient's consent.⁴⁵² State law prevails over federal law where the two conflict.⁴⁵³ New York State law also provides for separate disclosure requirements for HIV and AIDS-related medical information.⁴⁵⁴

HIPAA privacy rules permit the disclosure of patient health information in certain situations. If the patient has the capacity to make health care decisions and is present or available prior to or at the time of the disclosure, the HIPAA Privacy Rule⁴⁵⁵ specifically permits covered entities⁴⁵⁶ to share a patient's "protected health information"

⁴⁵² See N.Y. PUB. HEALTH LAW § 17.

⁴⁵³ See Ronald J. Levine, Anne Maltz and Rachel C. Engelstein, *The Evolving Protections of HIPAA Regulations*, N.Y.L.J., Aug. 30, 2004, at 9 (citing *Nat'l Abortion Fedn. v. Ashcroft*, 2004 U.S. Dist LEXIS 4530 (S.D.N.Y. 2004) (finding New York healthcare privacy statute to be more stringent than HIPAA requirements due to New York's patient consent requirement for disclosure). New York State provisions are more stringent (and thus will prevail) than HIPAA's standards in several additional respects. N.Y. PUB. HEALTH L. LAW § 17 will prevail with respect to the prohibition of disclosure of medical information concerning the "treatment of an infant patient for venereal disease or the performance of an abortion operation upon such infant patient" because HIPAA contains no such prohibition, but leaves it up to the states to so legislate. Moreover, N.Y. PUB. HEALTH LAW § 18 will prevail with respect to psychotherapy notes, because the State's statute contains no exception for notes, while HIPAA carves out an exception. See 45 C.F.R. 164.524(a)(1)(i), 164.501. New York also goes beyond the "floor" mandated by HIPAA concerning the disclosure of medical information to parents relating to a minor: If a parent requests information concerning a child over 12 years old, the practitioner may notify the child and if the child objects to disclosure, may deny the request, a provision that is more strict than HIPAA. See N.Y. PUB. HEALTH LAW § 18(3)(c); 54 C.F.R. § 164.502(g)(3)(ii)(A). In addition, under HIPAA, a covered entity must provide an individual with the requested protected health information within 30 to 60 days (with a possible 30 day extension), whereas under New York law, a provider must provide a copy or permit inspection within 10 days of the request; because the New York law is more stringent, it prevails over HIPAA. See N.Y. PUB. HEALTH LAW § 18(2)(a),(d),(g); 45 C.F.R. § 164.524(d)(4).

⁴⁵⁴ N.Y. PUB. HEALTH LAW §§ 2780, 2782.

Confidential HIV related information" means any information, in the possession of a person who provides one or more health or social services or who obtains the information pursuant to a release of confidential HIV related information, concerning whether an individual has been the subject of an HIV related test, or has HIV infection, HIV related illness or AIDS, or information which identifies or reasonably could identify an individual as having one or more of such conditions, including information pertaining to such individual's contacts.

N.Y. PUB. HEALTH LAW § 2780(7). A person who obtains confidential HIV related information in the course of providing any health or social service or pursuant to a release of confidential HIV related information may not disclose or be compelled to disclose such information, except under specific circumstances detailed in section 2782, N N.Y. PUB HEALTH LAW § 2782(1).

⁴⁵⁵ 45 C.F.R. § 164.510(b) (2004).

⁴⁵⁶ This report will use the terms "hospital" or "doctor," although the correct reference under the statute is to a "covered entity." See 45 C.F.R. § 164.104 (2004) (covered entities include: a health plan, a

(“PHI”) with a spouse, family member, friend or other person identified by the patient who is involved directly in the patient’s care or payment for health care⁴⁵⁷ so long as the patient consents or, given a meaningful opportunity to do so, does not object to the disclosure.⁴⁵⁸ If the patient is not present, or emergency circumstances or the patient’s incapacity make it impracticable for the doctor (or, more correctly, the covered entity) to talk with the patient about her care or payment for care, the doctor may share this information with a family member or other person, when, in exercising his or her professional judgment, the doctor determines that doing so would be in the best interest of the patient.⁴⁵⁹ Otherwise, if an unauthorized person asks about a patient by name, a doctor or hospital is permitted to disclose only the patient’s location in the facility and a general description of the patient’s condition.⁴⁶⁰

The penalties under HIPAA for unauthorized disclosure of PHI to another person are steep: both individuals and entities may be fined up to \$50,000 and/or imprisoned for up to one year *for each unauthorized disclosure*; or fined up to \$100,000 and/or imprisoned up to five years, likewise for each unauthorized disclosure, if the offense is committed under false pretenses; and fined up to \$250,000, imprisoned up to

health care clearinghouse, and a health care provider who transmits any health information in electronic form in connection with a transaction covered by this chapter).

⁴⁵⁷ 45 C.F.R. § 164.510(b).

⁴⁵⁸ See 45 C.F.R. § 164.510(b).

⁴⁵⁹ See 45 C.F.R. § 164.510(b). The regulations provide no further guidance as to how a doctor (“covered entity”) should make any of these assessments. For further discussion of this issue, see *infra* notes 466-467 and accompanying text.

⁴⁶⁰ See 45 C.F.R. § 164.510(a).

10 years, or both, if the offense is committed with intent to sell, transfer, or use PHI for commercial advantage or personal gain or with the intent to cause malicious harm.⁴⁶¹

HIPAA privacy regulations require covered entities to use their “professional judgment” before releasing confidential patient information in situations where a patient is unable to consent to the release of such information. This aspect of the HIPAA regulations presents a problem for individuals in same-sex relationships (or other unmarried couples) because it permits health care providers to exercise discretion when the patient is not capable of consent. Indeed, because there are stiff penalties for violating the privacy regulations, there is added incentive for covered entities not to disclose patient information to parties who are outside the traditional (*i.e.*, pre-HIPAA) categories of persons “appropriately” interested in a patient’s care: his or her spouse, parents, and children.

Because same-sex relationships do not have the same legal status as marriage, and because substantial documentation that may not be available in a medical emergency⁴⁶² it may be necessary for a same-sex partner to prove that his or her interest

⁴⁶¹ See 42 U.S.C. § 1320d-6 (2004). New York State does not currently provide penalties for the unauthorized release of protected health information, although at least one New York court has allowed a common law right of action following such a disclosure. See Jackie Huchenski and Linda Abdel-Malek, *HIPAA’s Lack of Private Right to Sue Not a Total Bar*, National Law J., (June 19, 2000), available at <http://www.healthlawtoday.com/hipaa/files/righttosue.htm> (noting that “some states [although not New York] allow patients who have been harmed by unauthorized disclosures of their health care information the right to recover damages in a civil proceeding pursuant to state statutes,” and citing *Jane Joe v. Community Health-Plan Kaiser Corp.*, 2000 N.Y. App. Div. LEXIS 5498 (3d Dep’t May 11, 2000)).

⁴⁶² Such documentation may include proof of domestic partnership, a health care proxy, a will, or other such documents. See *infra* Section I.K.2.a for further discussion of these documents. By contrast, a married spouse need only orally assert this or her relationship with the patient without further proof be acknowledged and treated as the patient’s spouse. As one commentator notes, hospitals may restrict visitation rights to immediate family members only, and exclude same-sex partners from this definition. See Cynthia J. Sgalla McClure, Note, *A Case for Same-Sex Marriage: A Look at Changes Around the Globe and in the United States, Including Baker V. Vermont*, 29 CAP. U. L. REV. 783, 786 (2002) (“McClure”). This should not, however, occur at hospitals regulated by the New York City Health and Hospitals Corporation. Executive Order No. 48: Domestic Partnership Registration Program. The City of

in a patient's condition and care is no less "appropriate" than that of a spouse, health care providers may well withhold important medical information from the same-sex partner in an exercise of "professional judgment."

In addition, HIPAA requires that where a state's privacy standards are more stringent, the state's standards must be followed. HIPAA's "reasonable judgment" standard provides physicians and other covered entities the ability to recognize relationships outside marriage. To the extent that New York law does not permit this relative flexibility, the New York rule governs.

Although this exclusion may not occur with regularity, the following example occurred in New York City in 2004:

Martha, an attorney and educator, and her partner Luisa, Ph.D. college lecturer, were enjoying a rare night out at a restaurant when Luisa grew increasingly dizzy and ultimately passed out. Luisa could not remain conscious and an ambulance was called. On the way to the hospital, Martha phoned Luisa's adult son, David, with whom they have a close relationship, and he later met them at the hospital. Although Martha and Luisa had executed numerous legal documents to create proof of their relationship, they were at home in New Jersey, where Martha did not return for a number of days because of Luisa's precarious health condition. Despite David's repeated insistence that the health care providers treat Martha as the primary contact and a shared decision maker, they repeatedly refused to share information with her and to involve her in decisions that had to be made for Luisa. Were it not for David's strong relationship with his mother and Martha, Martha would have been shut out completely.⁴⁶³

New York, Office of the Major, Jan. 7, 1993 (providing a domestic partnership registry to offer proof of relationship).

⁴⁶³ This anecdotal story was presented to the Committee; the names have been changed to protect confidentiality.

2. Decision Making Powers upon a Partner's Physical Incapacity

a. Health Care Proxies

The regulations promulgated under HIPAA and New York State law also permit a person to designate another individual to make health care decisions in the event of physical incapacity by executing a health care proxy.⁴⁶⁴ Along similar lines, under New York State law,⁴⁶⁵ the individual may execute an express, binding direction that he or she not be resuscitated in the event of a cardiac or respiratory arrest.⁴⁶⁶ The health care agent (the term used in New York)⁴⁶⁷ also may gain access to the principal's medical record, but only when the agent is authorized to act.⁴⁶⁸ There is no cost associated with appointing a health care agent. New York law authorizes an appointed health care proxy to act in the event of the appointing person's incapacity.⁴⁶⁹ New York law also authorizes an unappointed individual to act in limited circumstances but that authority is limited to decisions regarding cardiopulmonary resuscitation.⁴⁷⁰ In this instance, the individual has access to the patient's medical records.⁴⁷¹

⁴⁶⁴ See 45 C.F.R. § 164.502(g); N.Y. PUB. HEALTH LAW §§ 2960-2979.

⁴⁶⁵ N.Y. PUB. HEALTH LAW §§ 2981, 2982(3).

⁴⁶⁶ See N.Y. PUB. HEALTH LAW § 2981 (setting forth requirements for appointment of a health care agent or proxy); N.Y. PUB. HEALTH LAW § 2963 (describing requirements for determination of capacity to make a decision regarding resuscitation); and N.Y. PUB. HEALTH LAW § 2965 (describing requirements for surrogate decision-making regarding resuscitation).

⁴⁶⁷ New York uses the terminology "Health Care Proxy" instead of "Health Care Power of Attorney." A person in whose favor a proxy is executed is designated the "health care agent" of the individual signing the proxy. See William T. Graham, *Estate Planning Basics: The Health Care Proxy*, New York State Office for the Aging Web site, available at, <http://aging.state.ny.us/news/letter/an000502.htm>. See also Article 29-C Health Care Agents and Proxies, N.Y. PUB. HEALTH LAW § 2980 *et seq.*

⁴⁶⁸ N.Y. PUB. HEALTH LAW § 2981.

⁴⁶⁹ N.Y. PUB. HEALTH LAW § 2982(3).

⁴⁷⁰ N.Y. PUB. HEALTH LAW §§ 2965, 2966, 2967.

⁴⁷¹ N.Y. PUB. HEALTH LAW § 2965(3)(b).

Although relatively few people appoint health care agents,⁴⁷² they are becoming more prevalent because of (1) the specific statutory authorization of (and public policy favoring) health care proxies in New York and an increasing number of other states, and (2) the simplicity of the proxy itself, as well as the process by which a proxy may be executed. A lawyer is not required for the preparation and execution of a health care proxy; a sample form is posted on the Web site of the New York State Department of Health: The only formality associated with execution of the proxy is the requirement that it contain the signatures of two witnesses, 18 years of age or older, who are not the health care agent or an alternate (designated to succeed the health care agent if he or she is unable to serve).⁴⁷³ The appointed individual does not have to be a spouse or family member, and if an agent is designated, the health care decisions made by the agent do not have to be made in consultation with family members.⁴⁷⁴

⁴⁷² Experts estimate that only 2% - 25% of people have prepared advance directives. *See End-of-life Issues and Care: Terminology, Definitions, and Other Barriers to Communication*, available at <http://www.apa.org/pi/eol/terminology.html>; Barbara B. Ott, *Advance Directives: The Emerging Body of Research*, J. OF CRITICAL CARE, Jan. 1999, available at <http://www.aacn.org/AACN/jrnlajcc.nsf/GetArticle/ArticleEight81?OpenDocument>; University of Minnesota's Center for Bioethics Web site, available at http://www.bioethics.umn.edu/resources/topics/advance_directives.shtml. (noting that "some estimates say that fewer than 5% of people over 65 have advance directives"); Anita Rosen and John O'Neill, *Social Work Roles and Opportunities in Advanced Directives and Health Care Decision-Making*, March 1998 available at, <http://www.socialworkers.org/practice/aging/advdirct.asp>. (stating that, according to a 1995 U.S. General Accounting Office report "only 10 percent to 25 percent of Americans have documented their end-of-life choices or selected a health care agent to make decisions on their behalf").

⁴⁷³ *See* N.Y. PUB. HEALTH LAW § 2981(2) (witness requirement); N.Y. PUB. HEALTH LAW § 2981 (setting forth requirements for appointment of a health care agent or proxy) setting forth requirements for appointment of a health care agent or proxy). *See also* <http://www.health.state.ny.us/nysdoh/hospital/healthcareproxy/intro.htm> (includes link to form with instructions, and information about Health Care Proxies in English, Russian, Chinese and Spanish). New York Public Health Law Section 2981 lists the contents and form of a health care proxy. *See* N.Y. PUB. HEALTH LAW §2981(5). Although the same section also provides a form, a proxy does not have to use that form in order to be effective under New York law. *See* N.Y. PUB. HEALTH LAW §2981(5)(d) (suggested form).

⁴⁷⁴ *See In re Balich*, No. 10487/03, 2003 N.Y. Misc. LEXIS 879 (Sup. Ct. Suffolk County July 10, 2003). Some couples designate someone other than their spouse as their proxy, choosing instead an adult child or another trusted individual.

Although it is important for all couples to execute health care proxies, it is particularly important for same-sex couples to execute them: In addition to providing the benefit of having health care decisions executed in accordance with one's wishes, such proxies also provide evidence of a committed relationship.⁴⁷⁵ Still, even same-sex couples who have executed mutual health care proxies may still have their wishes thwarted by family members or hospital officials, particularly in situations where family members are not supportive of the couple's relationship, hospital officials are uncomfortable with LGBT individuals and their relationships,⁴⁷⁶ or when the proxy is not available in an emergency situation.⁴⁷⁷

This situation was described during a recent symposium on same-sex marriage. Two contributors described very different encounters that occurred during

⁴⁷⁵ Financial planners and attorneys emphasize that lesbian and gay couples have to document their relationship carefully in order to ensure that their rights are protected. See Tami Luhby, *Get a Lawyer – and a Financial Planner*, available at <http://www.newsday.com/business/ny-bzluhby0321,0,3334111.story?coll=ny-business-headlines>; presentations of Erica Bell, Esq., Carol Buehl, Esq., and Judith Turkel, Esq., to the NYSBA Committee, Dec. 15, 2003 and Feb. 11, 2004.

Having copies of documents that evidence a strong relationship can be particularly helpful in hospital situations. See *Hospital Visitation - A Right for All Families: Equality in Action Kit*, available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1013#II>. The Web site suggests that same-sex partners have multiple copies of: a domestic partnership registry, or a civil union certificate, and a healthcare proxy or durable power of attorney statement, because these forms may help medical personnel understand that the same-sex partner plays a significant role in the patient's life and that she or he is family. See *id.*

⁴⁷⁶ See Tami Luhby, *Get a Lawyer – and a Financial Planner*, available at <http://www.newsday.com/business/ny-bzluhby0321,0,3334111.story?coll=ny-business-headlines>.

⁴⁷⁷ A family member, health care provider or other enumerated persons may have an agent removed on the ground that the agent (a) is not readily available, willing and competent to fulfill his or her obligations, or (b) is acting in bad faith. Those same persons may override the agent's decision about health care treatment on the grounds that: (a) the decision was made in bad faith, or (b) the decision is outside the scope of the proxy (*i.e.*, the proxy contained express limitations), or the decision is not in accordance with the principal's wishes or religious and moral beliefs. N.Y. PUB. HEALTH LAW §§ 2982, 2992. If the principal's wishes regarding the administration of artificial nutrition and hydration are not reasonably known, and cannot with reasonable diligence be ascertained, the agent shall not have the authority to make decisions regarding these measures. N.Y. PUB. HEALTH LAW § 2982(2).

emergency medical situations.⁴⁷⁸ Their stories demonstrate the potential disparity between the way same-sex partners, on the one hand, and opposite sex non-married couples, on the other, may be treated at hospitals. During the symposium, one contributor recounted how, when her lesbian client, Stacy, accompanied her same-sex partner, Nina, to the hospital, she was stopped at the emergency room door, and would not have been allowed in if she had not had Nina's health care proxy with her.⁴⁷⁹ The contributor explained:

I think about Nina and Stacy, who ultimately became plaintiffs in the Vermont marriage case. Nina had her first child by home birth. Things went very much awry in the middle of the labor and they had to rush her to the hospital. Both her life and the life of her to-be-born baby were hanging in the balance. As they rushed into the door of the hospital and took Nina back into the room where they were going to work to save her life and save the baby's life, they stopped Stacy at the door and asked her if she could produce some paperwork to demonstrate that she had a legal right to be there while her life partner's and child's lives were hanging in the balance. Now Nina and Stacy are actually pretty sophisticated people. They had the knowledge that they needed durable powers of attorney for health care. They had the wherewithal to pay lawyers to draft them. And somehow, even in that moment of crisis, Stacy had the presence of mind to go to the file cabinet, get those papers, and take them with her to the hospital. So she got in the room. But I have to tell you that when they describe that experience, getting in the room won't begin to erase the sting of the assault on the integrity of their family at a time when they were most vulnerable.⁴⁸⁰

A heterosexual contributor noted that he was struck by the contrast between Stacy's experience and his experience in Washington, D.C., about six months prior to the symposium, when he had to go to the emergency room. He described:

⁴⁷⁸ See Transcript, *The Michigan Journal of Gender & Law Presents a Symposium Marriage Law: Obsolete or Cutting Edge?*, 10 MICH. J. GENDER & L. 21, 72-73, 95 (2003).

⁴⁷⁹ *Id.* at 72-73.

⁴⁸⁰ *See id.*

My fiancée was with me, but she had no power of attorney allowing her to play a role in my health care, nor any other legal relationship to me at that time. It didn't matter. She wasn't questioned at all! The point is that it wasn't just the law that led to Stacy's presence being questioned. The hospital authorities weren't just enforcing legal rights. Rather they had a mindset created by social structure and history, which, when a same-sex person wanted to be with her partner said, "You are not welcome here." When in my case it was an opposite sex partner who wanted to be with the patient it didn't matter that she had no legal relationship to me. The health care provider's view was, "Come on in. Tell us what you think! Be there. He needs you!"

b. Section 2965 of the Public Health Law

Section 2965 of the New York Public Health Law, which governs surrogate decision-making, provides the order of priority for persons who have the authority to act as a surrogate on a patient's behalf in the event that a health care proxy is not in place.⁴⁸¹ This list includes, in order of priority: (i) a committee of the person or a guardian appointed pursuant to article seventeen-A of the surrogate's court procedure act; (ii) the spouse; (iii) a son or daughter eighteen years of age or older; (iv) a parent; (v) a brother or sister eighteen years of age or older; and (vi) a close friend.⁴⁸²

Unlike a married spouse, absent an express consent granting a same-sex partner this authority, the partner's decision-making authority is subordinated to the wishes of his or her partner's family. When a surrogate or health care agent is not available, the statutory order of priority favors an available family member (regardless of the family member's actual contact with or relationship with the patient) rather than a "close friend."⁴⁸³ The length of the partnership and the relationship that the physically

⁴⁸¹ See N.Y. PUB. HEALTH LAW § 2965(2)(a).

⁴⁸² See *id.* § 2965 (2)(a)(i)-(vi).

⁴⁸³ See *id.*; see also N.Y. PUB. HEALTH LAW § 2961(22) (defining "surrogate list" as the list of individuals set forth in Section 2965(2) who are competent to act on behalf of the patient regarding a do not resuscitate order); N.Y. PUB. HEALTH LAW § 2963(3) (describing concurring determination of capacity to

incapacitated person may have with the enumerated individuals who have priority over the partner (or “close friend”) are not taken into consideration.⁴⁸⁴ The order of priority has a serious impact on same-sex couples, as family members may object to the appointment of life partners as surrogates.⁴⁸⁵

3. Decision Making Powers upon a Partner’s Mental Incapacity

When an adult is declared mentally incapacitated, the authority to make decisions on behalf of the incapacitated individual does not vest automatically in any individual, including one’s spouse or family members.⁴⁸⁶ Rather, under the provisions of Article 81 of the New York Mental Hygiene Law, the appointment of a guardian under such circumstances is made by court order.⁴⁸⁷ Several groups of people are entitled to notice of a guardianship proceeding, some of which include categories into which same-sex partners could fall.⁴⁸⁸ These include: the person or persons with whom the individual

make a decision regarding resuscitation); and N.Y. PUB. HEALTH LAW § 2981(3)(d) (setting forth restrictions on who may be a health care agent and limitations on a health care agent, and providing that a person is who not the spouse, child, parent, brother, sister or grandparent of the principal, or who is not the issue of, or married to, such person cannot be appointed as a health care agent if he or she is presently the health care agent for ten principals).

⁴⁸⁴ One practitioner notes that a Health Care Proxy is “absolutely crucial for unmarried partners to have for each other.” See Erica Bell, *Special Issues in Estate Planning for Non-marital Couples and Non-traditional Families*, 319 PLI/EST 1187, 1206 (2002) (“Bell”).

⁴⁸⁵ See Edward A. Adams, *New Law on Medical Treatment Decisions Urged by Task Force*, N.Y.L.J. 1 (col. 1) (Mar. 24, 1992) (quoting Paula Ettelbrick, former Acting Director of Lambda Legal Defense and Education Fund, Inc., in her 1986 testimony before a New York State Task Force convened to study medical treatment decisions). Ms. Ettelbrick further noted that relegating same-sex partners as last in priority “does not recognize their status as spousal equivalents.” *Id.*

⁴⁸⁶ See N.Y. MENTAL HYG. LAW § 81.19 (listing eligibility requirements for the appointment of a guardian).

⁴⁸⁷ See N.Y. MENTAL HYG. LAW § 81.11(a) (noting that “a determination that the appointment of a guardian is necessary for a person alleged to be incapacitated shall be made only after a hearing”); see also N.Y. MENTAL HYG. LAW §§ 81.01 *et seq.* (addressing proceedings for appointment of a guardian for personal needs or property management); N.Y. SURR. CT. PROCS. ACT §§ 1750 *et seq.* (addressing guardians of mentally retarded and developmentally disabled persons).

⁴⁸⁸ See N.Y. MENTAL HYG. LAW § 81.07.

alleged to be incapacitated resides and, if known to the petitioner (*i.e.*, the individual who seeks to establish a guardianship), any person who has demonstrated a genuine interest in promoting the best interests of the person alleged to be incapacitated, such as by having a personal relationship with the person, regularly visiting the person, or regularly communicating with the person.⁴⁸⁹

The statute was revised in 2004 to include those categories specifically to ensure notice to people who actually have knowledge of the capacity of the alleged incapacitated person.⁴⁹⁰ The purpose of the revision was to avoid the situation, possible under an earlier version of the statute, where relatives were entitled to notice regardless of their geographical proximity to the alleged incompetent or their actual interest in his or her life or welfare; at the same time, individuals who were not in the aforementioned categories, but who had actual knowledge of the alleged incompetent's situation and were interested in his or her welfare, were not entitled to notice.⁴⁹¹

In appointing a guardian for a person deemed incapacitated, a New York court first must consider whether the incapacitated person has nominated someone to act as his or her guardian.⁴⁹² The court is required to appoint the person named as guardian unless the nominee is unfit or the person alleged to be incapacitated no longer wishes the nominee appointed.⁴⁹³ At the guardianship hearing, even in the absence of a prior written

⁴⁸⁹ See N.Y. MENTAL HYG. LAW § 81.07 (d)(1)(ii) (person(s) with whom alleged incapacitated person resides); § 81.07 (d)(1)(v) (person that has demonstrated a genuine interest in promoting the best interests of the person alleged to be incapacitated).

⁴⁹⁰ See *Law Revision Commission Comments*, N.Y. MENTAL HYG. LAW § 81.07.

⁴⁹¹ See *id.*

⁴⁹² See N.Y. MENTAL HYG. LAW § 81.17.

⁴⁹³ See N.Y. MENTAL HYG. LAW § 81.19(b).

guardianship authorization, the alleged incapacitated person may nominate a person to serve as guardian, and the court will honor that choice unless it “determines for good cause that such appointment is not appropriate.”⁴⁹⁴

The Mental Health Law gives a court great flexibility in appointing a guardian.⁴⁹⁵ The court must consider the specific circumstances in appointing a guardian, including “the social relationship between the incapacitated person and the person, if any, proposed as guardian.”⁴⁹⁶ The statute does not prioritize the appointment of family members; in practice, however, in the absence of any nomination by the alleged incapacitated person, courts generally give preference to his or her family members,⁴⁹⁷ rather than to a friend or even a (same-sex) partner.⁴⁹⁸ Further, in situations where family members are not appropriate appointments, the court must explain its reasons for not choosing a family member.⁴⁹⁹ Although the most important factor is the court’s

⁴⁹⁴ See N.Y. MENTAL HYG. LAW § 81.19(c).

⁴⁹⁵ See generally N.Y. MENTAL HYG. LAW § 81.19 (governing the eligibility requirements of guardians); the statute provides no fixed order of preference in the appointment of guardians.

⁴⁹⁶ N.Y. MENTAL HYG. LAW § 81.19(d)(2).

⁴⁹⁷ See *In re Robinson*, 709 N.Y.S.2d 170 (1st Dep’t 2000) (finding that the appointment of the court evaluator as guardian for property management instead of adult children was an abuse of discretion and dismissing the lower court’s concerns that one son resided in England and the children did not have experience handling large sums of money); *In re Application of Eichner*, 423 N.Y.S.2d 580, 588 (Sup. Ct. Nassau County 1979) (noting policy of state to give preference to family members), *modified on other grounds*, 426 N.Y.S.2d 517, *modified on other grounds*, 438 N.Y.S.2d 266 (1982); see also Mary Rose Bailly, *Supplementary Practice Commentaries*, N.Y. MENTAL HYG. LAW § 81.19 (noting preference given to family members).

⁴⁹⁸ New York State recognizes three categories of persons who may seek custody or visitation with children: parents, siblings, and grandparents. N.Y. DOM. REL. LAW §§ 70, 71, 72, and 240. The N.Y. Court of Appeals has made clear that all others are legal strangers, who have no standing to pursue custody or visitation. See, e.g., *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991) (declining to expand definition of parent to include biological mother’s same-sex partner).

⁴⁹⁹ See Rose Mary Bailly, *Practice Commentary*, N.Y. MENTAL HYG. LAW § 81.19 (noting same and citing *Matter of Pasner*, 627 N.Y.S.2d 966 (2d Dep’t 1995)); *In re Naquan S.*, No. 100130/02, 2003 N.Y. App. Div. LEXIS 13080, at *2 (2d Dep’t Dec. 8, 2003) (finding improvident exercise of discretion in appointing stranger since New York case law “has firmly established that a stranger will not be appointed

perception of “what the best interests and welfare of the incompetent require,” because family members and the wishes of family members are given priority, same-sex partners may, in the absence of an express appointment, find themselves excluded from consideration as a partner’s guardian.⁵⁰⁰

The nomination of a guardian under Article 81 of the New York Mental Hygiene law often is unnecessary if the partner has power of attorney and a Health Care Proxy.⁵⁰¹ However, if one partner becomes incapacitated to the point that appointment of a guardian is necessary, nomination of a guardian in advance (or even in court) might serve to overcome the court’s presumption that its best or only recourse is appointing a family member.⁵⁰²

4. Right to Gain Access to a Hospitalized Partner

Unlike the spouse or immediate family of a patient, the right to visitation by one’s partner is not guaranteed in all states. In 2004, New York State enacted legislation prohibiting the denial of hospital visitation rights to domestic partners when such rights are accorded to spouses and other kin.⁵⁰³ Further, all New York patients have the right “to have private communications and consultations with [their] physician,

as guardian of an incapacitated person “unless it is impossible to find within the family circle, or their nominees, one who is qualified to serve”) (citations omitted).

⁵⁰⁰ See *In re Eichner*, 423 N.Y.S.2d at 588 (noting best interests standard). According to one practitioner, “a court’s typical predisposition toward appointment of blood relatives [is likely to prevail] even where the incapacitated person has a committed domestic partner of many years.” See Bell, *supra* note 484, at 1207.

⁵⁰¹ See *id.*

⁵⁰² See *id.*

⁵⁰³ 2004 N.Y. Laws ch. 571.

attorney, and any other person,”⁵⁰⁴ which would include a same-sex partner. Patients also “have the right to authorize those family members and other adults who will be given priority to visit” consistent with the patient’s ability to receive visitors.⁵⁰⁵ Similarly, the “other adults” category should include a patient’s partner]. Prior to the codification of this law, persons registered as domestic partners in New York City were specifically entitled by law to visit partners hospitalized in facilities operated by the New York City Health and Hospitals Corporation.⁵⁰⁶

These provisions do not offer immediate assistance when an individual is incapacitated and cannot express that his or her partner should have visitation priority. Same-sex partners in this situation are subject to the individual policies and practices of the hospital in which their partner is being treated in a way that married spouses are not. Same-sex partners can take steps to safeguard visitation rights; for example, they can designate their partner as their health care agent and specify in their Health Care Proxy

⁵⁰⁴ See N.Y. PUB. HEALTH LAW § 2803-c(3)(b) (right to private communications); see N.Y. PUB. HEALTH LAW § 2803-c (noting that the principles enumerated in section three are the public policy of the state and requiring that a written copy of rights and responsibilities be conspicuously posted in each facility covered under Public Health Law section 2801).

⁵⁰⁵ See N.Y. PUB. HEALTH LAW § 2803-c(3)(o) (right to visitors).

⁵⁰⁶ See 3 N.Y.C. ADMIN. CODE § 3-244(c) (2003) (discussing certificate of domestic partnership registration and benefits of same: “Such a certificate shall constitute notice of a registered domestic partnership when persons apply for rights or benefits available to domestic partners, including but not limited to: . . . c. Visitation in facilities operated by the New York City health and hospitals corporation”); see also 51 N.Y.C.R.R. §§ 4-01 to 4-04 (rules and regulations governing domestic partnership registration).

The New York City Health and Hospitals Corporation (HHC) was created by legislation in 1970 to oversee the City’s public health care system in all five boroughs. See *New York City Health and Hospitals Corporation Web site, Frequently Asked Questions page, available at* <http://www.ci.nyc.ny.us/html/hhc/html/faq.html>. It consists of 11 acute care hospitals, six Diagnostic and Treatment Centers, four long-term care facilities, a certified home health care agency, and more than 100 community health clinics, including Communicare Centers, Child Health Clinics and Oral Health Clinics. HHC facilities treat nearly one-fifth of all general hospital discharges and more than one third of emergency room and hospital-based clinic visits in New York City. See *id.*

that their health care agent has the right to be treated as immediate family for purposes of restricted visitation facilities (*e.g.*, intensive care units).⁵⁰⁷

5. Experiences in a Medical Setting

In emergency or incapacity situations, a same-sex partner could be excluded from both visiting and medical decision making where health care provider involves only legal or blood relatives. For example, “Ted,” an individual interviewed as part of a study of committed same-sex couples, relayed his experience when his partner was hospitalized in a hospital’s ICU following a serious car accident.⁵⁰⁸ Despite the fact that Ted was in a committed relationship with his partner, he had to request permission from his partner’s biological family to visit him in the I.C.U; the family retained complete control over health care decisions throughout the ordeal.⁵⁰⁹ Ted also was a hospital employee, and he contributed his recollection of the situations that some gay couples faced in the hospital where he worked:

I’ve seen horror stories beyond people’s wildest imaginations. One couple, both with AIDS, as one started deteriorating in health and needed 24-hour care in a nursing home, the family took him away from his partner, put him in a nursing home at an undisclosed location, wouldn’t even tell him when he died. I’ve seen bank accounts frozen within hours after death. I’ve seen wills not followed⁵¹⁰

Heather McDonnell (“Heather”) and Carol Snyder (“Carol”), plaintiffs challenging New York State’s prohibition on same-sex marriage, describe two instances

⁵⁰⁷ See Bell, *supra* note 484, at 1206.

⁵⁰⁸ See Kathleen E. Hull, *The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-Sex Marriage*, 28 LAW & SOC. INQUIRY 629, 636 (2003). Note that “Ted” is a pseudonym and that other potentially identifying information, such as occupation, has been altered as necessary to protect confidentiality. See *id.* at 636 n.7.

⁵⁰⁹ See *id.* at 636.

⁵¹⁰ See *id.*

of discrimination that took place in the hospital during their 14-year partnership.⁵¹¹ The first involved the treatment of Heather when Carol was diagnosed with breast cancer.

When that occurred, Heather had to fight to be a part of Carol's care at the hospital. They purposefully sought a surgeon who understood the significance of committed same-sex relationships. However, the nurses and other hospital staff were constantly challenging Heather. They frequently demanded to know who she was, saying things like: "Who are you? Why are you here? Are you her sister?" Only their doctor seemed to comprehend and respect their relationship.⁵¹²

After this experience, Carol and Heather formally registered as domestic partners and signed health care proxies naming each other as their medical decision-maker in case of physical incapacity.⁵¹³ Even though they had these protections in place, Carol and Heather again faced problems when Carol was subsequently hospitalized for a cardiac event.⁵¹⁴ By contrast, married couples tend not to have these experiences upon the incapacity of a spouse.

L. RIGHTS TO ASSETS OF THE DECEASED SPOUSE

When a married person dies and leaves a surviving spouse, New York law provides certain protections for the surviving spouse. If the decedent dies without a will, the law of intestate distribution creates a vested interest in the surviving spouse in some or all of the assets of the decedent's estate. If the decedent leaves a will, the statutory

⁵¹¹ See American Civil Liberties Union Foundation Web site with link to complaint, *Sylvia Samuels, et al. v. New York State Department of Health*, ¶ 23, available at <http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=15440&c=101>. Plaintiffs seek a declaratory judgment that the states not permitting same-sex couples to marry violates the state constitution.

⁵¹² See *id.*

⁵¹³ See *id.* ¶ 24.

⁵¹⁴ See *id.* ¶ 25. Despite their legal domestic partnership and the health care proxy, the hospital again did not recognize Heather's role as family and in particular as Carol's partner. At one point, Carol was crashing and the doctor told Heather to keep talking to Carol to soothe her. A nurse came into the room and told Heather, "You can leave." Heather pointed out that she was Carol's health care proxy, and the nurse responded: "Who are you?" See *id.*

right of election protects the interests of the surviving spouse regardless of the terms of the will. In either scenario, New York law recognizes a surviving spouse's automatic right to certain exempt assets intended to fill basic household needs. No comparable protections exist under New York law for the surviving partner in an unmarried relationship.

1. Intestate Distribution

The law of intestate distribution determines how the assets of a deceased person will be distributed in the absence of a valid will and how certain assets or the residuary estate will be disposed of when they are not disposed of by a valid will.⁵¹⁵ Intestate distribution is determined by state law, which generally enumerates the categories of relationships to the deceased person that will have rights in the distribution of the assets in the estate.⁵¹⁶ Under the Estates, Powers, and Trusts Law of the State of New York, the surviving spouse of a decedent has vested rights in any intestate distribution.⁵¹⁷ If the deceased person has no issue, then the surviving spouse receives the entire intestate estate.⁵¹⁸ If the deceased person has issue, then the surviving spouse receives fifty thousand dollars plus one half of the remaining intestate estate.⁵¹⁹

⁵¹⁵ N.Y. EST. POWERS & TRUSTS LAW § 4.

⁵¹⁶ With very few exceptions, state intestacy laws do not include surviving same-sex/unmarried partners in the distribution scheme. *See, e.g.,* E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1999). One rare exception to the general rule of exclusion is California Probate Code § 6401 (2003), which gives a surviving domestic partner the same intestate rights as a surviving spouse. New York follows the general rule and excludes non-marital and non-blood relationships from the intestate distribution scheme. *See* N.Y. EST. POWERS & TRUSTS LAW § 4-1.

⁵¹⁷ N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a).

⁵¹⁸ N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(2).

⁵¹⁹ N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(1).

The surviving partner of an unmarried deceased person receives nothing under the law of intestate distribution in New York. The statutory language does not contemplate unmarried partners.⁵²⁰ Further, the New York Surrogate Court has interpreted the statute to exclude surviving partners in same-sex relationships since a marriage license is necessary for inclusion in the state's intestate distribution scheme.⁵²¹

2. The Spousal Right of Election

Surviving spouses in the State of New York who are excluded in whole or in part from sharing in the distribution of their deceased spouse's estate, may have a statutory right of election against the will of the decedent spouse.⁵²² When the will of a decedent spouse excludes or insufficiently provides for the surviving spouse, and the decedent has not otherwise provided for the surviving spouse by passing assets to him or her outside the probate process, the surviving spouse may exercise the statutory right of election against the will and take the greater of \$50,000 or one-third of the net estate.⁵²³

For right of election purposes, the net estate of the decedent spouse includes certain testamentary substitutes (*e.g.*, property passing by right of survivorship) in addition to devises made in the will and intestate distributions.⁵²⁴ To know whether or not a surviving spouse may validly exercise a right of election, it is necessary to value all

⁵²⁰ N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (including surviving spouses, issue, parents, issue of parents, grandparents, and issue of grandparents in the intestate distribution scheme).

⁵²¹ *In re Petri*, NYC Surrogate Court Dec. No. 4052/91, available at N.Y.L.J., Apr. 4, 1994.

⁵²² See N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (providing a statutory right of election against the will of a deceased spouse who dies on or after September 1, 1992). For application of the statutory right of election against the will of a decedent who died prior to September 1, 1992; see N.Y. EST. POWERS & TRUSTS LAW § 5-1.1.

⁵²³ N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(a)(2). If the capital value of the net estate is less than \$50,000, the surviving spouse may take the entire net estate.

⁵²⁴ N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(b)(2).

testamentary substitutes owned by the decedent at their date of death value.

Testamentary substitutes are defined in detail in EPTL §5-1.1-A(b)(1)(A)-(H), but can be generally described as assets of the decedent placed into a form of ownership between the decedent and another person in such a manner that will have the effect of passing the asset to the surviving owner upon decedent's death. Examples include: joint bank accounts, retirement plans with named beneficiaries, US Savings Bonds held jointly between the decedent and another. Life insurance is not considered a testamentary substituted under the statute.

By following the formulaic calculation of the "net estate" as prescribed by the statute,⁵²⁵ it will become clear whether or not the surviving spouse has, in fact, received her/his requisite \$50,000 plus one-third share. If not, it is the responsibility of the Surrogate in the right of election proceeding, to order that other beneficiaries under the will, intestate distributees, or beneficiaries of certain testamentary substitutes, must ratably contribute to the surviving spouse's elective share.⁵²⁶ That is, each of the non-spousal beneficiaries will contribute a portion of her/his share received to bring the surviving spouse's share up to the elective share amount. The contributions of the non-spousal beneficiaries will be made in the percentage to which their gift or inheritance related to the decedent's entire estate. The right of election is personal to the surviving spouse.⁵²⁷

⁵²⁵ N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(a)(1)-(4).

⁵²⁶ N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(c)(2).

⁵²⁷ N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(c)(3).

By its terms, the statutory right of election only applies in the context of marriage.⁵²⁸ The surviving partner in a same-sex relationship has no right to elect against the deceased partner's will.⁵²⁹ In the one case that has considered this exact question of law, the court held that the plain language of the statute precluded a same-sex partner from exercising the right election, and that no constitutional rights were abrogated by such preclusion.⁵³⁰

3. Exempt Property

When an individual dies leaving a surviving spouse or children under the age of 21, the Estates, Powers, and Trusts Law of New York provides that certain items of property automatically vest in the surviving spouse or dependent children and are not considered assets of the deceased person's estate.⁵³¹ These items are called "set off property."⁵³² The items of property covered by this right of exemption include household assets, a motor vehicle, and money for funeral expenses.⁵³³ Since such property automatically vests in the surviving spouse or children, dependent spouses and children receive at least some immediate economic support.⁵³⁴

⁵²⁸ N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A(a) (providing a right of election for the "surviving spouse").

⁵²⁹ See *In re Cooper*, 592 N.Y.S.2d. at 797.

⁵³⁰ *Id.* The court found the presence of the terms "husband" and "wife" in the section of the Estates, Powers, and Trusts Law detailing disqualifications as a surviving spouse to be dispositive. See N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a).

⁵³¹ N.Y. EST. POWERS & TRUSTS LAW § 5-3.1.

⁵³² *Id.*

⁵³³ N.Y. EST. POWERS & TRUSTS LAW § 5-3.1(a) (describing the property covered by the right of exemption as including household assets not exceeding an aggregate value of \$10,000, family books, software, and other media not exceeding an aggregate value of \$1,000, farm animals and equipment not exceeding an aggregate value of \$15,000, a motor vehicle or its cash equivalent, and money or property for funeral expenses not exceeding an aggregate value of \$15,000).

⁵³⁴ N.Y. EST. POWERS & TRUSTS LAW § 5-3.1.

An unmarried partner has no access to immediate cash or statutorily exempt property under New York law because he or she is not considered a spouse.⁵³⁵ No case or ruling has directly addressed the right of exemption in the context of a same-sex relationship. However, a court addressing the statutory right of election has interpreted the Estates, Powers, and Trust Law to exclude same-sex partners from the definition of the term “surviving spouse,” thus holding that a surviving partner does not have a right of election against the decedent’s estate.⁵³⁶ Thus, the same interpretation may well apply for purposes of exempt property under EPTL 5-3.1, denying same-sex couples the right of exemption.

M. RIGHT OF A SURVIVING SPOUSE TO OCCUPY RENT-CONTROLLED AND RENT-STABILIZED APARTMENTS

1. Right of a Surviving Spouse to Occupy a Rent-Controlled Apartment

New York City Rent and Evictions Regulations provide that upon the death of a rent-control tenant, the landlord may not dispossess “any member of the tenant’s family” who has resided with the tenant for at least two years.⁵³⁷ Under that regulation, “family member is defined as a husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, or daughter-in-law of the tenant” and as “any other person residing with the tenant in the housing accommodation as a primary residence who can prove emotional and financial

⁵³⁵ N.Y. EST. POWERS & TRUSTS LAW § 5-3.1(a) (providing the right of exemption, unless the individual claiming the right is disqualified as a surviving spouse under N.Y. EST. POWERS & TRUSTS LAW § 5-1.2).

⁵³⁶ *In re Cooper*, 592 N.Y.S.2d at 799.

⁵³⁷ *See* 9 N.Y.C.R.R. 2204.6(d)(1). For similar rent control regulations *outside* New York City, *see* 9 N.Y.C.R.R. 2104.6d)(3)(i).

commitment, and interdependence between such person and the tenant.”⁵³⁸ Thus, under the regulation, individuals who are not related by blood or marriage must offer evidence to prove an emotional and financial commitment and interdependence.⁵³⁹

The statute provides several factors that a court can consider to establish such a relationship.⁵⁴⁰ These include the following:

- (a) longevity of the relationship;
- (b) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;
- (c) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.;
- (d) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;
- (e) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, conferring upon each other a power of attorney and/or authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;
- (f) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their words or actions;

⁵³⁸ See 9 N.Y.C.R.R. 2204.6(d)(3)(i). Note that under the New York City Administrative Code the definition of “family” includes individuals “who are parties to a domestic partnership.” See 27 N.Y.C. ADMIN. CODE § 27-232 (2003); 3 N.Y.C. ADMIN. CODE § 3-244(a) (2004) (discussing certificate of domestic partnership registration and benefits of same); 51 N.Y.C.R.R. §§ 4-01–4-04 (2003) (rules and regulations governing domestic partnership registration). Registered domestic partners also are eligible to qualify as a family member entitled to succeed to the tenancy or occupancy rights of a tenant or cooperator in buildings supervised by or under the jurisdiction of the Department of Housing Preservation and Development. See 3 N.Y.C. ADMIN. CODE § 3-244(e) (2003).

⁵³⁹ See 9 N.Y.C.R.R. 2204.6(d)(3)(i).

⁵⁴⁰ See *id.*

- (g) regularly performing family functions, such as caring for each other or each other’s extended family members, and/or relying upon each other for daily family services; and
- (h) engaging in any other pattern of behavior, agreement, or other action which evidences the intention of creating a long-term, emotionally committed relationship.⁵⁴¹

A surviving spouse, by contrast, does not have to present evidence as to any of these factors.⁵⁴² Marital status in itself is sufficient to grant the survivor the right to occupy the rent-controlled apartment.⁵⁴³

Under an earlier version of the statute, the Court of Appeals, in reviewing the purpose of the regulation, held that the surviving partner in a same-sex relationship, after a review of the parties’ relationship, may be a qualified “family” member.⁵⁴⁴ The court held that in the context of eviction, a view of family that takes into account the reality that non-traditional family structures exist and may include “two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence.”⁵⁴⁵

2. Right of a Surviving Spouse to Occupy a Rent-Stabilized Apartment

As is the case with rent-controlled apartments, nonmarried survivors in a committed relationship are allowed to remain in a rent-stabilized apartment, but they must first make a showing of the factors first enumerated in *Braschi*. A surviving spouse does not need to show these factors; the fact that two persons were legally married will suffice.

⁵⁴¹ See *id.*

⁵⁴² See *id.*

⁵⁴³ See *id.*

⁵⁴⁴ See *Braschi*, 74 N.Y.2d 201.

⁵⁴⁵ See *id.* at 211.

Shortly after the *Braschi* case, two New York courts ruled that, although the Court of Appeals had limited its holding to rent-*controlled* apartments, there was “no logical reason to limit *Braschi* to rent-controlled apartments”⁵⁴⁶ and that “[a]lthough the Rent Stabilization Code, unlike the rent control laws, specifically defined ‘family’ [] it would be anomalous to hold that a life partner could be a valid family member for the purpose of protection from eviction from a rent-controlled apartment but not a valid family member insofar as eviction from a rent-stabilized apartment is concerned, since the two regulatory schemes share similar purposes, viz. to prevent oppressive rents, hardship and dislocation.”⁵⁴⁷ A few months after the Court of Appeals handed down the *Braschi* decision, the New York State Department of Housing and Community Renewal (DHCR) also amended the Rent Stabilization Code so as to enlarge the definition of family beyond blood or marriage to include the “*Braschi* factors”⁵⁴⁸

⁵⁴⁶ *In re Eggena v. Stassman*, N.Y.L.J., May 23, 1990 (Civ. Ct., Housing Part 18, 1990) (Zarkin, J) (noting that “while the Legislature has refused to recognize any but heterosexual marriages there has been a trend towards legitimizing these relationships without the benefit of traditional marriage.”). In *Eggena*, the court held that the surviving gay life partner (Allen) of a deceased tenant (Eggena) in a rent-stabilized apartment was the new legal tenant because the couple satisfied the *Braschi* factors. The Court found that “Allen and Eggena did create between themselves, their respective families and their friends a family relationship for all to see. . . . When Eggena was dying it was Allen who tended to him as long as he could.” *Id.*

⁵⁴⁷ *East 10th Str. Assocs. v. Estate of Goldstein*, 552 N.Y.S.2d 257, 259 (1st Dep’t 1990) (holding that it would be arbitrary and capricious to exclude a gay life partner from the definition of “family” under the Rent Stabilization Code, in view of the New York Court of Appeals’ decision in *Braschi* and the close affinity of purpose of the Rent Stabilization Law with the Rent Control Law.); *see also Park Holding Co. v. Power*, 161 A.D.2d 143, 143 (1st Dep’t 1990) (in holdover proceeding, holding that question of fact was presented as to whether gay tenant had a relationship that encompassed *Braschi* factors, should be afforded protection from eviction from rent-stabilized apartment in light of *Braschi* decision).

⁵⁴⁸ *Rent Stabilization Ass’n v. Higgins*, 83 N.Y.2d 156, 167 n.2 (1993) (upholding DHCR regulations amending rent stabilization regulations to include *Braschi* factors; specifically upholding Emergency Tenant Protection Regulations (9 N.Y.C.R.R. 2500.2[n]; 2503.5(d) (rent stabilization outside New York City) and 9 N.Y.C.R.R. 2520.6(o)(2), 2523.5(b), Rent Stabilization Code (rent stabilization within New York City))).

3. Other State and City Regulated Housing

In the wake of *Braschi* and the incorporation of a “functional definition” of family into the New York Rent and Eviction Regulations and the Rent Stabilization Code, the DHCR promulgated similar regulations governing state-regulated Mitchell-Lama cooperatives⁵⁴⁹ and in rem (tax-foreclosed) properties managed or overseen by New York City housing departments.⁵⁵⁰

The Mitchell-Lama program is a statewide program created in 1955 to provide affordable housing for middle-income New York residents.⁵⁵¹ The program includes apartments throughout the State, with more than 120,000 of them located in New York City.⁵⁵² The program works by providing low-interest mortgages and tax breaks to apartment buildings, which in turn must provide affordable housing at below-market rates.⁵⁵³ Under a program instituted by the DHCR in 1991, owners of Mitchell-Lama complexes can pay off their loans and “buy out” of the program and thus charge higher rents, though they are still subject to the Rent Stabilization Laws.⁵⁵⁴

⁵⁴⁹ See 28 N.Y.C.R.R. § 3-02(p); see also *Alfred v. Barrios-Paoli*, 676 N.Y.S.2d 185 (2d Dep’t 1998) (holding that in order “to succeed to the leasehold rights of a Mitchell-Lama apartment, one must satisfy [the “family-member” criteria] and must have resided in the apartment with the former legal tenant for two years immediately prior to the tenant’s permanent vacatur of the apartment”).

⁵⁵⁰ See 28 N.Y.C.R.R. § 24-01.

⁵⁵¹ See New York State Division of Housing and Community Renewal, *Mitchell-Lama Housing Program*, available at <http://www.dchr.state.ny.us/ohm/progs/mitchlam/ohmprgmi.htm>.

⁵⁵² New York City Rent Guidelines Board, *Mitchell-Lama Housing*, available at <http://www.housingnyc.com/resources/Mitchell/Mitchell.html>; see also Independent Budget Office: *Mitchell-Lama: City Seeks to Preserve Housing*, 9 City Law 69 (May/June 2003).

⁵⁵³ New York City Rent Guidelines Board, *Mitchell-Lama Housing*, available at <http://www.housingnyc.com/resources/Mitchell/Mitchell.html>.

⁵⁵⁴ See New York State Division of Housing and Community Renewal, *Mitchell-Lama Housing Program*, available at www.dchr.state.ny.us/ohm/progs/mitchlam/ohmprgmi.htm; see also Independent Budget Office: *Mitchell-Lama: City Seeks to Preserve Housing*, 9 City Law 69 (May/June 2003) (discussing Mitchell-Lama buyouts and noting that they “actually increase revenue for the City by eliminating the need for City subsidies and tax breaks”).

At least one case has ruled that in rem properties managed by the New York City Department of Housing and Preservation are prohibited from discriminating on the basis of marital status.⁵⁵⁵ There, the court ruled that the petitioner, an unmarried heterosexual female, had “a clear statutory right to be considered for in rem housing and to have the determination of her eligibility based on nondiscriminatory factors. Marital status cannot be a factor in the selection.”⁵⁵⁶

N. RIGHT TO CLAIM DECEDENT’S REMAINS AND TO MAKE ANATOMICAL CONTRIBUTIONS

A person has the right to determine and dictate the manner in which his or her body is disposed of after death. Certain categories of individuals have rights with respect to both the burial arrangements and anatomical gifts of others. Surviving next of kin have a right to the immediate possession of the decedent’s body for preservation and burial.⁵⁵⁷ If a person is not legally married to his or her significant other, then the decedent’s relatives have this right.⁵⁵⁸ New York law is, however, silent as to any

⁵⁵⁵ *Johnson v. City of New York*, 578 N.Y.S.2d 977 (Sup. Ct. N.Y. County 1991), *aff’d*, 596 N.Y.S.2d 33 (1st Dep’t 1993).

⁵⁵⁶ *Id.* at 977. See also New York City Department of Housing Preservation and Development, *Useful Information about Housing Rules and Regulations for Owners and Tenants*, April 2004 ed., available at <http://www.nyc.gov/hpd> (noting that “by law, owners may not deny prospective tenants housing because of . . . sexual preference. . . or marital status.”).

⁵⁵⁷ See N.Y. PUB. HEALTH LAW § 4200(1) (“Except in the cases in which a right to dissect it is expressly conferred by law, every body of a deceased person, within this state, shall be decently buried or incinerated within a reasonable time after death.”); see also *Finn’s Estate v. City of New York*, 350 N.Y.S.2d 552, 555 (1st Dep’t 1973) (noting that surviving next of kin have right to immediate possession of decedent’s body for preservation and burial and citing N.Y. PUB. HEALTH LAW § 4200(1)); *Stewart v. Schwartz Brothers-Jeffery Mem’l Chapel, Inc.*, 606 N.Y.S.2d 965, 967 (Sup. Ct. Queens County 1993) (“*Stewart*”) (noting that, in absence of testamentary direction, right to possession of dead body, for purpose of preservation and burial, belongs to surviving spouse or next of kin).

⁵⁵⁸ Same-sex partners may be excluded by their partner’s family when their partner dies. See Michael D. Goldhaber, *All-Gay Law Firms Find their Lifestyle is a Selling Point*, N.Y.L.J. Apr. 21, 2000 at 24, col. 2 (discussing case where a same-sex partner was shunted aside at his partner’s funeral and locked out of the house he had shared with his partner by his partner’s family).

explicit order of priority with respect to burial arrangements.⁵⁵⁹ And, as the New York Supreme Court has stated, “[t]he general rule giving the right to determine the method of disposal of a decedent’s remains to the family is far from being absolute.”⁵⁶⁰

Accordingly, in *Stewart*, although the New York Supreme Court refused to view the same-sex partner of the deceased as the spouse or next-of-kin of the deceased,⁵⁶¹ it did find that the same-sex partner had provided sufficient evidence of the wishes of the deceased to give the surviving partner standing to challenge the funeral and burial plans of the deceased’s mother and brother.⁵⁶² The parties settled their dispute before the court rendered a final decision on that challenge.⁵⁶³

However, the legal spouse of the decedent is given clear priority with respect to anatomical contributions. In fact, New York law provides an order of priority in this arena: (a) the spouse; (b) a son or daughter eighteen years of age or older; (c) either parent; (d) a brother or sister eighteen years of age or older; (e) a guardian of the person of the decedent at the time of his death; and (f) any other person authorized or under the obligation to dispose of the body.⁵⁶⁴ This class of individuals, in the order of priority stated,⁵⁶⁵ also has the authority to challenge a gift where the donor has not properly given written authorization. Thus, the same-sex partner of the decedent would be permitted to make an anatomical contribution of his or her partner only under the “any

⁵⁵⁹ See N.Y. PUB. HEALTH LAW § 4200.

⁵⁶⁰ *Stewart*, 606 N.Y.S.2d at 967.

⁵⁶¹ See *id.* at 967.

⁵⁶² See *id.* at 968-69.

⁵⁶³ See *id.* at 969.

⁵⁶⁴ See N.Y. PUB. HEALTH LAW § 4301(2) (addressing anatomical gifts).

⁵⁶⁵ See N.Y. PUB. HEALTH LAW §§ 4301(2), 4301(3).

other person authorized” and then, only if he or she is authorized under a health care proxy.

O. DOMESTIC VIOLENCE AND ACCESS TO THE COURTS

In cases of domestic violence, a victim’s legal recourse is to obtain an order of protection, which restrains the abuser from committing further acts of violence or threats. New York law states that the Family and Criminal Courts have concurrent jurisdiction over domestic violence cases between spouses, parent and child or “members of the same family or household” and allows a victim of domestic violence to file for a civil order of protection in Family Court.⁵⁶⁶ For purposes of concurrent jurisdiction, however, both the Family Court Act and the Criminal Procedure Act define “members of the same family or household” as blood relatives, persons legally married, persons formerly married, or persons who have a child in common (regardless of whether they have been married or have lived together at any time).⁵⁶⁷ Thus, as the law in New York currently stands, the Family Court may not issue an order of protection to a victim of domestic violence by a same-sex abuser unless that victim has a “child in common”⁵⁶⁸

⁵⁶⁶ The New York Family Court Act § 812(1) provides in pertinent part:
For purposes of this article, “members of the same family or household” shall mean the following:
(a) persons related by consanguinity or affinity;
(b) persons legally married to one another;
(c) persons formerly married to one another; and
(d) persons who have a child in common regardless whether such persons have been married or have lived together at any time.

See also New York Crim. Proc. Law § 530.11 (identical language).

⁵⁶⁷ *See* New York Family Court Act § 812(1) and New York Crim. Proc. Law § 530.11.

⁵⁶⁸ For a discussion of the ways in which both same-sex partners may obtain the legal status of “parent” of a child, *see supra* Section I.E.

with his or her abuser.⁵⁶⁹ Rather, this victim must file for an order of protection in a pending criminal proceeding.⁵⁷⁰

To obtain an order of protection in the criminal system, the abuser must be arrested, and the victim must satisfy a more stringent evidentiary standard than in Family Court.⁵⁷¹ The necessity of having an abuser arrested to get an order of protection in Criminal Court is “the biggest impediment that survivors face.”⁵⁷² Further, the criminal process generally takes longer than obtaining an order of protection in Family Court.⁵⁷³ As a result, same-sex victims “have to jump the hurdles of calling the police, asking for help, making sure they are taken seriously, filing a complaint, [and] choosing to have their perpetrator arrested.”⁵⁷⁴ Significantly, the choice to have an abuser arrested can have the unintended and adverse effect of triggering more abuse.⁵⁷⁵

In June 2003, Governor Pataki introduced the Domestic Violence Omnibus Act,⁵⁷⁶ which would provide access to Family Court to all unmarried couples

⁵⁶⁹ In 2002, the New York City Gay and Lesbian Anti-Violence Project (“NYC-AVP”) reported to the National Coalition of Anti-Violence Programs (“NC-AVP”), that it opened 371 new domestic violence cases and continued to serve 109 ongoing domestic violence clients. Lesbian, Gay, Bisexual and Transgender Domestic Violence in 2002, A Report of the National Coalition of Anti-Violence Programs, at 41-42, *available at* www.avp.org (last visited Jan. 29, 2004). NC-AVP estimates that the degree of domestic violence in LGBT relationships runs at roughly the same rate as in the heterosexual community. Lesbian, Gay, Bisexual and Transgender Domestic Violence in 2002, A Report of the National Coalition of Anti-Violence Programs, *available at* www.avp.org, at 7-9 (last visited Jan. 29, 2004).

⁵⁷⁰ N.Y. CRIM. PROC. LAW § 530.13.

⁵⁷¹ *See* Conference, *Revolutions Within Communities: The Fifth Annual Domestic Violence Conference: Lesbian, Gay, Bisexual, and Transgender Communities and Intimate Partner Violence*, 29 FORDHAM URB. L.J. 121 (2001) (“Conference”).

⁵⁷² *See id.* at 139.

⁵⁷³ *See id.*

⁵⁷⁴ *See id.* at 140. Both practitioners and professionals who work with domestic violence victims have commented upon the adverse effects of not allowing same-sex victims access to a civil order of protection.

⁵⁷⁵ *See id.*

⁵⁷⁶ *See* 2003 New York Senate Bill No. 5438 and 2003 New York State Assembly Bill No. 8773.

who currently live together or have lived together in the past, including same-sex couples. Governor Pataki renewed his call for the legislature to pass the legislation in February 2004,⁵⁷⁷ but no legislative action has been taken.

P. BANKRUPTCY

Certain provisions of the United States Bankruptcy Code (the “Bankruptcy Code”) grant benefits to debtors based upon marital status.⁵⁷⁸ For example, the Bankruptcy Code authorizes spouses to file joint bankruptcy petitions.⁵⁷⁹ Likewise, in various ways, the Bankruptcy Code and New York State law protect a non-debtor spouse or former spouse who has a claim against the debtor for alimony, maintenance, support, property settlement or equitable distribution in connection with a divorce or separation agreement.⁵⁸⁰ In this regard, the bankruptcy law favors spousal obligations over other debts or financial obligations.

⁵⁷⁷ See http://www.state.ny.us/governor/press/year04/feb3_1_04.htm.

⁵⁷⁸ Absent a challenge to DOMA, same-sex couples who legally have entered into civil marriages, would not be permitted federal – or all other – benefits and responsibilities that otherwise adhere to civil marriage. See *infra* Section II.B.7.a for a more complete discussion of DOMA.

⁵⁷⁹ See 11 U.S.C. § 302 (2004). Other sections of the Bankruptcy Code not discussed in this report incorporate the term “spouse” or ownership interests incidental to marriage. See, e.g., 11 U.S.C. § 363(h)-(j) (2004) (governing sale of non-debtor co-owner’s interest in property); 11 U.S.C. § 541(a)(2) (2003) (including within “property of the estate” certain interests in community property); 11 U.S.C. § 541(a)(5) (2004) (including within “property of the estate” property that is acquired by a debtor within 180 days after the bankruptcy filing as a result of a property settlement agreement with the debtor’s spouse or of an interlocutory or final divorce decree).

⁵⁸⁰ See 11 U.S.C. § 507(a)(7) (2004) (granting priority to claims of spouse or former spouse for alimony, maintenance or support); 11 U.S.C. § 522(f) (2004) (making nondischargeable debts owed to spouse or former spouse for alimony, maintenance or support); 11 U.S.C. §§ 522(c)(1) (2004) (making exemption property subject to certain nondischargeable debts owed to spouses or former spouses for alimony, maintenance or support); 11 U.S.C. §§ 523(a)(5) and 523(a)(15) (making nondischargeable debts owed to spouse or former spouse for alimony, maintenance or support or for property settlement/equitable distribution). See also 59 N.Y. Jur. 2d § 61, at 71-74 (2004).

1. The Right to File Jointly for Bankruptcy

Section 302 of the Bankruptcy Code allows “spouses” to file a joint bankruptcy petition.⁵⁸¹ The purpose of joint filing is to facilitate case administration based on the assumption that most married couples are jointly liable for their debts and jointly hold most of their property.⁵⁸² Joint administration allows married debtors to avoid duplication of filing, legal and administrative costs, and potentially reduces the amount of time each spouse must spend in court.⁵⁸³

Because the Bankruptcy Code does not define “spouse,” courts traditionally have looked to state laws concerning marriage to define the term.⁵⁸⁴ As such, same-sex partners have not been permitted to file a joint petition. In *In re Allen*,⁵⁸⁵ the debtors were two men in a long-term relationship which “had many characteristics of a typical marriage between a man and a woman.”⁵⁸⁶ The couple had participated in a religious ceremony in which they exchanged vows.⁵⁸⁷ They had lived together and incurred debt together – approximately 92% of their debts were held jointly.⁵⁸⁸

Nevertheless, the Bankruptcy Court held that because the men could not obtain the legal

⁵⁸¹ 11 U.S.C. § 302 (“A joint case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual’s spouse.”).

⁵⁸² See S. Rep. No. 95-989, at 32 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5818.

⁵⁸³ See A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM L. REV. 69, 90-93 (1998) (“Dickerson”) (discussing benefits granted based on marital status under the Bankruptcy Code and arguing that Congress should reconsider whether debtors should be entitled to extra benefits based upon marital status). Bankruptcy Courts can excuse one spouse from full participation in the case if the other spouse can provide all relevant financial information for the absent spouse. *Id.*

⁵⁸⁴ 186 B.R. 769 (Bankr. N.D. Ga. 1995).

⁵⁸⁵ *Id.*

⁵⁸⁶ *Id.* at 772.

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.*

status of marriage in Georgia (where they resided) or Nevada (where they had their ceremony), they did not qualify as “spouses” within the meaning of section 302.⁵⁸⁹

More recently, a federal Bankruptcy Court held that a lesbian couple, married in Canada, could not jointly file their bankruptcy petition. Reluctantly upholding the Defense of Marriage Act, which defines the term “spouse” as “only . . . a person of the opposite sex who is a husband or wife,”⁵⁹⁰ the court dismissed the couple’s petition, noting that this would be only the start of much litigation concerning DOMA.⁵⁹¹ As such, under DOMA, permitting same-sex couples to marry in New York State would not qualify same-sex couples as “spouses” under the Bankruptcy Code.

2. The Effects of Bankruptcy Law on Spousal Obligations: Priority and Nondischargeability

Most bankruptcy cases do not generate sufficient proceeds to pay in full all claims entitled to payment.⁵⁹² Therefore, the Bankruptcy Code designates certain categories of claims as having priority over other categories of claims.⁵⁹³ Priority claims are entitled to payment in full before all other claims.⁵⁹⁴ Section 507(a)(7) of the Bankruptcy Code gives priority to claims of a “spouse” or “former spouse” for alimony, maintenance or support in connection with a separation agreement, divorce decree or

⁵⁸⁹ *Id.* at 773. Such partners could, however, be considered “insiders” for preference recovery purposes. *See Wiswall v. Tanner (In re Tanner)*, 145 B.R. 672, 677 (Bankr. W.D. Wash. 1992) (allowing trustee to recover an alleged preference from the debtor’s former lesbian partner because former partner was “insider” within the meaning of section 101(31)(A)).

⁵⁹⁰ *See* 1 U.S.C. § 7. *See also* Tisha Morris Federico, *The Impact of the Defense of Marriage Act on Section 302 of the Bankruptcy Code and The Resulting Renewed Interest in the Equitable Doctrine of Substantive Consolidation*, 103 COM. L.J. 82, 89 (1998) (discussing the definition of spouse after enactment of the Defense of Marriage Act and arguing for different theories of qualification to file a joint petition).

⁵⁹¹ *See Kandu*, 315 B.R. at 145-48.

⁵⁹² *See* COLLIER ON BANKRUPTCY, ¶ 507.02[1] (15th ed. 1994).

⁵⁹³ *See id.*

⁵⁹⁴ *See id.*

other order of a court.⁵⁹⁵ In essence, this means that support obligations owed to a spouse are more likely to get paid in full than other debts that do not enjoy priority under the Bankruptcy Code.

Additionally, the Bankruptcy Code does not allow a debtor to discharge in bankruptcy a debt owed to a “spouse” or “former spouse” for alimony, maintenance, support, property settlement or equitable distribution in connection with a divorce or separation agreement.⁵⁹⁶ In other words, debts owed to a spouse in connection with a divorce or separation agreement will survive the adjudication of the bankruptcy case.

Because same-sex couples cannot qualify as “spouses” under DOMA and the Bankruptcy Code, they also cannot obtain the legal equivalent of a separation agreement or divorce decree upon dissolution of their relationships,⁵⁹⁷ and thus, the various protections given to such persons cannot apply to a former or current same-sex partner.

3. Debtor’s Exemptions

An exemption is a debtor’s right to retain a portion of his or her property free from seizure and sale by creditors under judicial process.⁵⁹⁸ A debtor domiciled in New York may exempt from the bankruptcy estate a list of certain personal and real property exempt from application to the satisfaction of money judgments under the New

⁵⁹⁵ See 11 U.S.C. § 507(a)(7) (2003).

⁵⁹⁶ See 11 U.S.C. §§ 523(a)(5) and 523(a)(15) (2003). See also 59 N.Y. Jur. 2d § 61, at 71-74 (2003).

⁵⁹⁷ See *infra* Section I.Q, concerning dissolution of marital relationships.

⁵⁹⁸ See generally 31 Am. Jur. 2d, Exemptions § 1 (2003). The scheme of the Bankruptcy Code allows the states to determine whether a debtor may choose between two alternative sets of exemptions: either property claimed under the federal exemptions set forth in the Bankruptcy Code or property claimed under applicable state law as well as property exempt under other federal law. See 11 U.S.C. § 522(b)(2). Like the overwhelming majority of states, New York has “opted out” of the federal exemptions, and limits debtors domiciled in New York to exempt property specified under applicable New York law. N.Y.C.L.S. Debt. & Cred. L. §§ 282-284.

York Civil Practice Law and Rules (“CPLR”). Some of these exemptions are related to marital status. For example, a wedding ring is among the basic list of items of the judgment debtor’s personal property that the law puts beyond the reach of creditors.⁵⁹⁹ Further, if the spouse is a judgment debtor, spousal support payments awarded in a matrimonial action are generally exempt from income execution to the satisfaction of a money judgment.⁶⁰⁰ In other words, a debtor spouse or former spouse who receives alimony or support can generally retain these payments free from the threat that a creditor can attach the payments to satisfy a debt.

Likewise, CPLR 5206 contains the list of the debtor’s interest in real property that the law exempts from the reach of creditors. The most significant is the “homestead exemption,” which permits a debtor to keep up to \$10,000 in equity in a principal residence free from the reach of creditors. If both spouses are debtors filing a bankruptcy petition and the property is owned jointly, they can exempt \$20,000 of equity in their principal residence.⁶⁰¹ One further distinct benefit extends to a surviving spouse:

⁵⁹⁹ See C.P.L.R. 5205.

⁶⁰⁰ See generally C.P.L.R. 5205(d)(3); 59 N.Y. Jur. 2d § 43, at 48 (2003). The Bankruptcy Code provides similar protections to spouses and former spouses. For example, under the exemptions provided by section 522 of the Bankruptcy Code, a debtor is prohibited from avoiding a judicial lien that secures debt owed to a spouse or former spouse for maintenance or support, subject to certain prescribed limitations. See 11 U.S.C. § 522(f). Further, in states that permit debtors to use the federal bankruptcy exemptions to keep property, a debtor can treat a non-debtor spouse as a “dependent,” regardless of actual dependency. See Dickerson, at 89-101 (discussing benefits granted pursuant to marital status under the Bankruptcy Code and arguing that Congress should reconsider whether debtors should be entitled to extra benefits based upon marital status).

⁶⁰¹ See C.P.L.R. 5206(a); *John T. Mather Mem’l Hosp. v. Pearl*, 723 F.2d 193, 195 (2d Cir. 1983) (“The purpose of the New York legislation was clearly to provide joint debtors the opportunity to make a ‘fresh start’ with a \$20,000 homestead exemption.”)

The “homestead exemption” of an owner of real property continues after death for the benefit of the owner’s surviving spouse.⁶⁰²

Other than the modest, capped monetary value preserved as the “homestead,” New York law does not protect the remaining value of the home from the reach of creditors. The Bankruptcy Code permits the sale not only of the debtor’s interest in property, but also that of any other non-filing co-owner. As such, no special protective status inures to the marital residence per se, and, although courts are reluctant to apply this provision, a non-debtor spouse is not protected from a court-ordered sale of the family’s home.⁶⁰³

Q. REQUIREMENT OF DIVORCE OR ANNULMENT TO DISSOLVE MARRIAGE

One of the most significant consequences of marriage is the inability of either of the parties to terminate the relationship without court intervention.⁶⁰⁴ In an action or proceeding to dissolve a marriage, the judicial determination of support and property rights has a significant impact on the parties’ rights and obligations to each other.⁶⁰⁵ For non-married couples, there is no legal equivalent to a judicial determination of support and property rights.⁶⁰⁶

⁶⁰² See C.P.L.R. 5206(b).

⁶⁰³ *Persky v. Community Nat’l Bank & Trust Co.*, 893 F.2d 15 (2d Cir. 1989); see also Catherine M. Durning, Case Comment, *Bankruptcy Law – When Creditors Can Force the Sale of a Home Owned by a Debtor and Nondebtor Spouse as Tenants By the Entirety – In re Persky*, 893 F.2d 15 (2d Cir. 1989), 24 SUFFOLK U. L. REV. 801 (Fall 1990).

⁶⁰⁴ See N.Y. DOM. REL. LAW § 170.

⁶⁰⁵ See N.Y. DOM. REL. LAW § 170-a.

⁶⁰⁶ *But see* American Law Institute, *Principles of the Law of Family Dissolution*, Chapters 4 & 6 (2002) (discussing factors to determine whether couple is in a domestic partnership and applying principles of marital distribution of property and awards of support). This is not the current law in New York.

The State of New York recognizes three means by which a party may dissolve a marriage.⁶⁰⁷ First, one of the parties may seek an annulment by claiming that the marriage itself was void – *i.e.*, a purported marriage between persons less than fourteen years of age or an incestuous or bigamous marriage.⁶⁰⁸ Second, the parties together may enter into a separation agreement setting forth the terms of the contemplated divorce; if the parties live separate and apart for a period of one year pursuant to such agreement, either party may seek a divorce based on the agreement – sometimes referred to as a “conversion divorce.”⁶⁰⁹ But, if the parties’ relationship has deteriorated to the point that they seek to dissolve the marriage, it is often the case that they cannot readily agree on the terms of a divorce, making a conversion divorce impossible.

If the grounds for annulment or a conversion divorce are not present, one of the parties must prove that his or her spouse is at “fault” to dissolve the marriage. There are four “fault” grounds entitling a person to a divorce in New York: (1) adultery (which must be proven, at least in part, by the evidence of a non-party);⁶¹⁰ (2) a spouse’s imprisonment for three consecutive years after the marriage;⁶¹¹ (3) a spouse’s abandonment of the other (whether actual or constructive) for a period of one year or

⁶⁰⁷ See *infra* Section II.B.3.b, concerning the dissolution of a Vermont civil union and how other states have treated proceedings to dissolve civil unions.

⁶⁰⁸ N.Y. DOM. REL. LAW § 6.

⁶⁰⁹ *Id.* at §§ 170(5) and 170(6).

⁶¹⁰ *Id.* at § 170(4) (“The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual intercourse, oral sexual conduct or anal sexual conduct, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. Oral sexual conduct and anal sexual conduct include, but are not limited to, sexual conduct as defined in subdivision two of section 130.00 and subdivision three of section 130.20 of the penal law.”).

⁶¹¹ *Id.* at § 170(3).

more;⁶¹² or (4) the cruel and inhuman treatment of one spouse by the other.⁶¹³ In an uncontested divorce, one of the parties presents evidence under oath that his or her spouse is at “fault” based upon one of these grounds, and the accused spouse simply does not contest the allegations.⁶¹⁴ If the complaining spouse’s evidence is legally sufficient to prove one of the fault grounds, then the divorce will be granted.⁶¹⁵

Unmarried cohabitating couples, whether same- or opposite-sex, need not meet any requirements to terminate their relationships. Although one party in a cohabitating heterosexual couple could seek to prove that a common-law marriage existed, thereby bringing the relationship within the Domestic Relations Law, this rarely is an issue in New York as New York does not recognize common-law marriages entered into in the State.⁶¹⁶ New York does, however, recognize common-law marriages that are valid in the state in which the agreement was contracted.⁶¹⁷

R. JUDICIAL DETERMINATION OF SUPPORT AND PROPERTY RIGHTS UPON DISSOLUTION OF THE MARRIAGE

When a marriage is dissolved, the court will equitably distribute the parties’ marital property, award spousal maintenance if appropriate, and administer

⁶¹² *Id.* at § 170(2). “Constructive abandonment” is defined as “[t]he sexual abandonment of the plaintiff by the defendant for a period of one or more years over the objection of the plaintiff spouse.

⁶¹³ *Id.* at § 170(1) (“cruel and inhuman treatment” “so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant”). Notably, New York does not recognize “irreconcilable differences” as a ground for divorce.

⁶¹⁴ *Id.* at § 211.

⁶¹⁵ *Id.*

⁶¹⁶ *See Mott v. Duncan Petroleum Trans.*, 51 N.Y.2d 289, 292 (1980). A common-law marriage is created when the parties agree to take each other as husband and wife in words of the present tense, and they are otherwise competent to marry. *See id.* at 293. The essential feature of a common-law marriage is the agreement to live together as husband and wife with the obligations that attach to marital status. *See id.*

⁶¹⁷ *See infra* Sections III.F.1 & 2 for a discussion of the “Celebration Rule” and the Full Faith and Credit Clause.

interim relief while the matrimonial action is pending. When couples are not married, they cannot seek this significant relief from the court when they terminate their relationships. Not marrying may be a matter of choice for opposite sex couples; it is not for same-sex couples.

1. Equitable Distribution of Marital Property

Since July 19, 1980, New York law has treated marriage as an economic as well as a social partnership.⁶¹⁸ When a marriage is dissolved, New York courts equitably distribute all of the parties' "marital property."⁶¹⁹ "Marital property," in contrast to "separate property," is defined as "all property acquired by either spouse or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held."⁶²⁰ Even a spouse who does not work outside of the home, or who earns less money than the other spouse, will receive an "equitable" portion of all marital property.⁶²¹

When distributing the parties' property, New York courts may consider the disparate financial positions of the parties.⁶²² Assets divided between the parties may

⁶¹⁸ Alan D. Sheinkman, Practice Commentaries, Domestic Relations Law § 236, Introduction (McKinney 1999). The Equitable Distribution Law was signed into law on June 19, 1980 and became effective 30 days later, on July 19, 1980. L.1980, c. 281, §§ 9, 47. Before this change, New York was a title state, meaning that if one did not hold title, one did not get the property. This earlier law had a particularly detrimental impact on women.

⁶¹⁹ N.Y. DOM. REL. LAW § 236.

⁶²⁰ N.Y. DOM. REL. LAW § 236 Part B(1)(c).

⁶²¹ N.Y. DOM. REL. LAW § 236 Part B(d)(6).

⁶²² See *Conner v. Conner*, 468 N.Y.S.2d 482, 491-92 (2d Dep't 1983) (courts may consider earning capacity when distributing marital property or awarding maintenance).

include pension contributions earned or made during the marriage.⁶²³ Even property that a spouse held in his or her own name that appreciated in value during the marriage can, in certain circumstances, be subject to the court's disposition to both spouses.⁶²⁴ Similarly, a spouse may receive compensation for helping the other spouse obtain a professional license or advanced degree during the marriage to the extent the license or degree ultimately enhances the other spouse's earning capacity.⁶²⁵ Several cases have also held that the enhancement in a spouse's earning capacity may be valued and distributed between the parties even in the absence of a professional license or degree.⁶²⁶

Equitable distribution, created by the Legislature, is based on property concepts unique to married couples.⁶²⁷ In the absence of a legally recognized marriage or other valid contract, a cohabitating couple may not seek to have a court equitably distribute assets that are acquired or appreciate in value during their relationship.

⁶²³ See *Majauskas v. Majauskas*, 61 N.Y.2d 481, 485-86 (1984) (holding that husband's vested rights in a non-contributory pension plan are marital property to the extent they were acquired between date of marriage and commencement of matrimonial action, even though the rights are unmatured at the time the action is begun).

⁶²⁴ N.Y. DOM. REL. LAW § 236 Part B(1)(d)(6) (marital property includes "the increase in value of separate property . . . to the extent that such appreciation is due in part to the contribution or efforts of the [non-titled] spouse.").

⁶²⁵ See, e.g., *O'Brien v. O'Brien*, 66 N.Y.2d 576, 586 (1985) (considering medical degree marital property).

⁶²⁶ See, e.g., *Hougie v. Hougie*, 689 N.Y.S.2d 490, 491 (1st Dep't 1999) (earning capacity is subject to equitable distribution even though it does not require a license); *Elkus v. Elkus*, 572 N.Y.S.2d 901, 904-05 (1st Dep't 1991), *appeal dismissed without op.* 179 N.Y.2d 851 (1992) (look to contribution of spouse seeking distribution, not whether other spouse holds license or degree). *But see West v. West*, 625 N.Y.S.2d 116, 117 (4th Dep't) (enhanced earning capacity not subject to equitable distribution because spouse did not obtain license or degree), *appeal dismissed*, 86 N.Y.2d 885 (1995).

⁶²⁷ See *O'Brien v. O'Brien*, 66 N.Y.2d 576, 583 (1985) ("New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law.") (citation omitted).

2. Post-Marital Maintenance

In addition to equitable distribution of marital assets, upon divorce, a spouse might be entitled to receive maintenance to assist him or her in becoming self-supporting.⁶²⁸ Once an award of maintenance is made, the Domestic Relations Law provisions concerning enforcement of such an award may be invoked.⁶²⁹ In addition, once a matrimonial action is commenced, a court may order the party paying support to obtain life insurance that, in the event of his or her death, is payable to the spouse receiving support.⁶³⁰ This relief is not available, however, unless the parties are married.⁶³¹

In *Robin v. Cook*,⁶³² the relationship of a cohabitating lesbian couple ultimately soured. According to the plaintiff, the two women had an oral contract pursuant to which the plaintiff would provide the defendant with nursing care, cooking, housekeeping and other services for the rest of the defendant's life and, in exchange, the defendant would buy an apartment for the plaintiff's use and pay the plaintiff \$600 a month for the rest of the plaintiff's life.⁶³³ The defendant did not deny that she purchased

⁶²⁸ See *Hartog v. Hartog*, 85 N.Y.2d 36, 52 (1995) (purpose of maintenance is to assist spouse in becoming self-supporting).

⁶²⁹ See N.Y. DOM. REL. LAW §§ 243-45.

⁶³⁰ N.Y. DOM. REL. LAW § 236B(8)(a).

⁶³¹ *Robin v. Cook*, N.Y.L.J., at 22 (Sup. Ct. Oct. 30, 1990) (Saxe, J.) (lesbian denied support from former partner).

⁶³² *Id.*

⁶³³ *Id.*

an apartment for the plaintiff's use and paid the plaintiff \$600 monthly,⁶³⁴ but disputed the existence of a life-long oral contract.⁶³⁵

The plaintiff sought to recover on two alternative theories. First, she sought damages based on a contract theory. This avenue was unsuccessful, however, because the alleged oral contract, which could not be performed within one year, did not comply with the statute of frauds.⁶³⁶ Second, the plaintiff sought an award of maintenance, inheritance rights and possession of the apartment based on her allegation that the women were in a "spousal-type" relationship.⁶³⁷ The court rejected this theory, holding that "the law does not permit two individuals to declare themselves married and to thereby become endowed with the statutory rights bestowed upon the parties to a marriage legally solemnized under Domestic Relations Law §11."⁶³⁸ Because access to judicial process under the Domestic Relations Law is unavailable to unmarried couples, the court underscored the necessity of unmarried couples entering into express written agreements to govern their relationships.⁶³⁹

3. Procedural Protections and Burdens while Matrimonial Actions Are Pending

In a matrimonial action, the court may order relief on a temporary basis pending the outcome of the case. During the pendency of the divorce proceeding, both parties to a marriage must make full financial disclosure and provide all relevant

⁶³⁴ *Id.*

⁶³⁵ *Id.*

⁶³⁶ *Id.*

⁶³⁷ *Cook, supra* note 631, at 22.

⁶³⁸ *Id.*

⁶³⁹ *Id.*

supporting documentation.⁶⁴⁰ Thus, a court may restrain a married party from transferring his or her assets in order to preserve them until a final judicial determination is made.⁶⁴¹ A court also may order a married party to vacate the marital residence, regardless of who holds title, if it is proven that continued cohabitation presents a real threat to the health or safety of any member of the family.⁶⁴² Finally, a court may order a married person to pay the reasonable fees of the attorneys and experts engaged by his or her spouse for purposes of the matrimonial litigation.⁶⁴³ This type of relief is also not available to unmarried couples, whom the Domestic Relations Law currently views as legal strangers.

S. POST-SEPARATION RIGHTS AND OBLIGATIONS WITH REGARD TO CHILDREN

The former partner of a biological parent generally has standing to petition for custody or visitation only if he or she has adopted the child(ren) in question, regardless of whether the couple was married.⁶⁴⁴ Since second-parent adoptions generally are permitted for qualified married and unmarried partners,⁶⁴⁵ altering the marriage laws to permit same-sex couples to marry would have little effect on the ability of lesbians and gay men to petition for custody of, or visitation with, their former partners' children if a second-parent adoption has occurred. Absent this action, despite

⁶⁴⁰ N.Y. DOM. REL. LAW § 236 Part A(2).

⁶⁴¹ See, e.g., *Leibowits v. Leibowits*, 462 N.Y.S.2d 469, 470 (2d Dep't 1983) (Domestic Relations Law § 234 "provides authority for issuance of an order restraining disposition of marital assets during the pendency of a divorce action"; CPLR Article 63 relative to preliminary injunctions not a prerequisite).

⁶⁴² N.Y. DOM. REL. LAW § 234.

⁶⁴³ N.Y. DOM. REL. LAW § 237.

⁶⁴⁴ See Section I.E.2, discussing the availability of second-parent adoption for the married and unmarried partners of biological or adoptive parents.

⁶⁴⁵ See generally *In re Jacob*, 86 N.Y.2d 651 (1995) (holding unmarried same- and opposite-sex partners of biological parents can adopt their partners' children); see also Section I.E.2.

the significant relationship that can develop between an individual and his or her partner's children, there currently is little to no legal recourse for an individual seeking custodial rights or visitation with his or her partner's children if the relationship dissolves. In certain extraordinary cases, courts will abrogate the custodial rights of an unfit parent in favor of another competent caretaker, but in most instances, the federal Constitution and New York State law vigorously protect the right of parents to retain custody of their children and decide when and with whom their children will socialize and interact.⁶⁴⁶

1. Custody

In custody disputes, courts are statutorily required to consider “the circumstances of the case” and the “best interests of the child.”⁶⁴⁷ In reality, courts almost always award custody to a biological (or adoptive) parent over any other adult, whether a stepparent, a grandparent, or the unmarried partner of a parent. To award custody to someone who is not a legal parent, even if he or she is a current or former stepparent, a court first must make a judicial finding of voluntary surrender, abandonment, unfitness or persistent neglect by the legal parent, or must find another “extraordinary circumstance.”⁶⁴⁸ This is a threshold determination; until such an extraordinary circumstance is established, the question of the child's best interest is not

⁶⁴⁶ See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (holding that Washington State statute allowing grandparents to petition for visitation with their grandchildren over the objections of a fit parent is a violation of the 14th Amendment); *In re Ronald FF. v. Cindy GG.*, 70 N.Y.2d 141, 144-45 (1987) (holding that former live-in boyfriend of biological mother had no right to visitation with child because there had been no showing that custodial mother was unfit).

⁶⁴⁷ N.Y. DOM. REL. LAW § 240(1)(a).

⁶⁴⁸ *Gray v. Chambers*, 614 N.Y.S.2d 591, 592 (3d Dep't 1994) (“*Gray*”); *Culver v. Culver*, 594 N.Y.S.2d 68, 69 (3d Dep't 1993) (“*Culver*”).

reached.⁶⁴⁹ Even where a petitioning adult has a valid and verified psychological bond with the child(ren), or has been standing *in loco parentis*, absent a showing of unfitness or “exceptional circumstances,” the legal parent’s right to custody is paramount.⁶⁵⁰

Because of the tremendous deference given to biological and adoptive parents when making custody determinations, altering the marriage laws to allow same-sex couples to marry would have little effect on these determinations. Currently, unmarried same- and opposite-sex partners – like stepparents – have the opportunity to petition the court for a second-parent adoption of their partners’ children.⁶⁵¹ Absent an adoption, the ability of same-sex partners to gain full or partial custody of those children after the end of the relationship is about equal to that of stepparents; *i.e.*, if the biological parent does not consent, there must be a showing of unfitness or extraordinary circumstances.

⁶⁴⁹ *Gray* 614 N.Y.S.2d at 621; *In re Katherine D. v. Christine D.*, 187 A.D.2d 587, 587-88 (2d Dep’t 1992).

⁶⁵⁰ *See Culver*, *supra* note 648, at 70. (“[T]he claimed psychological bond between the children and their grandparents has no bearing on respondent’s rights as a natural parent in the absence of unfitness, abandonment, persistent neglect or other gross misconduct or grievous cause.”); *La Croix v. Deyo*, 452 N.Y.S.2d 726, 727 (3d Dep’t 1982) (upholding grant of custody to biological father, who had never lived with the child, over the objections of stepfather, who had lived with the child and recently deceased mother).

There are cases in which custody of a child is granted to someone other than the biological parent, but it is always after a finding of gross unfitness or other extraordinary circumstances. *See, e.g., Parliament v. Harris*, 697 N.Y.S.2d 694, 695 (2d Dep’t 1999) (granting custody to father’s “paramour,” who had cared for child for nine years, over objections of father, who was incarcerated for child sexual abuse); *Doe v. Doe*, 399 N.Y.S.2d 977, 983 (Sup. Ct. N.Y. County 1977) (granting custody to stepmother where biological mother was dead, father had significant emotional problems and was shown to be an inadequate and disinterested parent, teenage children said they want nothing to do with their father, and there was love and a solid parent-child relationship between the children and stepmother); *see also In re Gilbert A. v. Laura A.*, 689 N.Y.S.2d 810, 811 (4th Dep’t 1999) (where stepfather was married to biological mother when she gave birth, the child bore his surname, he and the child both believed he was the child’s father, and the mother fostered a father-child relationship between them, the stepfather should be allowed to offer proof to support his contention that case involved rare “extraordinary circumstances” warranting a grant of his custody petition and denial of custody to the mother).

⁶⁵¹ *See generally In re Jacob*, 86 N.Y.2d 651; *see also* Section I.E.2.

2. Visitation

Control over when and with whom one's children may socialize and interact, like custodial rights, are vigorously protected by the courts. The United States Supreme Court has held that "the interest of parents in the care, custody and control of their children" is a "fundamental right" protected by the substantive component of the Due Process Clause of the 14th Amendment.⁶⁵² Similarly, the New York Court of Appeals has held that the right of a parent to choose with whom her or his child associates is a "fundamental right" with which the State may not interfere "unless it shows some compelling State purpose which furthers the child's best interests."⁶⁵³ The New York statute that authorizes parties to bring petitions for visitation confers the right to bring such a petition only on a "parent" (including a "step-parent") of the child in question.⁶⁵⁴

Against this backdrop, the Court of Appeals has ruled, in *Alison D. v. Virginia M.*,⁶⁵⁵ that a person who is not a legal parent of a child has no standing to petition for visitation rights with that child.⁶⁵⁶ In *Alison D.*, petitioner and respondent were in a long-term same-sex relationship, and after living together for two years, they

⁶⁵² See *Troxel v. Granville*, 530 U.S. at 65 (holding that Washington state statute allowing grandparents to petition for visitation with their grandchildren over the objections of a fit parent is a violation of the 14th Amendment).

⁶⁵³ *In re Ronald FF. v. Cindy GG.*, 70 N.Y.2d 141, 144-45 (1987) (holding that former live-in boyfriend of biological mother had no right to visitation with child because there had been no showing that custodial mother was unfit).

⁶⁵⁴ N.Y. DOM. REL. L. § 70. Step-parents, foster parents, aunts, cousins, and other who have had daily contact with the child do not have automatic standing to seek custody and are not entitled to the DRL § 70 procedures. There is no test in New York to establish standing. See, e.g., *Lynda A.H. v. Diane T.O.* 243, 673 N.Y.S.2d 989 (4th Dep't 1998).

⁶⁵⁵ 77 N.Y.2d 651 (1991).

⁶⁵⁶ *Id.* at 656-57. The conclusion of the Court of Appeals affirmed a dismissal of the action for lack of standing by the New York Supreme Court, which the Appellate Division then upheld. *Id.* at 655.

decided they wanted to raise a child together.⁶⁵⁷ They decided that the respondent would be artificially inseminated, and “[t]ogether, they planned for the conception and birth of the child and agreed to share jointly all rights and responsibilities of child-rearing.”⁶⁵⁸ When the child was two years old, petitioner and respondent ended their relationship; petitioner moved out of their jointly-owned home, but continued to pay one-half of the mortgage and household expenses.⁶⁵⁹ After respondent cut off all contact between petitioner and the child, petitioner filed her petition for visitation pursuant to Domestic Relations Law § 70.⁶⁶⁰

The Court of Appeals held that because Domestic Relations Law § 70 restricts standing to petition for visitation to “parent[s]” of the child(ren) in question, and since petitioner was neither the biological nor adoptive mother of the child,⁶⁶¹ she had no standing to petition for visitation.⁶⁶² Petitioner argued that, by virtue of her involvement in the lives of the child and the respondent, she should be considered a “de facto” parent or a parent “by estoppel,”⁶⁶³ but the court held that if the legislature had meant for anyone

⁶⁵⁷ *Id.* at 655.

⁶⁵⁸ *Id.*

⁶⁵⁹ *Id.*

⁶⁶⁰ *Id.* at 655-56.

⁶⁶¹ *Alison D.*, 77 N.Y.2d at 656.

⁶⁶² *Id.* at 656-57.

⁶⁶³ *Id.* at 656. This argument was the basis for a strong dissent by Judge Kaye, who also argued that the “best interest of the child” standard was not served by severing a child’s ties with an adult that he or she has come to view as a parental figure. *See id.* at 657-62 (Kaye, J., dissenting). Judge Kaye argued that since the statute itself does not define “parent” for the purposes of § 70, it made sense to broaden the acceptable definition so as to serve equitable ends, similar to the way in which the Court of Appeals broadened the definition of “family member” in *Braschi*, 74 N.Y.2d 201 (1989), to allow a deceased man’s live-in same-sex partner to take over the rent-controlled lease to their shared apartment. *See Alison D.*, 77 N.Y.2d at 659, 661-62. *See* Section I.M.1.

other than an actual parent to have standing, they had the knowledge and ability to indicate as such.⁶⁶⁴

Alison D. and its progeny have denied standing both to former same-sex partners⁶⁶⁵ and former unmarried, live-in heterosexual partners⁶⁶⁶ seeking visitation with their former partners' children.⁶⁶⁷ In at least one case, *Jean Maby H. v. Joseph H.*,⁶⁶⁸ however, the Court of Appeals has affirmed the standing of the former husband of a biological mother to request, in the context of a divorce proceeding, visitation with his former stepchild. The *Jean Maby H.* court did not frame the question to be resolved in such a way that the former spouses' marital status was relevant,⁶⁶⁹ instead finding that *Alison D.* and its forbear, *In re Ronald FF.*,⁶⁷⁰ were distinguishable because the defendant husband in *Jean Maby H.* was asserting an argument – equitable estoppel – that was not significantly addressed in these prior decisions.⁶⁷¹ However, while not discussing “equitable estoppel” *per se*, the *Alison D.* court did note, and dispense with, petitioner's

⁶⁶⁴ *Alison D.*, 77 N.Y.2d at 656-57.

⁶⁶⁵ See, e.g., *Janis C. v. Christine T.*, 742 N.Y.S.2d 381, 382 (2d Dep't 2002) (denying standing to biological mother's former same-sex partner); *Speed v. Robins*, 732 N.Y.S.2d 902, 902 (2d Dept 2001) (same); *Lynda A.H. v. Diane T.O.*, 673 N.Y.S.2d 989, 991 (4th Dep't 1998) (same).

⁶⁶⁶ *Multari v. Sorrell*, 731 N.Y.S.2d 238, 239-40 (3d Dep't 2001).

⁶⁶⁷ Cf. *Alison D. v. Virginia M.*, 77 N.Y.2d at 657 (Kaye, J., dissenting) (“The Court's decision, fixing biology as the key to visitation rights, has impact far beyond this particular controversy, one that may affect a wide spectrum of relationships – including those of longtime heterosexual stepparents, “common-law” and nonheterosexual partners such as involved here, and even participants in scientific reproduction procedures.”).

⁶⁶⁸ 676 N.Y.S.2d 677 (2d Dep't 1998).

⁶⁶⁹ *Id.* at 678 (framing the question raised on appeal as “whether a nonbiological parent may invoke the doctrine of equitable estoppel to preclude the biological parent from cutting off custody or visitation with the child”).

⁶⁷⁰ 70 N.Y.2d 141 (holding that former live-in boyfriend of biological mother had no right to visitation with child because there had been no showing that custodial mother was unfit).

⁶⁷¹ *Jean Maby H.*, 676 N.Y.S.2d at 681 (finding that “[i]n *Matter of Ronald FF.*, . . . the nonbiological father never raised the doctrine of equitable estoppel,” and “[i]n *Matter of Alison D.*, the issue of equitable estoppel was ‘merely brushed upon by the gay cohabitant’”) (citation omitted).

argument that she was a “parent ‘by estoppel.’”⁶⁷² Beyond the estoppel argument, there are three other prominent facts that distinguish *Jean Maby H.* from *Alison D.*: (1) *Alison D.* involved a same-sex couple while *Jean Maby H.* involved an opposite-sex couple; (2) the defendant husband in *Jean Maby H.* was held out as the father of the child to the world, and to the child herself (though the parties apparently always knew that the defendant was not the child’s biological father);⁶⁷³ and (3) the parties in *Jean Maby H.* had been married, whereas the parties in *Alison D.* had not.

Although the holding in *Alison D.* – that nonbiological and nonadoptive parents have no standing under Domestic Relations Law § 70 to petition for visitation with their former partners’ children – seems, on its face, to preclude such petitions regardless of the marital status of the partners in question, *Jean Maby H.* indicates that courts may be more favorable toward such petitions when they are brought by the former legal spouse of the child’s parent.

⁶⁷² *In re Alison D.*, 77 N.Y.2d at 656-57.

⁶⁷³ *Jean Maby H.*, 676 N.Y.S.2d at 678-79, 682.

PART II

MARRIAGE: HISTORICAL OVERVIEW AND LEGAL DEVELOPMENTS

Part II of this Report describes the spectrum of legal options used to recognize same-sex couples – such as marriage and civil union – as well as legal prohibitions on such unions, ranging from the Defense of Marriage Act (“DOMA”) to a proposed federal constitutional amendment. Understanding these options, including the advantages and disadvantages of each, was essential for the Committee to do its work.

To appreciate the significance of the modern legal landscape of marriage, the Committee also found it needed to understand the historical context of marriage. Accordingly, Part II opens with a brief history of marriage, focusing on its development in the United States and the modern reasoning for marriage. Although many of us assume we know what the purposes of marriage may be, the Committee thought it prudent to make explicit many common assumptions about this venerable institution. This section also contains a review of some instances of historical recognition of same-sex relationships.

The next section of Part II traces the extensive legal developments that more recently have influenced whether same-sex couples have been permitted to marry. Although the Report focuses primarily on the changes and challenges occurring in the United States, it also briefly touches on global developments. The Report sets forth in great detail the holdings in the two domestic cases that most profoundly affect the debate at home: *Goodridge v. Department of Public Health*, where the highest court in Massachusetts held that same-sex couples in that State could not be excluded from the civil institution of marriage; and *Baker v. State*, in which the Vermont Supreme Court called on the legislature to rectify what it found to be an unconstitutional exclusion of

same-sex couples from marriage or a marriage equivalent. This latter holding led to the creation of “civil unions,” a separate, but parallel means of creating civil and legal rights and responsibilities in same-sex couples and their families.

This section of Part II also reviews other mechanisms that have been established that provide more limited rights and responsibilities in families headed by same-sex couples. More specifically, this section explores the state-created definitions of “domestic partnerships” and “reciprocal beneficiaries” and compares them with each other, as well as with civil union and marriage. The section continues with a discussion of more limited conferral of benefits that have been created both by the private sector and by state and local governments – including New York State.

Part II closes with an examination of existing and proposed statutory and constitutional limitations on the extension of marriage to same-sex couples. Such limitations include the federal Defense of Marriage Act and analogous “mini-DOMAs” established by approximately 39 states,⁶⁷⁴ as well as a proposed federal constitutional amendment seeking to permanently exclude same-sex couples from marriage and some similar state-based amendments.

A. THE EVOLVING INSTITUTION OF MARRIAGE

Fundamentally, marriage is a civil contract to which the consent of parties, legally capable of entering into contracts, is essential.⁶⁷⁵ For over 100 years, however, courts and statutes have recognized marriage as more than a contract, and have imposed

⁶⁷⁴ This Report is accurate up to October 24, 2004. As the legal developments surrounding marriage change virtually daily, it is possible that this Report is not comprehensive past that date.

⁶⁷⁵ N.Y. DOM. REL. LAW § 10.

numerous benefits and responsibilities on married couples.⁶⁷⁶ New York courts long have deemed marriage “an institution which involves the highest interests of society . . . regulated by law based upon principles of public policy.”⁶⁷⁷

In 2004, the Massachusetts Supreme Judicial Court described marriage as:

at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. ‘It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.’ Because it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.⁶⁷⁸

Although marriage often is perceived as a fairly stable institution, it has changed greatly over the millennia. Today, any opposite-sex couple may enter the unique marriage bond. In ancient Greece and Rome, however, although the most common type of marriage was the monogamous union of a male-female couple,⁶⁷⁹ these marriages were reserved for the “propertied classes” and primarily were a property arrangement.⁶⁸⁰ Polygamous marriages also existed.⁶⁸¹ Regardless of the form it has

⁶⁷⁶ See *Maynard v. Hill*, 125 U.S. 190 (1888).

⁶⁷⁷ *Fearon v. Treanor*, 272 N.Y. 268, 272 (1936).

⁶⁷⁸ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954-55 (Mass. 2003) (quoting *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

⁶⁷⁹ JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE, 32 (1994).

⁶⁸⁰ *Id.* at 32. The ancients’ understanding of marriage is not the same as our modern understanding: [I]t is difficult, perhaps impossible, to map onto the grid of premodern heterosexual relationships what modern speakers understand by “marriage”: nothing in the ancient world quite corresponds to the idea of a permanent, exclusive union of social equals freely chosen by them to fulfill both their emotional needs and imposing equal obligations of fidelity on both partners.

Id. at 38.

⁶⁸¹ “Polygamous marriages were not unheard of, and were widespread among rich males, who simply took *additional* wives when the tired of the old ones.” *Id.* at 31.

taken, though, marriage always has been subject to regulation – by the church, the state, or both.⁶⁸²

The growth of Christianity in the late Roman Empire appears to have had a profound effect on the development of the institution of marriage.⁶⁸³ Between the fifth and sixth centuries, the increasing influence of Christianity, which valued marriage for procreative purposes, prevailed and canon law steadily merged with local, secular marriage laws.⁶⁸⁴ Canon law recognized marriage as a sexual union sanctified by God and forbade both sex outside marriage and divorce. Those who violated the law were subject to both civil and religious penalties.⁶⁸⁵ The merger of secular and religious marriage was so complete that by the thirteenth century, ecclesiastical courts had sole jurisdiction over marriage in England.⁶⁸⁶ Henry VIII famously defied the marriage laws of the Roman Catholic Church in 1534, but jurisdiction over marriage simply shifted from the Catholic to the Anglican ecclesiastical courts as a result of his rebellion.⁶⁸⁷

Until England’s Marriage Act of 1753, which sought to separate religious and secular regulation of marriage, ecclesiastical courts alone declared the acceptable

⁶⁸² HARRY D. KRAUSE, ET AL., FAMILY LAW: CASES, COMMENTS AND QUESTIONS, 33 (5th ed. 2003). For example, the Babylonian Code of Hammurabi, promulgated in 2250 B.C., declared that a woman was not a man’s legal wife if he did “not arrange with her the proper contracts.” *Id.* at 33. Roman law also required a marital contract and recognized both secular and pre-Christian religious marriages, although only adherents to a particular religion were subject to that religion’s marriage rules. *Id.*

⁶⁸³ WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT, 24 (1996) (“Eskridge I”).

⁶⁸⁴ See KRAUSE, *supra* note 682, at 33-34. As late as the twelfth century, however, a church ceremony was considered no more than a corollary to the civil ceremony. Esther Cohen & Elliott Markowitz, *In Search of the Sacred: Jews, Christians and Rituals of Marriage in the Later Middle Ages*, 20 J. MEDIEVAL & RENAISSANCE STUD. 225, 231 (1990).

⁶⁸⁵ KRAUSE, *supra* note 682, at 34.

⁶⁸⁶ *Id.* at 33-34.

⁶⁸⁷ *Id.* at 34.

ways of contracting a valid marriage and judged the validity of disputed marriages throughout England.⁶⁸⁸ Although the Marriage Act started a shift in jurisdiction over marriage disputes and divorces from the church to the civil government,⁶⁸⁹ England did not completely transfer jurisdiction to its civil courts until the Matrimonial Causes Act of 1857.⁶⁹⁰

In the United States, most states modeled their marriage laws after the legal order inherited from England.⁶⁹¹ Thus, even though many of the states' marriage and divorce requirements have ecclesiastical roots, American marriage and divorce always have been subject to civil law alone.⁶⁹²

Another prevalent feature of marriage in America was the acceptance of common law marriage in most states.⁶⁹³ Informal marriages were both ordinary and accepted beginning in the colonial period and occurred primarily due to the lack of

⁶⁸⁸ Hazel D. Lord, *Husband and Wife: English Marriage Law from 1750: A Bibliographic Essay*, 11 S. CAL. REV. L. & WOMEN'S STUD. 1, 1 (2001) ("Lord").

⁶⁸⁹ *Id.* at 1.

⁶⁹⁰ KRAUSE, *supra* note 682, at 34.

⁶⁹¹ Hendrik Hartog, *Man and Wife in America: A History* 12 (2000) ("Hartog"). A few states, however, borrowed from other European traditions, notably the French idea of community property. *Id.*

⁶⁹² The Supreme Court of Oklahoma described this distinction as follows:
We are a civil court having constitutional and legislative sanction to administer man-made laws justly, fairly and equally. We have no jurisdiction to regulate or enforce scriptural obligations. . . . Divorce is wholly a creature of statute with absolute power to prescribe conditions relative thereto being vested in the State. . . . Appellant's complaint that her constitutional right for the free exercise of religion is being violated is unfounded. The action of the trial court only dissolved the civil contract of marriage between the parties. No attempt was made to dissolve it ecclesiastically. Therefore, there is no infringement upon her constitutional right of freedom of religion. She still has her constitutional prerogative to believe that in the eyes of God, she and her estranged husband are ecclesiastically wedded as one, and may continue to exercise that freedom of religion according to her belief and conscience. Any transgression by her husband of their ecclesiastical vows, is, in this instance, outside the jurisdiction of the court. It is not within the power of the church or an individual to affect the status or civil relations of persons. This may only be regulated by the supreme civil power.

Williams v. Williams, 543 P.2d 1401, 1403 (Okla. 1975) (citations omitted).

⁶⁹³ KRAUSE, *supra* note 682, at 87.

officials who could solemnize vows.⁶⁹⁴ Even as the availability of clergy and officials increased, marriage ceremonies did not immediately become the norm.⁶⁹⁵ Most couples did not consider formal marriage until the relationship bore children, leading one late eighteenth century minister to comment “if . . . no marriage should be deemed valid that had not been registered in the Parish Book, it would I am persuaded bastardize nine tenths of the People in the Country.”⁶⁹⁶ Eventually, however, most states rejected common law marriage in favor of statutory marriage. New York abolished common law marriage in 1933.⁶⁹⁷

Historically, a woman had limited separate legal or economic rights. She was under her father’s control until marriage; when she married that control shifted to her husband,⁶⁹⁸ making it difficult for a married woman to act independently in civil society.⁶⁹⁹ The husband, as the political and legal representative of his wife, was the only full citizen of the household.⁷⁰⁰ By the early nineteenth century, most states had supplemented or replaced common law marriage with marriage codes; but, the enactment

⁶⁹⁴ NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION at 31 (2000) (“Cott”).

⁶⁹⁵ *Id.*

⁶⁹⁶ *Id.* at 31-32.

⁶⁹⁷ New York abolished common law marriage by amending N.Y. Domestic Relations Law on April 29, 1933. See N.Y. DOM. REL. LAW § 11 (McKinney’s); see also *In re Estate of Benjamin*, 34 N.Y.2d 27, 30 (1974). Today, only a handful of states continue to recognize common law marriages. Krause, et al. at 87. States that recognize common law marriage include: Alabama, Colorado, District of Columbia, Georgia (if created before 1/1/97), Idaho (if created before 1/1/96), Iowa, Kansas, Montana, New Hampshire (for inheritance purposes only) Ohio (if created before 10/10/91), Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas and Utah. Dorian Solot and Marshall Miller, *Demystifying Common Law Marriage, Alternatives to Marriage Project*, available at <http://www.unmarried.org/common-law-marriage.html>.

⁶⁹⁸ Cott, *supra* note 694, at 7.

⁶⁹⁹ *Id.*

⁷⁰⁰ *Id.* at 12.

of codes did not inherently change this inequality.⁷⁰¹ Indeed, the assumption that marriage represented “the essential unity of the married pair” persisted⁷⁰² through the middle of the twentieth century.⁷⁰³

New York first addressed this gender inequity with the passage of the Married Woman’s Property Acts of 1848 and 1849.⁷⁰⁴ These acts provided that “any married female may take, by inheritance, gift, &c., and hold to her sole and separate use, and convey and devise, real and personal property, &c., in the same manner and with the like effect as if she were unmarried.”⁷⁰⁵ Notwithstanding that fairly broad language, the New York Court of Appeals, however, did not interpret the acts as creating a completely separate legal identity for the wife:

I think it is plain . . . that the statute does not remove the incapacity which prevents [a married woman] from contracting debts. She may convey and devise her real and personal estate, but her promissory note or other personal engagement is void, as it always was by the rules of the common law. This legal incapacity is a far higher protection to married women than the wisest scheme of legislation can be, and we should hardly expect to find it removed in a statute intended for “the more effectual protection of her rights.”⁷⁰⁶

An 1860 law provided further reforms, allowing a married woman legally to control both her property and her earnings.⁷⁰⁷ Similar changes occurred across the

⁷⁰¹ *Id.* at 7.

⁷⁰² *Id.*

⁷⁰³ *Id.*

⁷⁰⁴ Hartog, *supra* note 691, at 187.

⁷⁰⁵ *Yale v. Dederer*, 18 N.Y. 265, 271 (1858).

⁷⁰⁶ *Id.* at 272.

⁷⁰⁷ Cott, *supra* note 694, at 53.

U.S. for the next 100 years, ensuring that women and men now are legally equal partners in a marriage.⁷⁰⁸

In addition to these gender-based regulations, states historically also imposed race-based regulations. For example, before the Civil War, slaves were regarded as property and counted as less than full persons;⁷⁰⁹ therefore, in the logic of the times, slaves had no civil rights and were barred from access to state-sanctioned marriage.⁷¹⁰ Further, “marriages” created or recognized within the slave community were forcefully terminated when plantation owners sold or “bred” slaves.⁷¹¹ After the Civil War, most states did not allow “mixed” marriages between white and black individuals, and some western states did not permit marriage between white and Asian people.⁷¹² Until the Supreme Court’s invalidation of anti-miscegenation laws in 1967,⁷¹³ sixteen of the fifty states still considered interracial marriages void or criminal.⁷¹⁴

⁷⁰⁸ See Ann Laquer Estin, *Marriage and Belonging*, 100 MICH. L. REV. 1690 (2002) (reviewing Cott, *supra* note 694). “By the twentieth century, with the character of the national polity well established, marriage was effectively disestablished, as laws enforcing gender roles and creating barriers to divorce and nonmarital childbearing were abandoned.” *Id.*

⁷⁰⁹ U.S. CONST. art. I, § 2, cl. 3. The Three Fifths Clause calculated population for purposes of congressional representation “by adding to the whole Number of free Persons . . . [to] three fifths of all other Persons.” As a result, the representational base for slave states included slaves, even though they could not vote.

⁷¹⁰ Cott, *supra* note 694, at 4. Although New York recognized slave marriages during its gradual process of emancipation following the American Revolution, the legislature stipulated that these marriages were not legally binding. *Id.* at 33. E. Franklin Frazier, *The Negro Slave Family*, 15 J. NEGRO HIST. 198, 246 (1930) (discussing the inability of slaves to attain any civil effects of marriage).

⁷¹¹ It was not uncommon for slaves to enter into committed relationships recognized by other slaves as a marriage. See Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251 (1999). See also Jo Ann Manfra & Robert R. Dykstra, *Serial Marriage and the Origins of the Black Stepfamily: The Rowanty Evidence*, 72 J. AM. HIST. 18, 34-35 (1985) (providing statistics indicating that force accounted for the termination of about one-third of slave marriages, and that of those marriages that were dissolved forcefully, about one-third were unions of five or more years, and about half produced offspring); JOHN W. BLASSINGAME, *THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH* 91 (1972) (providing similar statistics and concluding that of 2888 slave families, 32.4% were separated forcefully within six years of their marriage).

⁷¹² Cott, *supra* note 694, at 4.

Along with changes in who may marry, and the rights of women within marriage, during the past century American law also increasingly has expanded the grounds to end a marriage – including the possibility that one spouse alone may determine when the marriage should end.⁷¹⁵

⁷¹³ See *Loving v. Virginia*, 388 U.S. 1 (1967) (“*Loving*”).

⁷¹⁴ Cott, *supra* note 694, at 4. For a discussion of *Loving*, see *infra* notes 1277-1368 and accompanying text.

⁷¹⁵ Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243, 243-44 (2003) (“Spaht”). Using Louisiana law as indicative of the trends in the rest of the United States, Spaht discusses the evolution of divorce. Until 1827, there was no divorce under general Louisiana laws. At the turn of the century until the passage of the Married Women’s Emancipation legislation during the period of 1916 to 1928, a wife fell under the authority of her husband and was required to obtain his authorization, concurrence or consent to most civil acts. Today, however, one spouse may effectuate a divorce. According to Lynn Wardle, a movement to reform divorce laws swept the United States in the 1970s, leading to the widespread adoption of no-fault grounds for divorce. Between 1970 and 1975, more than half of the states adopted some no-fault ground for divorce, and by 1985, every American jurisdiction except one had adopted some generally available, explicit non-fault ground for divorce). Lynn D. Wardle, *No Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79. *But see* Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497 (2000) (observing that, while no-fault divorce may seem revolutionary in its break with the past, the collapse of fault divorce was gradual and inevitable). There are two grounds for no-fault divorce in New York State:

The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.

N.Y. DOM. REL. LAW § 170(5). And:

The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides. In lieu of filing such agreement, either party to such agreement may file a memorandum of such agreement, which memorandum shall be similarly subscribed and acknowledged or proved as was the agreement of separation and shall contain the following information: (a) the names and addresses of each of the parties, (b) the date of marriage of the parties, (c) the date of the agreement of separation and (d) the date of this subscription and acknowledgment or proof of such agreement of separation.

N.Y. DOM. REL. LAW § 170(6).

Although marriage remains the primary context for bearing and raising children,⁷¹⁶ and often is cited as the ideal context for doing so,⁷¹⁷ marriage today often is thought of “as the public recognition of a private, sexually intimate, and privileged relationship created for the satisfaction, support, nurturance and fulfillment of the two parties”⁷¹⁸ – rather than a partnership designed *primarily* for the purpose of bearing and raising children.⁷¹⁹ This development, however, is a fairly modern one.⁷²⁰

The twentieth century has seen a rise and fall in the incidence of marriage in the United States. After World War II, marriage rates increased. During the 1970s and 1980s, however, marriage rates declined rapidly. By the end of the 1980s, the prevalence of marriage in the United States was lower than it had been in the first decade of the 1900s.⁷²¹ Notably, the decline in marriage rates toward the end of the twentieth century has not signaled the end of intimate relationships. Rather, as non-marital cohabitation was decriminalized, its incidence increased sharply; this occurred at the same time the prevalence of marriage declined.⁷²² More recently, however, the National

⁷¹⁶ Center for Disease Control and Prevention, Table 1-19. Birth Rates for Married Women by Age of Mother, According to Race and Hispanic Origin: United States, 1950 and 1955 and Each Year 1960-99, available at <http://www.cdc.gov/nchs/data/statab/t991x19.pdf>.

⁷¹⁷ See, e.g., Gerard V. Bradley, *Law And The Culture Of Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 189, 196 (stating that marriage is the “uniquely appropriate” context for having children).

⁷¹⁸ Spaht, *supra* note 715, at 245.

⁷¹⁹ *Id.* at 244.

⁷²⁰ *Id.* at 244-45.

⁷²¹ Sociologists report that marriage rates in the US are down since the 1960’s. See, e.g., Smart Library on Children and Families, *Measuring the Decline in U.S. Marriage Rates*, available at <http://www.children.smartlibrary.org/NewInterface/segment.cfm>. But see *infra* note 749 and accompanying text stating that, more recently, the number of marriages is on the rise.

⁷²² Arland Thornton, *Comparative and Historical Perspectives on Marriage, Divorce, and Family Life*, 1994 UTAH L. REV. 587, 595-96 (1994).

Marriage Project, a nonpartisan institute at Rutgers University, reported that “marriage [is enjoying] something of a comeback.”⁷²³

1. Ancient Acknowledgments of Same-Sex Relationships

The history of religious or civil affirmation of homosexual couples is difficult to discern; as with all re-constructions of ancient history, examination of documents can take us only so far. John Boswell, a Yale historian, wrote a great deal on the issue.⁷²⁴ Many find his work compelling; others find it problematic.⁷²⁵ As he is widely recognized as a significant scholar in this area, however, it is important to know of his findings.⁷²⁶

According to Boswell, rituals affirming intimate relationships between same-sex individuals – which some describe as marriages – are not absent from the history of Western civilization. In the Greco-Roman world, same-sex individuals could

⁷²³ Barbara Dafoe Whitehead & David Popenoe, *The State of Our Unions 2003: The Social Health of Marriage in America*, The National Marriage Project, June 2003, at 7, available at <http://marriage.rutgers.edu/publicat.htm>. The authors noted:

[T]he revived enthusiasm for marriage is mostly about romantic relationships and lavish weddings. It has little to do with the importance of marriage for children, or the connection between marriage and parenthood. Indeed, though Americans aspire to marriage, they are ever more inclined to see it as an intimate relationship between adults rather than as a necessary social arrangement for rearing children.

Id.

⁷²⁴ Some of Boswell’s works include: SAME-SEX UNIONS IN PRE-MODERN EUROPE (1994); *Concepts, Experience, and Sexuality, Differences* 2.1 (1990), at 67-87; *The Origins of Christian Intolerance of Homosexuality* (in Spanish), *Cuadernos del Norte* 8:44 (1987), at 18-23; The Church and the Homosexual: An Historical Perspective, in *Theological Pastoral Resources: A Collection of Articles on Homosexuality from a Pastoral Perspective*, 6th ed., (Kathleen Leopold and Thomas Orians eds., 1981, repr. 1985), at 16-20; CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY (1980), winner of the National Book Award in 1981.

⁷²⁵ JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE 183 (1994). *But see* Brent D. Shaw, book review, *Same-Sex Unions in Premodern Europe*, *New Republic*, July 18, 1994, at 33 (concluding that Boswell has mistranslated texts and misconstrued evidence throughout his book); David Wright, book review, *Do You Take This Man . . .*, 8/29/94 NAT’L REV. 59-60 (“Wright”) (concluding that “Mr. Boswell’s extraordinary skills and industry are deployed with such tendentiousness, exaggeration, special pleading, and occasional banality that the work deserves, at very best, the distinctive verdict of the Scottish courts: not proven”).

⁷²⁶ *See, e.g.*, Wright, *supra* note 725, at 59.

formalize their intimate relationships, frequently utilizing the same customs and forms as heterosexual marriage.⁷²⁷ Some types of same-sex unions had “all the elements of European marriage tradition: witnesses, gifts, religious sacrifice, a public banquet, a chalice, a ritual change of clothing for one partner, and change of status for both, even a honeymoon.”⁷²⁸

The Greek culture, Boswell asserts, also developed rich cultural norms for same-sex relationships, closely akin to marriages. The earliest known Greek liturgical manuscripts, dated 336 A.D., contain descriptions of ceremonies of sacramental union for both heterosexual and same-sex couples.⁷²⁹ Later documents dating from the eighth century reveal that both types of ceremonies persisted and contained similarities, “suggesting substantial mutual influence or parallel development.”⁷³⁰

According to Boswell, at least seven other versions of Christian ceremonies blessing relationships between same-sex individuals exist from before the twelfth century. Similar ceremonies appear in numerous manuscripts written during the twelfth through sixteenth centuries and occurred throughout the Christian world.⁷³¹

⁷²⁷ Boswell, *supra* note 724, at 80; William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993) (“Eskridge II”). A poem by Martial dating from the second century describes two men marrying “[u]nder the same law by which a woman takes a husband.” *Id.* Such ceremonies took place in public and “had become . . . absolutely commonplace.” *Id.* at 80-81.

⁷²⁸ Boswell, *supra* note 724, at 91.

⁷²⁹ *Id.* at 178. In contrast, Western Christianity did not create a sacramental marriage ceremony for heterosexual couples until 1215. *Id.*

⁷³⁰ *Id.* at 179.

⁷³¹ *Id.* at 183-84 (1994). Boswell states that, according to modern conceptions of marriage, these unions were “unequivocally a marriage.” *Id.* at 190. In an office of same-sex union dated 1147, the priest prays:

O Lord our God, Ruler of all, who didst fashion humankind after thine image and likeness, and bestowed upon us power of everlasting life, who didst deem it meet that thy holy apostles Philip and Bartholomew, should be united, not bound unto one another by law of nature but in the manner of a holy spirit and faith, as Thou didst also bless the

Starting in the fourteenth century, however, Western Europe began to stigmatize homosexual behavior.⁷³² Boswell posits that this development likely is tied to the increasing promotion of marriage for procreation purposes by Christianity.⁷³³ The persecution of individuals engaging in sodomy grew more pronounced, forcing those involved in same-sex unions to hide their relationships.⁷³⁴ This evolution ultimately contributed to the rejection of same-sex unions.⁷³⁵

Many non-Western cultures also historically recognized and institutionalized same-sex relationships.⁷³⁶ Same-sex marriage was an accepted and valued part of at least some Native American cultures preceding the arrival of Europeans on the continent.⁷³⁷ In parts of Africa, “Woman” marriages occurred between a woman

joining together of thy holy martyrs Serge and Bacchus in union of spirit. Send down, most kind Lord, the grace of thy Holy Spirit upon these thy servants, whom thou hast found worthy to be united not by nature but by faith and a holy spirit. Grant unto them thy grace to love each other in joy without injury or hatred all the days of their lives, with the aid of the all-holy Mother of God and of all of thy saints, forasmuch as thou art blessed and glorified everywhere, now and forever. . . . *Then shall [the two men] kiss the Holy Gospel and the priest and one other.*

Id. at 313-14. For translations of eleven such ceremonies, *see id.* at 283-344.

⁷³² *Id.* at 262 (“For reasons never adequately explained, ‘Western Europe was gripped by a rabid and obsessive negative preoccupation with homosexuality as the most horrible of sins.’”).

⁷³³ Eskridge I, *supra* note 683, at 36. Further, as western culture in the fourteenth century became more urban, bourgeois, and statist, same-sex unions increasingly were seen as a threat to the social order and powerful state. *See id.*

⁷³⁴ *Id.* at 36-37.

⁷³⁵ Boswell, *supra* note 724, at 249.

⁷³⁶ *Id.* at xxvi.

⁷³⁷ *Id.*; Eskridge I, *supra* note 683, at 15, 1419. In 1886, the Native American Zuni Tribe sent as its emissary to Washington, D.C., a man named We’wha, considered by his tribe to be amongst the strongest, wisest, and most esteemed. We’wha was a berdache, a male who dressed in female clothing, and he was married, under the laws of his tribe to another man. Such marriages were not at all uncommon among the Zuni or among other tribes. *See, e.g.*, Eskridge I at 1 (citing, *inter alia*, Elsie Crews Parsons, “The Zuni La’mana,” *AMERICAN ANTHROPOLOGIST* 18 (1916)); WILL ROSCOE, *THE ZUNI MAN-WOMAN* (Albuquerque: University of New Mexico Press, 1991). At that time, American state law recognized valid Native American marriages. *Id.* at 1. *See also* CLELLAN S. FORD AND FRANK A. BEACH, *PATTERNS OF SEXUAL BEHAVIOR*, 1301-31 (Harper and Row, 1951); WALTER L. WILLIAMS, *THE SPIRIT AND THE FLESH: SEXUAL DIVERSITY IN AMERICAN INDIAN CULTURE* (Beacon Press, 1986). The berdache tradition also was

who was barren and one who was not.⁷³⁸ The barren woman became the legal husband, and was entitled to all of the rights of any other husband, such as demanding damages if her wife had relations with men without her consent, becoming father to her wife’s children, and receipt of dower of her wife’s daughters.⁷³⁹

Egyptian cultures reveal same-sex relationships in unearthed artifacts depicting same-sex couples in intimate poses.⁷⁴⁰ “For example, a tomb for two male courtiers of the Fifth Dynasty (circa 2600 B.C.) includes bas-reliefs of the ‘two men in intimate poses, holding hands, embracing, noses touching’, poses that are strikingly more erotic than those depicting different-sex couples in Egyptian tombs.”⁷⁴¹ There is, unfortunately, little information available on how these non-Western unions and marriages lost favor and largely disappeared.

2. Modern Marriage

Marriage has been heralded as the “bulwark of the social order and ‘seedbed of virtue’ upon which the Republic rests. It is the organism through which the very life of a nation is nurtured and passed on to future generations.”⁷⁴²

Although the legal and financial benefits that come with marriage may provide important incentives for some couples to marry,⁷⁴³ there are less tangible and

common in northeastern Brazil and were recognized more generally by Native American laws and cultures. Eskridge I at 28.

⁷³⁸ Eskridge I, *supra* note 683, at 34.

⁷³⁹ *Id.*

⁷⁴⁰ *Id.*

⁷⁴¹ *Id.* at 1438. In addition, the relationship between a Japanese samurai and an apprentice began with a “formal exchange of written and spoken vows, giving the relationship a marriage-like status.” *Id.* at 30. Each promised to love the other in this life and the next. *Id.*

⁷⁴² Patrick F. Fagan, et al., *Marriage and Welfare Reform: The Overwhelming Evidence that Marriage Education Works* 1, 3 (Oct. 25, 2002) (quoting “America’s founders” in Cott, *supra* note 694).

more emotional reasons why couples marry. Indeed, most people are unaware of all of the thousand-plus federal and countless state and local benefits and responsibilities triggered by legal marriage.⁷⁴⁴

As noted previously, the modern institution of marriage differs from earlier conceptions in that it increasingly is seen primarily as a means of uniting two people in love who plan to live their lives together; although most married couples wish to – and in fact, do – have children, having and raising children is increasingly seen as a by-product of the marriage, rather than the purpose for the marriage.⁷⁴⁵ For instance, “[i]n a recent cross-national comparison of industrialized nations, nearly 70 percent of Americans aged 20 to 29 *disagreed* with the statement that ‘the main purpose of marriage is having children.’”⁷⁴⁶ Instead, these young Americans view marriages as a union of “soul mates.”⁷⁴⁷

Some lament this change. Historian Allan Carlson, senior fellow at the Family Research Council stated in July 2003 that “childrearing is the primary reason marriage has traditionally been treated as a ‘privileged’ relationship,” and that

⁷⁴³ See *supra* Part I describing the rights and responsibilities that adhere to marriage.

⁷⁴⁴ See Mark Strasser, *Same-Sex Marriages And Civil Unions: On Meaning, Free Exercise, And Constitutional Guarantees*, 33 LOY. U. CHI. L.J. 597, 603-4 (2002) (listing the variety of social and individual purposes marriage serves).

⁷⁴⁵ Spaht, *supra* note 715, at 244-45.

⁷⁴⁶ Barbara Dafoe Whitehead & David Popenoe, The National Marriage Project, *The State of Our Unions 2002: The Social Health of Marriage in America*, 6 (2002).

⁷⁴⁷ *Id.* at 31. At the same time, young girls are seen to be increasingly pessimistic about the prospect of lifelong marriage, with “[l]ess than a third of the girls and only slightly more than a third of the boys” believing “that marriage is more beneficial to individuals than alternative lifestyles.” *Id.* at 31. Compare the “soul mate” view among American youths with the views of British youth in the late 1980’s: “Less than half, 41%, of 18 to 21-year olds questioned thought love was the most compelling reason for marriage and 44% thought they would start a family before they wed.” *Marriage Without Love*, THE TIMES (London), June 18, 1989.

“[m]arriage is ‘not just another friendship or another love affair or another expression of sexual passion.’”⁷⁴⁸

A 1998 Canadian study offers additional insight into the reasons people might get married.⁷⁴⁹ Just under half of both men and women believed that love and companionship are the primary reasons to marry; only 2% of men and no women believed that sex is the “main benefit of marriage.”⁷⁵⁰ Although “[p]eople still marry for practical, financial and material reasons,” the report found that respondents believed “love, having children, and safe sex” to be more important.⁷⁵¹ Most respondents believed that marriage is “mutually advantageous,” yet men are deemed “to be the main beneficiaries.”⁷⁵² There are also still vestiges, particularly among the older male population, of the belief that “providing economic protection to women is a legitimate basis for marriage.”⁷⁵³

In addition to companionship and childrearing, many couples marry because their religious upbringing reinforces the importance of marriage. The Roman

⁷⁴⁸ Cheryl Wetzstein, *Romance Tops Family as Reason to Marry, Study Says; Researchers Suggest Benefits to Children Undervalued*, WASHINGTON TIMES, June 19, 2003, at A3.

⁷⁴⁹ See Rashida Dhooma, *Affairs of the Heart, Canadians Marry for Love, Not Money*, TORONTO SUN, Oct. 27, 1998, at 42 (reporting on Canada’s “national survey on sex and relationships”).

⁷⁵⁰ *Id.*

⁷⁵¹ *Id.*

⁷⁵² *Id.* The article reports:

Men and women agree marriage is mutually advantageous, but many men seem to be the main beneficiaries, according to 40% of women surveyed, who stated men get the best deal.

Ask men and 23% say women are better off wedded.

This dichotomy underlies major conflicts in some marriages, says Dr. Ed Herold, a research consultant to the study and a professor at the University of Guelph.

It’s more evident in situations where both spouses work outside of the home, but the women have the main responsibility for taking care of the children and the household, explains Herold.

Id.

⁷⁵³ *Id.*

Catholic Church, for example, considers marriage one of the seven sacraments alongside baptism, confirmation and Holy Communion.⁷⁵⁴ Judaism and Islam also long have valued the importance of both marriage and childbearing.⁷⁵⁵

Further, some marry, or desire to marry, to celebrate their relationships or to obtain familial and societal recognition of their relationships.⁷⁵⁶ Indeed, heterosexual couples are permitted to marry for no reason at all, or for reasons not generally discussed.⁷⁵⁷

⁷⁵⁴ See The Holy See, Catechism of the Catholic Church, at http://www.vatican.va/archive/ccc_css/archive/catechism/p2s2c3a7.htm#1638 (last visited March 8, 2004).

⁷⁵⁵ See, e.g., Qur'an, 30:21: "And among His signs is this, that He created for you mates from among yourselves, that ye may dwell in tranquility with them, and He has put love and mercy between your hearts. Verily in that are signs for those who reflect." Qur'an 16:72: "And Allah has made for you mates (and companions) of your own nature, and made for you, out of them, sons and daughters and grandchildren, and provided for you sustenance of the best. Will they then believe in vain things, and be ungrateful for Allah's favours?" Genesis 2:18.: "And God said it is not good for man to be alone. I will make a helper for him." Genesis 1:28: "God blessed them and God said to them, be fertile and increase; fill the earth and master it." Professor Anver M. Emon, Ph.D. candidate in history at U.C.L.A., J.S.D. candidate at Yale Law School, and Adjunct Professor at Fordham Law School, and Rabbi Ayelet Cohen, Associate Rabbi of Congregation Beth simchat Torah in New York (ordained in the Conservative tradition) provided invaluable assistance in identifying these sources.

Rabbi Cohen noted, however, that the Bible itself also is replete with negative examples of traditional relationships. Examples include Abraham's giving his wife Sarah to a king (twice, and then taking her back) to preserve his own life, as well as Abraham's engaging in a relationship with his concubine Hagar that results in the birth of Ishmael; Genesis 12:10-20, 16:1-6, 20:1-18; Jacob's taking Leah as a second wife while still married to Rachel and having relationships with concubines; Genesis 29:1-35; 30:1-24. See also Deuteronomy 21:10-17 (permitting men to take on second wives, if they no longer love their first wives) and Deuteronomy 22:13-13 (permitting the stoning death of a woman found not to be a virgin upon marriage).

⁷⁵⁶ See Andrew Sullivan, *Why the M Word Matters to Me; Only Marriage Can Bring a Gay Person Home*, TIME, Feb. 16, 2004, at 104 (arguing that only full access to marriage will allow him the full embrace accorded to heterosexuals and noting that even when in a long-term relationship his "parents and friends never asked the question they would have asked automatically if I were straight: So, when are you going to get married? When will we be able to celebrate it and affirm it and support it?").

⁷⁵⁷ Indeed, there are many examples where the importance of marriage seems to have been disregarded. See, e.g., Christine S.Y. Chun, *The Mail-Order Bride Industry: The Perpetuation of Transnational Economic Inequalities and Stereotypes*, 17 U. PA. J. INT'L ECON. L. 1155 (1996); Lola Ogunnaike, *Britney Spears, After A Dip Into Marriage, Is Free For Whatever the Future May Hold*, N.Y. TIMES, Jan. 6, 2004; Alessandra Stanley, *Television Review/The New Season; The Latest Reality Show Twist: Take My Wife, Please*, N.Y. TIMES, Sept. 29, 2004, at E7; Rick Hampson and Karen S. Peterson, *The state of our unions; Divorce and adultery are common; still, nearly all Americans at least TRY marriage*, USA TODAY, Feb. 26, 2004. Some couples marry to help with one partner's immigration status or because of a pregnancy. The U.S. Citizenship and Immigration Services Website references the need for those who

B. LEGAL DEVELOPMENTS CONCERNING THE EXTENSION OF MARRIAGE TO SAME-SEX COUPLES

The issue of whether gay men and lesbians should be permitted to marry has been the subject of much debate. This section leads the reader through the primary options that states have established for same-sex couples to legally sanction their relationships: marriage, civil union, and domestic partnership. It also explores the various bans that have been put into effect prohibiting same-sex couples from marrying or from otherwise obtaining state support for their relationships. Although these issues have been considered since the 1970s, they have garnered increasing public attention since 1993, when the Hawai'i Supreme Court was the first to find that restricting marriage to opposite-sex couples violated a state's Equal Protection clause. The greatest changes in the marriage landscape, however, have occurred since mid-2003.

1. A Brief History of Efforts to Permit Marriage between Same-Sex Partners in the United States

Same-sex partners in the United States have been seeking the right to marry for over thirty years. Indeed, the first legal claim to this right began in the early 1970s. In May 1970, a Minnesota same-sex couple was refused a marriage license by the district court county clerk. The District Court ruled that clerk was not required to issue marriage license to applicants who were of the same sex and specifically directed that a license not be issued to the couple. On appeal, petitioners contended that the absence of a statutory prohibition against same-sex marriages in Minnesota evinced a legislative intent

are applying with their spouse for removal of "the conditions of [their] permanent residence" to file "[e]vidence that you did not get married to evade the immigration laws of the United States." U.S. Citizenship and Immigration Services, *Application Procedures: Removing the Conditions on Permanent Residence Based on Marriage*, available at <http://uscis.gov/graphics/howdoi/remcond2.htm>.

to authorize same-sex marriages.⁷⁵⁸ The court, relying on Webster’s and Black Law Dictionaries, ruled that, in Minnesota’s marriage statute, “marriage” referred to the “common usage” of the term, meaning “the state of union between persons of the opposite sex.”⁷⁵⁹

In their constitutional claim, petitioners contended that the prohibition on granting marriage licenses to same-sex couples denied them a fundamental right guaranteed by the Ninth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment.⁷⁶⁰ The Supreme Court of Minnesota, looking to United States Supreme Court precedent, reasoned that the right to marry without regard to the sex of the parties is not a fundamental right of all persons, and that restricting marriage to opposite-sex couples is not irrational. In distinguishing *Loving*,⁷⁶¹ the court found a “clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.”⁷⁶²

Over the last three decades, a number of other cases have been brought by same-sex couples in different states of the union; until recently, each was similarly unsuccessful.⁷⁶³

⁷⁵⁸ *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

⁷⁵⁹ *Id.*

⁷⁶⁰ *Id.*

⁷⁶¹ 388 U.S. 1 (1967).

⁷⁶² *Baker*, 191 N.W.2d at 187. The court found that the prohibition on marriage of same-sex couples did not offend the First, Eighth, Ninth, or Fourteenth Amendments to the Constitution. *Id.*

⁷⁶³ See, e.g., *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App., 1973); *Singer v. Hara*, 84 Wash. 2d 1008 (1974); *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982); *Slayton v. State*, 633 S.W.2d 934 (Tex. App. 1982); *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. Sup. Ct. 1981) (overruled on other grounds by *Damron v. Damron*, 670 N.W.2d 871 (2003)); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Sup. Ct. 1984); *Gajovski v. Gajovski*, 610 N.E.2d 431 (Ohio Ct. App. 1991); *Van Dyck v. Van Dyck*, 425 S.E.2d 853 (Ga. Sup. Ct. 1993); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. Ct. App. 1995).

By the late 1990s, the highest courts in Hawai'i⁷⁶⁴ and Alaska⁷⁶⁵ ruled that restricting marriage to opposite-sex couples violated their respective state constitutions. In each case, however, the people of the state responded negatively to this development. In November 1998, voters in both Alaska and Hawai'i approved amendments to their State constitutions.⁷⁶⁶ The Alaska Constitution now permits only opposite-sex couples to marry.⁷⁶⁷ As amended in response to *Baehr*,⁷⁶⁸ the Hawai'i Constitution now relies upon the state legislature to determine the definition of marriage; since 1996 the legislature has determined that marriage is to be only between a man and a woman.⁷⁶⁹

⁷⁶⁴ *Baehr v. Lewin*, 852 P.2d 44, 59 (1993) (“*Baehr*”); see *infra* Section II.4.C for further discussion of this case.

⁷⁶⁵ In 1998, the Superior Court of Alaska ruled that the strict scrutiny test applies to the state’s review of its prohibition of same-sex marriage and that marriage is a fundamental right. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6592 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998) (“*Brause*”) (citing Alaska Stat. § 25.05.011 (2003) and stating that “[m]arriage is a civil contract entered into by one man and one woman that requires both a license and a solemnization”). On the issue of privacy, the court asked not whether the same-sex marriage was rooted in Alaska traditions, but rather whether the freedom to choose one’s life partner was so rooted. The court found “that the choice of a life partner is personal, intimate, and subject to the protection of the right to privacy.” *Id.* at *4. On the equal protection challenge, the court found that the right to marry is a fundamental right, and that a “person’s choice of life partner“ also is a fundamental right. *Id.* at *5. The case was remanded to determine whether, given this holding, the State could establish that there was a compelling state interest in maintaining its ban on same-sex marriage. Before the court could rule, however, the State quickly adopted a constitutional amendment barring same-sex marriages in Alaska. See AK CONST. art. I, § 25.

⁷⁶⁶ AK CONST. art. I, § 25; Liz Ruskin, *Limit on Marriage Passes in Landslide*, ANCHORAGE DAILY NEWS, Nov. 4, 1998, at A1; HAW. CONST. art. 1, § 23; Kerstin Marx, *Rights-U.S.:Gay Activists Battle Homophobia*, INTER PRESS SERV., June 23, 1999, available at 1999 WL 5949332.

⁷⁶⁷ AK CONST. art. I, § 25. “To be valid or recognized in this State, a marriage may exist only between one man and one woman.” *Id.*

⁷⁶⁸ After the Hawai'i Supreme Court held that denying marriage licenses to same-sex couples violated the state constitution, the voters of Hawaii passed an initiative granting the Hawai'i legislature the authority to define the term “marriage.” See *Baehr*, 74 Haw. 530; Kerstin Marx, *Rights-U.S.:Gray Activists Battle Homophobia*, INTER PRESS SERV., June 23, 1999, available at 1999 WL 594332; HAW. CONST. art. 1, § 23.

⁷⁶⁹ HAW. CONST. art. 1, § 23 states: “the legislature shall have the power to reserve marriage to opposite-sex couples.” *Id.* It was in response to the Hawai'i decision that Congress considered and ultimately enacted the Defense of Marriage Act. Congress was concerned that, in response to *Baehr*, non-resident same-sex couples would marry in Hawai'i and return to their home state under the presumption that their marriage was valid.

This section now turns to a discussion of the Massachusetts high court decisions in *Goodridge v. Department of Public Health*, which ultimately led to the first legally sanctioned marriages of same-sex couples in the U.S., beginning on May 17, 2004. This section then tracks the other significant judicial and legislative actions that bear on this issue. By its nature, this Report cannot discuss every development and further is limited by pragmatics: this area of law is constantly changing and virtually as soon as one draft is complete another important event occurs that renders it incomplete. Notwithstanding these difficulties, the following provides a useful guide through the recent changes in domestic marriage law.

2. The Modern Marriage Cases

a. *Goodridge I: Same-sex Couples May Not Be Denied the Benefits of Marriage*

i. The Majority Opinions

On November 18, 2003, the Massachusetts Supreme Judicial Court (“SJC”) held in *Goodridge v. Department of Public Health* that the Commonwealth may not “deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry”:⁷⁷⁰

Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community’s most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.⁷⁷¹

⁷⁷⁰ 798 N.E.2d at 948. The Court was split four to three, with one concurrence and three dissents. Each of the three dissents was joined by the other two dissenters.

⁷⁷¹ *Id.* at 949.

The question of same-sex marriage had never been addressed before by an appellate court in Massachusetts.⁷⁷² Although, according to the SJC, the United States Supreme Court had left the issue of same-sex marriage an open question under federal law in *Lawrence v. Texas* (“*Lawrence*”),⁷⁷³ the Massachusetts Constitution is “more protective of individual liberty and equality than the Federal Constitution.”⁷⁷⁴

The plaintiffs argued that the Massachusetts statute defining marriage does not include an explicit reference to gender and therefore is not a bar to same-sex marriage. The SJC rejected this argument, determining that the intent of the statute is clear.⁷⁷⁵ The main issue, therefore, was whether prohibiting same-sex marriage violated the Massachusetts Constitution’s “guarantees of equality before the law” and “liberty and due process provisions.”⁷⁷⁶

⁷⁷² *Id.* at 948.

⁷⁷³ *Id.* (stating that in *Lawrence* “the Court affirmed that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one’s choice of an intimate partner”) (citing *Lawrence*, 539 U.S. 558, 578-79 (2003)). See also Linda Greenhouse, *Same-Sex Marriage: The Context; Supreme Court Paved Way for Marriage Ruling with Sodomy Law Decision*, N.Y. TIMES, Nov. 19, 2003, at A24 (“‘You’d have to be tone deaf not to get the message from *Lawrence* that anything that invites people to give same-sex couples less than full respect is constitutionally suspect,’ Professor Laurence H. Tribe of Harvard Law School said . . . and had the Texas case been decided differently – or not at all – ‘the odds that this cautious, basically conservative state court would have decided the case this way would have been considerably less.’”).

Like the *Goodridge* Court, the high court of Ontario highlighted the issue of “human dignity” in their recent decision regarding same-sex marriage. See *Halpern v. Canada*, 65 O.R.(3d) 161 (2003) (defining the question in Canada as “whether excluding same-sex couples from another of the most basic elements of civic life – marriage – infringes human dignity and violates the Canadian Constitution”).

⁷⁷⁴ *Goodridge*, 798 N.E.2d at 948.

⁷⁷⁵ *Id.* at 952 (“The everyday meaning of ‘marriage’ is ‘the legal union of a man and woman as husband and wife,’ and the plaintiffs do not argue that the term ‘marriage’ has ever had a different meaning under Massachusetts law.”) (citations omitted).

⁷⁷⁶ *Id.* at 953. Although each issue involves slightly different analyses, the SJC addressed the issues in tandem, because they often overlap, particularly when they implicate issues of family life. *Id.* at 798.

The SJC began its analysis with a reminder that marriage is a “wholly secular institution.”⁷⁷⁷ The court then turned to a review of the “enormous private and social advantages” bestowed by marriage, including property, parentage, and medical-related rights:

Tangible as well as intangible benefits flow from marriage. The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what might otherwise be a burdensome degree of government regulation of their activities. The Legislature has conferred on “each party [in a civil marriage] substantial rights concerning the assets of the other which unmarried cohabitants do not have.”⁷⁷⁸

⁷⁷⁷ *Id.* at 954 (citing *Commonwealth v. Munson*, 127 Mass. 459, 460-66 (1879)); *see also Williams v. Williams*, 543 P.2d at 1403 (discussing the court’s jurisdiction over civil marriage and its lack of jurisdiction over ecclesiastical marriages).

⁷⁷⁸ *Goodridge*, 798 N.E.2d at 955.

The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that “hundreds of statutes” are related to marriage and to marital benefits. With no attempt to be comprehensive, we note that some of the statutory benefits conferred by the Legislature on those who enter into civil marriage include, as to property: . . . tenancy by the entirety (a form of ownership that provides certain protections against creditors and allows for the automatic descent of property to the surviving spouse without probate); . . . automatic rights to inherit the property of a deceased spouse who does not leave a will; the rights of elective share and of dower (which allow surviving spouses certain property rights where the decedent spouse has not made adequate provision for the survivor in a will); entitlement to wages owed to a deceased employee; eligibility to continue certain businesses of a deceased spouse; the right to share the medical policy of one’s spouse; . . . continuation of health coverage for the spouse of a person who is laid off or dies; access to veterans’ spousal benefits and preferences; . . . the equitable division of marital property on divorce; temporary and permanent alimony rights; the right to separate support on separation of the parties that does not result in divorce; and the right to bring claims for wrongful death and loss of consortium, and for funeral and burial expenses and punitive damages resulting from tort actions.

Exclusive marital benefits that are not directly tied to property rights include the presumptions of legitimacy and parentage of children born to a married couple; and evidentiary rights, such as the prohibition against spouses testifying against one another about their private conversations, applicable in both civil and criminal cases. Other statutory benefits of a personal nature available only to married individuals include qualification for bereavement or medical leave to care for individuals related by blood or marriage; an automatic “family member” preference to make medical decisions for an incompetent or disabled spouse who does not have a contrary health care proxy; the application of predictable rules of child custody, visitation, support, and removal out-of-State when married parents divorce; priority rights to administer the estate of a deceased spouse who dies without a will, and requirement that surviving spouse must consent to the appointment of any other person as administrator; and the right to interment in the lot or tomb owned by one’s deceased spouse.

Id. at 955-56 (footnotes, citations, and references omitted); *see supra* Section I for a review of the rights bestowed by marriage in New York State.

The SJC also noted the benefits that accrue to children from having married parents:

Notwithstanding the Commonwealth's strong public policy to abolish legal distinctions between marital and nonmarital children in providing for the support and care of minors, the fact remains that marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children.⁷⁷⁹

For these reasons, declared the SJC, civil marriage is a civil right.⁷⁸⁰

Therefore, the SJC found that while those who choose not to marry may be denied the institution's benefits, the same should not be true for those who would marry if they were able.⁷⁸¹ The Court referenced prior restrictions on marriage between white and black Americans, concluding that "the right to marry means little if it does not include the right to marry the person of one's choice."⁷⁸²

The SJC began its analysis using the rational basis test to examine the State's marriage law.⁷⁸³ The Department of Health ("Department") offered three rationales for the prohibition of same-sex marriage: "(1) providing a 'favorable setting for procreation'; (2) ensuring the optimal setting for child rearing . . . ; and (3) preserving scarce State and private financial resources."⁷⁸⁴ The Court rejected each rationale. On

⁷⁷⁹ *Id.* at 956-57.

⁷⁸⁰ *Id.* (citing other cases, such as *Loving*, 388 U.S. at 12; *Baehr*, 852 P.2d at 59; *Baker* 744 A.2d at 898 (Johnson, J., concurring in part and dissenting in part), that defined marriage as a civil right)).

⁷⁸¹ *Id.* at 957-58.

⁷⁸² *Id.* at 958 (the right is "subject to appropriate government restrictions in the interests of public health, safety, and welfare").

⁷⁸³ *Id.* at 961.

⁷⁸⁴ *Id.*

the issue of procreation, the SJC noted that “[p]eople who have never consummated their marriage, and never plan to, may be and stay married.”⁷⁸⁵ The SJC further explained:

[T]he Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual.⁷⁸⁶

In short, the Court declared that “[t]he ‘marriage is 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.”⁷⁸⁷ The Court found that such an argument perpetuated the stereotype that same-sex relationships are “inferior” and “not worthy of respect.”⁷⁸⁸

Turning to the question of the “optimal” setting in which to raise a child, the SJC concluded that “[r]estricting marriage to opposite-sex couples. . . cannot plausibly further” the policy of “[p]rotecting the welfare of children.”⁷⁸⁹ Returning to the theme of how marriage law affects children, the SJC noted that it has rejected the “power of the State to provide varying levels of protection to children based on the circumstances of birth”⁷⁹⁰ and references the Department’s concession that “same-sex couples may be ‘excellent’ parents.”⁷⁹¹

⁷⁸⁵ *Id.*

⁷⁸⁶ *Id.* at 961-62.

⁷⁸⁷ *Id.* at 962.

⁷⁸⁸ *Id.*

⁷⁸⁹ *Id.* at 962-63.

⁷⁹⁰ *Id.* at 963; *see also id.* at 964 (“It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.”).

⁷⁹¹ *Id.* at 963.

The SJC then addressed the Department’s proposition that the current marriage laws help conserve the financial resources of the State and private citizens. The government argued that the SJC “logically could assume that same-sex couples are more financially independent than married couples and thus less needy of public marital benefits, such as tax advantages, or private marital benefits, such as employer-financed health plans that include spouses in their coverage.”⁷⁹² The SJC rejected this claim on two grounds. First, the claim failed to recognize that many same-sex couples have to care for children and elderly parents. Second, the marriage laws do not require a showing of financial dependence on one’s spouse.⁷⁹³

Finally, the Court rejected a series of additional rationales suggested by the defendant and *amici*. The SJC first addressed the fear that a change in marriage laws would undermine the current institution:

Here, the plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want marriage abolished. They do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities. That same-sex couples are willing to embrace marriage’s solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.⁷⁹⁴

⁷⁹² *Id.*

⁷⁹³ *Id.* at 964.

⁷⁹⁴ *Id.* at 965 (footnotes omitted).

The SJC then spoke to the argument that marriage is solely a legislative question, claiming that “[t]o label the court’s role as usurping that of the Legislature is to misunderstand the nature and purpose of judicial review” and noting that the Court “owe[s] great deference to the Legislature to decide social and policy issues, but it is the traditional and settled role of courts to decide constitutional issues.”⁷⁹⁵

Turning to the argument that expanding marriage rights will spark interstate conflict, the SJC determined that concern for interstate comity should not “prevent [them] from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution.”⁷⁹⁶

Finally, the SJC responded to the government’s argument that the current institution of marriage reflects a community consensus regarding the immorality of homosexuality:

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.⁷⁹⁷

For all these reasons, the SJC “construe[d] civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.”⁷⁹⁸ The court

⁷⁹⁵ *Id.* at 966 (footnote omitted).

⁷⁹⁶ *Id.* at 967. The SJC added: “The genius of our Federal system is that each State’s Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.” *Id.* at 967.

⁷⁹⁷ *Id.* at 968.

⁷⁹⁸ *Id.* at 969.

then stayed the judgment for 180 days so that the Massachusetts legislature could take appropriate action.

Justice Greaney concurred in the decision but based his opinion on gender discrimination because “the case is more directly resolved using traditional equal protection analysis.”⁷⁹⁹ He described the marriage laws as preventing one from choosing a spouse due to that person’s gender.⁸⁰⁰ Justice Greaney addressed the argument that the prohibition applies equally to men and women:

A classification may be gender based whether or not the challenged government action apportions benefits or burdens uniformly along gender lines. This is so because constitutional protections extend to individuals and not to categories of people. Thus, when an individual desires to marry, but cannot marry his or her chosen partner because of the traditional opposite-sex restriction, a violation of art. 1 has occurred. I find it disingenuous, at best, to suggest that such an individual’s right to marry has not been burdened at all, because he or she remains free to chose [sic] another partner, who is of the opposite sex.⁸⁰¹

He then addressed the argument that marriage inherently is between a man and a woman:

A comment is in order with respect to the insistence of some that marriage is, as a matter of definition, the legal union of a man and a woman. To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide. This case calls for a higher level of legal analysis.⁸⁰²

Justice Greaney concluded with a call to the public to accept the ruling.⁸⁰³

⁷⁹⁹ *Id.* 970 (Greaney, J., concurring). For the full analysis of the gender discrimination basis, see *id.* at 344-49. In addition, Justice Greaney declared that marriage is a fundamental right. *Id.*

⁸⁰⁰ *See id.* at 971.

⁸⁰¹ *Id.* (citation omitted).

⁸⁰² *Id.* at 972-73.

⁸⁰³ *Id.* at 973. Justice Greaney writes:

ii. The Dissenting Opinions

The *Goodridge* decision was a close one, with three of the seven justices writing separate dissenting opinions. Justice Francis X. Spina stated that the issue before the court was the appropriate role for each branch of government. In his view, “[t]he power to regulate marriage lies with the Legislature, not with the judiciary.”⁸⁰⁴ He then turned to plaintiffs’ legal claims noting that even though the court did not take up the plaintiffs’ gender discrimination claim, it was baseless in any event, as the marriage law applies equally to both men and women.⁸⁰⁵ He then turned to the claim that the marriage law discriminates based on sexual orientation:

As the court correctly recognizes, constitutional protections are extended to individuals, not couples. The marriage statutes do not disqualify individuals on the basis of sexual orientation from entering into marriage. All individuals, with certain exceptions not relevant here, are free to marry. Whether an individual chooses not to marry because of sexual orientation or any other reason should be of no concern to the court.⁸⁰⁶

I am hopeful that our decision will be accepted by those thoughtful citizens who believe that same-sex unions should not be approved by the State. I am not referring here to acceptance in the sense of grudging acknowledgment of the court’s authority to adjudicate the matter. My hope is more liberating. The plaintiffs are members of our community, our neighbors, our coworkers, our friends. As pointed out by the court, their professions include investment advisor, computer engineer, teacher, therapist, and lawyer. The plaintiffs volunteer in our schools, worship beside us in our religious houses, and have children who play with our children, to mention just a few ordinary daily contacts. We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance, and respect. We should do so because it is the right thing to do. The union of two people contemplated by G. L. c. 207 “is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.” Because of the terms of art. 1, the plaintiffs will no longer be excluded from that association.

Id. at 973-74 (quoting *Griswold v. Connecticut*, 381 U.S. at 486) (footnotes omitted).

⁸⁰⁴ *Id.* at 974 (Spina, J., dissenting).

⁸⁰⁵ *Id.* at 974-75.

⁸⁰⁶ *Id.* at 975 (footnote omitted).

Justice Spina rejected analogies to cases related to marriage between members of different racial groups:

Unlike the *Loving* and *Sharp* cases, the Massachusetts Legislature has erected no barrier to marriage that intentionally discriminates against anyone. Within the institution of marriage anyone is free to marry In the absence of any discriminatory purpose, the State’s marriage statutes do not violate principles of equal protection.⁸⁰⁷

Justice Spina then concluded that the majority inappropriately created a new right under substantive due process, noting that the purpose of this doctrine is to protect existing rights, not to create new rights.⁸⁰⁸

Justice Martha B. Sosman dissented as well. She argued that rational basis scrutiny cannot require that legislation be consistent with the views of courts:

Our belief that children raised by same-sex couples *should* fare the same as children raised in traditional families is just that: a passionately held but utterly untested belief. The Legislature is not required to share that belief but may, as the creator of the institution of civil marriage, wish to see the proof before making a fundamental alteration to that institution.⁸⁰⁹

In sum, Justice Sosman detailed why the decision of the legislature not to recognize same-sex marriage, while debatable, is clearly not irrational.⁸¹⁰ She concluded by noting that although the opinion someday may be deemed “a tremendous step toward

⁸⁰⁷ *Id.* (footnote omitted).

⁸⁰⁸ *See id.* at 975-78 (“The court has extruded a new right from principles of substantive due process, and in doing so it has distorted the meaning and purpose of due process.”).

⁸⁰⁹ *Id.* at 980 (Sosman, J., dissenting). Justice Sosman continues: In short, while claiming to apply a mere rational basis test, the court’s opinion works up an enormous head of steam by repeated invocations of avenues by which to subject the statute to strict scrutiny, apparently hoping that that head of steam will generate momentum sufficient to propel the opinion across the yawning chasm of the very deferential rational basis test.

Id. at 981.

⁸¹⁰ *See generally id.* at 978; *see also Lawrence*, 539 U.S. at 605 (Thomas, J., dissenting) (noting that while the anti-sodomy law in question was “uncommonly silly” in the words of *Griswold v. Connecticut*, it is not the role of the Court to implement that judgment). *Goodridge*, 798 N.E.2d at 982.

a more just society,” currently it is “[a]s a matter of constitutional jurisprudence. . .an aberration.”⁸¹¹

Justice Robert J. Cordy offered his own extensive dissent to the *Goodridge* opinions, expanding on the themes highlighted by Justices Sosman and Spina. He specifically detailed his strong belief that, regardless of one’s view about the benefits of same-sex marriage, the issue is clearly debatable and the legislature’s continued adherence to a traditional marriage definition is thereby not irrational.⁸¹²

First, Justice Cordy took issue with the majority’s conclusion that the choice regarding whom to marry is “of fundamental importance,” and, therefore, marriage licenses cannot be denied those who choose someone of the same gender.⁸¹³ Noting that the majority did not say that such a choice is a fundamental right, he argued that “[i]n reaching this result the court has transmuted the ‘right’ to marry into a right to change the institution of marriage itself.”⁸¹⁴ Justice Cordy went on to explain why the choice to marry someone of the same gender is not a fundamental right even though marriage itself is: “Because same-sex couples are unable to procreate on their own, any right to marriage they may possess cannot be based on their interest in procreation, which has been essential to the Supreme Court’s denomination of the right to marry as fundamental.”⁸¹⁵ And, although “expressions of emotional support and public

⁸¹¹ *Id.*

⁸¹² *Id.* at 983 (Cordy, J., dissenting) (“Although it may be desirable for many reasons to extend to same-sex couples the benefits and burdens of civil marriage (and the plaintiffs have made a powerfully reasoned case for that extension), that decision must be made by the Legislature, not the court.”).

⁸¹³ *Id.* at 984.

⁸¹⁴ *Id.*

⁸¹⁵ *Id.* at 985.

commitment” are aspects of marriage, they alone are not the source of the right to marry.⁸¹⁶

Justice Cordy then addressed the question of whether same-sex marriage should be recognized as a fundamental right, noting how cautious courts must be in making such a determination. He found that there did not exist the sort of consensus regarding the right to have it be deemed fundamental: “[I]t is not readily apparent to what extent contemporary values have embraced the concept of same-sex marriage. Perhaps the ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.’ No State Legislature has enacted laws permitting same-sex marriages for any purpose.”⁸¹⁷ Therefore, he found that it was neither so deeply rooted nor “implicit in the concept of ordered liberty” as to require recognition as a fundamental right.⁸¹⁸

Turning next to the question of gender discrimination, Justice Cordy rejected the argument that the marriage statute violates the Equal Rights Amendment (“ERA”) of the Massachusetts Constitution: “The Massachusetts marriage statute does not subject men to different treatment from women; each is equally prohibited from precisely the same conduct.”⁸¹⁹ He also rejected the analogy to *Loving v. Virginia*, where the prohibition against mixed-race marriages was “designed to maintain White Supremacy,”⁸²⁰ because “there is no evidence that limiting marriage to opposite-sex

⁸¹⁶ *Id.* at 987 (quoting *Turner v. Safley*, 482 U.S. 78, 95 (1987)) (internal quotation marks omitted).

⁸¹⁷ *Id.* at 990 (citing *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989))) (citations omitted).

⁸¹⁸ *Id.* at 990 (citing *Baehr v. Lewin* 852 P.2d at 57).

⁸¹⁹ *Id.* at 991.

⁸²⁰ *Id.* at 992 (quoting *Loving*, 388 U.S. at 11) (internal quotation marks omitted).

couples was motivated by sexism in general or a desire to disadvantage men or women in particular.”⁸²¹ In addition, Justice Cordy pointed out that when the ERA was ratified as part of the Massachusetts Constitution, assurances were made that it would not affect the question of same-sex marriage.⁸²²

In the final part of his dissent, Justice Cordy analyzed in depth the rational basis analysis and his reasoning for finding the current marriage statute rational. He determined that the relevant classification in the statute is not between heterosexuals and homosexuals, but rather between opposite-sex and same-sex couples.⁸²³ At some length, he then examined the state’s purpose and found that the state has a great interest in regulating marriage, since it is “an organizing principle of society.”⁸²⁴ Justice Cordy concluded that “[i]t is difficult to imagine a State purpose more important and legitimate than ensuring, promoting, and supporting an optimal social structure within which to bear and raise children.”⁸²⁵ He then addressed the question of whether limiting marriage to opposite sex couples is a rational way to further the state purpose. In sum, he found:

⁸²¹ *Id.*

⁸²² *Id.* at 993. Justice Cordy writes:
While the court, in interpreting a constitutional amendment, is not bound to accept either the views of a legislative commission studying and reporting on the amendment’s likely effects, or of public commentary and debate contemporaneous with its passage, it ought to be very wary of completely disregarding what appears to be the clear intent of the people recently recorded in our constitutional history.

Id.

⁸²³ *Id.* at 994.

⁸²⁴ *Id.* at 996. Justice Cordy also noted:
It is undeniably true that dramatic historical shifts in our cultural, political, and economic landscape have altered some of our traditional notions about marriage, including the interpersonal dynamics within it, the range of responsibilities required of it as an institution, and the legal environment in which it exists. Nevertheless, the institution of marriage remains the principal weave of our social fabric.

Id. at 997 (footnotes omitted).

⁸²⁵ *Id.*

Taking all of this available information into account, the Legislature could rationally conclude that a family environment with married opposite-sex parents remains the optimal social structure in which to bear children, and that the raising of children by same-sex couples, who by definition cannot be the two sole biological parents of a child and cannot provide children with a parental authority figure of each gender, presents an alternative structure for child rearing that has not yet proved itself beyond reasonable scientific dispute to be as optimal as the biologically based marriage norm.⁸²⁶

Addressing the question then of why same-sex parents are permitted to adopt, Justice Cordy found that there is a difference between validating the optimal setting for child-rearing and permitting alternatives when the optimal setting is not available.⁸²⁷ In addition, the marriage statute permits the state to express the message “that marriage is a (normatively) necessary part of their procreative endeavor; that if they are to procreate, then society has endorsed the institution of marriage as the environment for it and for the subsequent rearing of their children.”⁸²⁸ Justice Cordy concluded by emphasizing that legislatures are capable of implementing social change, even if sometimes it is done too slowly for some. He noted that the evolution toward greater acceptance of homosexual citizens is likely to continue.⁸²⁹ Nevertheless, in his words, “the issue presented here is a profound one, deeply rooted in social policy, that must, for now, be the subject of legislative not judicial action.”⁸³⁰

⁸²⁶ *Id.* at 999-1000 (footnote omitted).

⁸²⁷ *Id.* at 1000.

⁸²⁸ *Id.* at 1002.

⁸²⁹ *Id.* at 1004.

⁸³⁰ *Id.* at 1005.

b. *Goodridge II: Civil Union is Separate and Unequal*

Shortly after *Goodridge* was handed down, the Massachusetts Senate requested the Justices' opinion on the following question:

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?⁸³¹

i. The Majority Opinion

On February 3, 2004, the Justices of the SJC submitted their answers. A four-member majority declared that a civil union law would not satisfy the requirements of their decision. Their opinion began with a review of the holding in *Goodridge*. The SJC then turned to the specific provisions in a bill the legislature proposed. The SJC first noted that the bill was a response to the *Goodridge* decision.⁸³² The bill would establish civil unions as the vehicle to provide same-sex couples with all the rights and responsibilities of marriage while maintaining marriage in its traditional form:⁸³³

The proposed law states that “spouses in a civil union shall be “joined in it with a legal status equivalent to marriage.” The bill expressly maintains that “marriage” is reserved exclusively for opposite-sex couples by providing that “[p]ersons eligible to form a civil union with each other under this chapter shall not be eligible to enter into a marriage with each other under chapter 207.” Notwithstanding, the proposed law purports to make the institution of a “civil union” parallel to the institution of civil “marriage.”⁸³⁴

⁸³¹ *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 566 (Mass. 2004) (“*Goodridge I*”). The Supreme Judicial Court of Massachusetts is empowered under that State’s Constitution to render advisory opinions in certain circumstances. MASS. GEN. LAWS ANN. CONST. Pt. II, ch. 3, art. 2.

⁸³² *Goodridge II*, 802 N.E.2d at 567-68.

⁸³³ *Id.* at 568-69.

⁸³⁴ *Id.* at 568 (citations omitted). The SJC concluded their examination of the bill’s provision with the following:

The SJC then turned to analyzing the bill in light of its ruling in *Goodridge*.

The court concluded that the Senate’s attempt to conform to *Goodridge* failed. The Justices reiterated their conclusion from *Goodridge* that “[t]he very nature and purpose of civil marriage . . . renders unconstitutional any attempt to ban all same-sex couples, *as* same-sex couples, from entering into civil marriage.”⁸³⁵ The court then described their holding in *Goodridge* as invalidating the classification of groups “based on unsupportable distinctions,” noting that “[t]he history of our nation has demonstrated that separate is seldom, if ever, equal.”⁸³⁶ The SJC recognized that although there are

The bill goes on to enumerate a nonexclusive list of the legal benefits that will adhere to spouses in a civil union, including property rights, joint State income tax filing, evidentiary rights, rights to veteran benefits and group insurance, and the right to the issuance of a “civil union” license, identical to a marriage license under G.L. c. 207, “as if a civil union was a marriage.”

Id. at 568-69.

⁸³⁵ *Id.* at 569 (emphasis in original). The SJC proceeded: “Segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance or ‘preserve’ what we stated in *Goodridge* were the Commonwealth’s legitimate interests in procreation, child rearing, and the conservation of resources.” *Id.*

⁸³⁶ *Id.* The SJC then responded to Justice Sosman’s claim in her dissenting opinion that the majority was in effect declaring sexual orientation as a suspect classification and applying a stricter scrutiny than they claimed:

The separate opinion of Justice Sosman . . . correctly notes that this court has not recognized sexual orientation as a suspect classification. It does so by referring to *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and stating that that case “involved a classification . . . that is expressly prohibited by our Constitution.” The *Brown* case was decided under the Federal Constitution and made no reference to “suspect classifications.” It held that “separate but equal” segregation in the context of public schools violated “the equal protection of the laws guaranteed by the Fourteenth Amendment” to the United States Constitution. The Fourteenth Amendment does not expressly prohibit discrimination against any particular class of persons, racial, religious, sexual, or otherwise, but instead elegantly decries the denial of equal protection of the laws “to any person” within the jurisdiction of the United States. Similarly, our decision in *Goodridge* did not depend on reading a particular suspect class into the Massachusetts Constitution, but on the equally elegant and universal pronouncements of that document.

In any event, we fail to understand why the separate opinion chastises us for adopting the constitutional test (rational basis) that is more likely to permit the legislation at issue. We did not apply a strict scrutiny standard in *Goodridge*. Under the even more lenient rational basis test, nothing presented to us as a justification for the existing distinction was in any way rationally related to the objectives of the marriage laws. Now,

strong convictions on both sides of the issue that are “outside the reach of judicial review or government interference,”⁸³⁷ this does not mean that the government may reflect such convictions by enacting a law that “enshrine[s] . . . an invidious discrimination.”⁸³⁸

With this framework, the SJC analyzed whether the civil union bill would have constituted such an enshrinement. It first concluded that use of different names for marriage and civil unions is not just “semantic,” but rather, assigns same-sex couples to a lesser status.⁸³⁹ The SJC rejected the dissent’s argument that differences in recognition afforded to same-sex relationships by the federal government serve as a rational basis for naming them differently:⁸⁴⁰

[W]e would do a grave disservice to every Massachusetts resident, and to our constitutional duty to interpret the law, to conclude that the strong protection of individual rights guaranteed by the Massachusetts Constitution should not be available to their fullest extent in the Commonwealth because those rights may not be acknowledged elsewhere. We do not resolve, nor would we attempt to, the consequences of our holding in other jurisdictions. But, as the court held in *Goodridge*, under our Federal system of dual sovereignty, and subject to the minimum requirements of the Fourteenth Amendment . . . “each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.”⁸⁴¹

we answer that this proposed legislation fails to provide a rational basis for the different nomenclature.

Id. at n.3 (citations omitted).

⁸³⁷ *Goodridge II*, at 570.

⁸³⁸ *Id.* at 570.

⁸³⁹ *Id.* (“The denomination of this difference by the separate opinion of Justice Sosman . . . as merely a ‘squabble over the name to be used’ so clearly misses the point that further discussion appears to be useless.”)

⁸⁴⁰ *Id.* at 571.

⁸⁴¹ *Id.* (citations omitted).

The SJC then noted that *Goodridge* was concerned not only with benefits but also with preventing the perpetuation of discrimination based on status.⁸⁴²

ii. The Dissent

The three dissenters from *Goodridge* again dissented on the question of civil unions. Justice Martha B. Sosman wrote the primary dissent to the majority and was joined by Justice Francis X. Spina. Justice Robert J. Cordy added a separate dissent. Justice Sosman began her opinion by defining the question before the court as: “whether the Massachusetts Constitution would be violated by utilizing the term ‘civil union’ instead of ‘marriage’ to identify the otherwise identical package of State law rights and benefits to be made available to same-sex couples.”⁸⁴³ Justice Sosman stated that because the bill provided all the rights of marriage, all that is left for the SJC is “a squabble over the name to be used”:⁸⁴⁴

There is, from the *amici* on one side, an implacable determination to retain some distinction, however trivial, between the institution created for same-sex couples and the institution that is available to opposite-sex couples. And, from the *amici* on the other side, there is an equally implacable determination that no distinction, no matter how meaningless, be tolerated. As a result, we have a pitched battle over who gets to use the “m” word.⁸⁴⁵

The Justice did not see this as being a question of “constitutional dimension.”⁸⁴⁶ Justice Sosman also denied that the question already had been decided by *Goodridge*:

⁸⁴² *Id.*

⁸⁴³ *Goodridge II*, at 572.

⁸⁴⁴ *Id.*

⁸⁴⁵ *Id.*

⁸⁴⁶ *Id.*

Today’s question presents the court with the diametric opposite of the statutory scheme reviewed in *Goodridge*. Where the prior scheme accorded same-sex couples (and their children) absolutely *none* of the benefits, rights, or privileges that State law confers on opposite-sex married couples (and their children), the proposed bill would accord them *all* of those substantive benefits, rights, and privileges. Nothing in *Goodridge* addressed the very limited issue that is presented by the question now before us, *i.e.*, whether the Constitution mandates that the license that qualifies same-sex couples for that identical array of State law benefits, rights, and privileges be called a “marriage” license. In other words, where *Goodridge* addressed whether there was any rational basis for the enormous substantive difference between the treatment of same-sex couples and the treatment of opposite-sex couples, the present question from the Senate asks whether a single difference in form alone – the name of the licensing scheme – would violate the Constitution. Repeated quotations of dicta from *Goodridge* – which is essentially all that today’s answer to the Senate consists of – simply does not answer the question that is before us.⁸⁴⁷

Noting the lack of precedent on how to apply rational basis scrutiny to the naming of statutes, Justice Sosman thought it “logical that the Legislature could call a program by a different name as long as there was any difference between that program and the other program in question.”⁸⁴⁸ She then noted the differences that would remain between same-sex and opposite-sex marriages, over which the state would have no control, and deemed it rational for the legislature to use different names:⁸⁴⁹

It would be rational for the Legislature to give different names to the license accorded to these two groups, when the obligations they are undertaking and the benefits they are receiving are, in practical effect, so very different, and where, for purposes of the vast panoply of federally funded State programs, State officials will have to differentiate between them. That these differences stem from laws and practices outside our own

⁸⁴⁷ *Id.* at 573 (emphasis in original); *id.* (“Nowhere does today’s answer to the Senate actually analyze whether there is or is not a conceivable rational basis for that distinction in name. Instead, the answer pays lip service to the rational basis test in a footnote and, in conclusory fashion, announces that, because the different name would still connote ‘a different status,’ it somehow lacks a rational basis and is contrary to *Goodridge*.”).

⁸⁴⁸ *Id.* at 573-74.

⁸⁴⁹ *Id.* at 574-76.

jurisdiction does not make those differences any less significant. They will have a very real effect on the everyday lives of same-sex couples, and the lives of their children, that will unavoidably make their ostensible “marriage” a very different legal institution from the “marriage” enjoyed by opposite-sex couples. That lack of recognition in other jurisdictions is not simply a matter affecting the intangibles of “status” or “personal residual prejudice,” but is a difference that gives rise to a vast assortment of highly tangible, concrete consequences. It is not the naming of the legal institution that confers “a different status” on same-sex couples, rather, that difference in terminology reflects the reality that, for many purposes, same-sex couples will have “a different status.”⁸⁵⁰

Justice Sosman also argued that the court failed to apply the rational basis test and, instead, applied a higher level of scrutiny.⁸⁵¹ She noted the majority’s reliance

⁸⁵⁰ *Id.* at 575-76 (footnote and citations omitted).

⁸⁵¹ *Id.* at 578-79. Justice Sosman added a substantial footnote here:

Today’s answer to the Senate also assumes that such “invidious discrimination” may be found in the mere name of the proposed licensing scheme. If the name chosen were itself insulting or derogatory in some fashion, I would agree, but the term “civil union” is a perfectly dignified title for this program – it connotes no disrespect. Rather, four Justices today assume that anything other than the precise word “marriage” is somehow demeaning. Not only do we have an insistence that the name be identical to the name used to describe the legal union of opposite-sex couples, but an apparent insistence that the name include the word “marriage.” From the dogmatic tenor of today’s answer to the Senate, it would appear that the court would find constitutional infirmity in legislation calling the legal union of same-sex couples by any name other than “marriage,” even if that legislation simultaneously provided that the union of opposite-sex couples was to be called by the precise same name.

Today’s answer assumes, in substance, that the “right to choose to marry” as recognized in *Goodridge*, includes the constitutional right to have the legal relationship bear that precise term. Given that *Goodridge* itself recognized that the Legislature could abolish the institution of marriage if it chose, it is hard to identify how the Constitution would be violated if the Legislature chose merely to rename it. Rather than imbuing the word “marriage” with constitutional significance, there is much to be said for the argument that the secular legal institution, which has gradually come to mean something very different from its original religious counterpart, be given a name that distinguishes it from the religious sacrament of “marriage.” Different religions now take very differing positions on such elemental matters as who is eligible to be “married” within that faith, or whether (and under what circumstances) the bonds of that “marriage” may be dissolved. The Legislature could, rationally and permissibly, decide that the time has come to jettison the term “marriage” and to use some other term to stand for the secular package of rights, benefits, privileges, and obligations of couples who have entered into that civil, secular compact. Retaining the same term merely perpetuates and adds to the confusion as to what the term means. Whatever the nature of this constitutional right “to choose to marry,” there is no right to have the State continue to use any particular term with which to describe that legal relationship.

Id. at 579 n.5 (citations omitted).

on cases which dealt with “fundamental rights” as well as “suspect classifications,”⁸⁵² concluding that there was no analysis of why sexual orientation should be a suspect classification in either *Goodridge* or the response to the Senate.⁸⁵³

Justice Cordy dissented separately on the basis that there was not yet a sufficient record to conclude whether a rational basis existed for the difference in nomenclature.⁸⁵⁴

⁸⁵² *Id.* at 579-80. Justice Sosman again added a substantial footnote in response to the majority’s argument:

This assumption is most explicit in the answer’s invocation of the concept of “separate but equal,” suggesting that the different naming of the statutory scheme contains the same type of constitutional defect as that identified in *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954). Of course, that landmark case involved a classification (and resulting separation) based on race, a classification that is expressly prohibited by our Constitution (art. 1 of the Declaration of Rights, as amended by art. 106 of the Amendments of the Massachusetts Constitution) and has long been recognized as a “suspect” classification requiring strict scrutiny for purposes of equal protection analysis under the Fourteenth Amendment to the United States Constitution. Classifications based on race, and hence any separate but allegedly equal treatment of the races, “must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.” It is that “historical fact” concerning the “central purpose” of the Fourteenth Amendment, not how “elegantly [it] decries the denial of equal protection of the laws ‘to any person,’” that subjects racial classifications to strict scrutiny. Here, we have no constitutional provision that has, as either its “central” or even its peripheral purpose, the elimination of discrimination based on sexual orientation.

Id. at 580 n.6 (citations omitted; alternatives in original).

⁸⁵³ *Id.* at 580.

⁸⁵⁴ *Goodridge II*, at 580-81 (Cordy, J., dissenting):

What was before the court, in fairness, was a yawning chasm between hundreds of protections and benefits provided under Massachusetts law for some and none at all for others. That a classification with such attendant advantages afforded to one group over another could not withstand scrutiny under the rational basis standard does little to inform us about whether an entirely different statutory scheme, such as the one pending before the Senate, that provides all couples similarly situated with an identical bundle of legal rights and benefits under licenses that differ in name only, would satisfy that standard. A mere difference in name, that does not differentiate on the basis of a constitutionally protected or suspect classification or create any legally cognizable advantage for one group over another under Massachusetts law, may not even raise a due process or equal protection claim under our Constitution, and the rational basis test may be irrelevant to the court’s consideration of such a statute, once enacted.

Assuming, however, that a difference in statutory name would itself have to rest on a rational basis, I would withhold judgment until such time as the Legislature completed its deliberative process before concluding that there was or was not such a basis.

c. Post-Goodridge Developments in Massachusetts

In the wake of the *Goodridge* decisions, Massachusetts Governor Mitt Romney, along with legislative allies, sought to amend the State’s Constitution to prohibit same-sex couples from marrying. On March 29, 2004, the Massachusetts Legislature voted in favor of a constitutional amendment that would ban marriage between same-sex couples and institute civil unions.⁸⁵⁵ To become part of the State’s Constitution, both chambers of the legislature must pass the measure again in 2005 and then it must be ratified by the people of the State in a ballot initiative.⁸⁵⁶ The earliest it can be included on the ballot is November 2006.⁸⁵⁷ In the meantime, same-sex couples who are residents of the state or who intend to become residents are permitted to marry in Massachusetts.

At the same time that Governor Romney began pursuing this constitutional prohibition, he declared that he would enforce General Laws Chapter 207, Section 11 – the 1913 Reverse Evasion Statute, which provides: “No marriage shall be contracted in the commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.”⁸⁵⁸ The statute had not been enforced for decades.⁸⁵⁹

Id. (citations omitted).

⁸⁵⁵ Elizabeth Mehren, *Massachusetts Legislature Moves to Bar Gay Marriages*, LOS ANGELES TIMES, Mar. 30, 2004, at A1.

⁸⁵⁶ *Id.*

⁸⁵⁷ *Id.*

⁸⁵⁸ MASS. GEN. LAWS ch. 207 § 11 (1998). The Governor turned to the statute in anticipation of a wave of out-of-state couples seeking to marry in Massachusetts when it became the first state to permit same-sex couples to wed. Town Clerks were instructed to monitor for *any* legal impediment, including

Initially, certain towns continued to issue licenses to all same-sex couples seeking to be married, regardless of their actual or intended residence.⁸⁶⁰ At the same time, the Massachusetts Attorney General, Thomas F. Reilly, interpreted the statute to mean that marriage licenses could be “issued to same-sex couples who live in Massachusetts or in other states that do not ban gay marriage.”⁸⁶¹ Ultimately, however, Governor Romney ordered local town and city hall clerks to deny marriage licenses to same-sex couples who live outside of Massachusetts. Notwithstanding their difference in interpretation, the Attorney General began to enforce the Governor’s order on May 21, 2004.⁸⁶²

On June 18, 2004, eight non-resident couples filed suit challenging the constitutionality and the “discriminatory,” selective enforcement of the Reverse Evasion

consanguinity, age, marital status and the gender requirements of the couples’ home state. *Cote-Whitacre v. Dep’t of Pub. Health*, No. 04-2656-G, 2004 WL 2075557, at *10 (Suffolk Super. Ct. Aug. 18, 2004).

⁸⁵⁹ The original intent of MASS. GEN. LAWS ch. 207, 811 (1998) has been hotly debated, with plaintiffs asserting that the law was intended to deny non-resident interracial couples the right to marry in Massachusetts. The defense countered that the intent of the statute was to prevent the evasion of existing divorce laws. *Cote-Whitacre*, 2004 WL 2075557, at *6.

⁸⁶⁰ Clerks in Provincetown, Somerville, Springfield and Worcester initially accepted Notices of Intention to marry and issued marriage licenses to out-of-state same-sex couples. The Office of the Attorney General then wrote to the Town Clerks and advised the offices to cease and desist from issuing such licenses. *See, e.g., Provincetown Backs Down For Now, But Vows Continued Fight*, ASSOCIATED PRESS NEWSWIRE, May 27, 2004.

⁸⁶¹ John McElhenny, *Gay Marriage License Rules Sought, Out-of-State Queries Beset Clerks’ Offices*, Boston Globe, Apr. 12, 2004, at B1; *see also* Fred Bayles, *Provincetown Plans Marriage Licenses for Non-Mass. Gays*, USA TODAY, Apr. 13, 2004, at 3A (“Attorney General Tom Reilly has said he believes it would be illegal to issue licenses to residents of the 38 states that prohibit recognition of gay marriage. Reilly’s office has not issued a formal ruling, but it has advised Gov. Mitt Romney’s legal staff about the law.”).

⁸⁶² Letter, David R. Kerrigan, Chief, Government Bureau, Office of the Attorney General, May 21, 2004. “Cease and desist” letters were sent to Provincetown, Springfield, Somerville, and Worcester, the four towns which had initially stated that they would grant marriage licenses to same-sex couples. *See also* Yvonne Abraham, *AG Asks End Of Out-Of-State Marriage Licenses*, BOSTON GLOBE, May 22, 2004 at A1, available at 2004 WL 59788110.

Statute.⁸⁶³ The plaintiffs claimed that Massachusetts' application of the statute to deny marriage rights only to non-resident same-sex couples violated the laws of the Commonwealth of Massachusetts and the Privileges and Immunities Clause of the United States Constitution and that the Commonwealth lacked a substantial justification for the discrimination and that there was no rational relationship between the discrimination and a legitimate state interest. Plaintiffs sought an immediate injunction barring Massachusetts from enforcing the law.

On August 18, 2004, Suffolk Superior Court Judge Carol S. Ball denied the couples' request for immediate relief and held that the plaintiffs failed to bring adequate proof to satisfy the elements of their selective enforcement claim.⁸⁶⁴ As to the likelihood of success on the merits, the court gave deference to the legislative enactment of the statute when discussing its constitutionality. Although the selective enforcement and timing of the revivification of the statute concerned the court,⁸⁶⁵ it concluded that the fact that clerks were instructed not to issue marriage licenses to *any* out-of-state couple with *any* impediment to marriage tended to show equitable treatment.⁸⁶⁶

The court also concluded that the plaintiffs failed to prove that the statute does not serve a legitimate governmental interest, noting that there is rational basis in

⁸⁶³ MASS. GEN. LAWS ch. 207 § 11 (1997).

⁸⁶⁴ *Cote-Whitacre*, 2004 WL 2075557 at *10. “[T]he plaintiffs have failed to show that same-sex couples are being subjected to a different set of rules than are opposite-sex couples [P]laintiffs failed to establish that (1) they, compared with others similarly situated, were selectively treated; and that (2) such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of a constitutional right [sic], or a malicious or bad faith intent to injure a person.” (internal citation omitted). *Id.* at *10-11.

⁸⁶⁵ “[I]t does seem to this court that on its face G.L.c. 207 § 11 violates the spirit of *Goodridge* Moreover, the court finds troubling the timing of the resurrection of the implementation of § 11 immediately after the Supreme Judicial Court declared the prohibition against gay marriages unconstitutional.” *Id.* at *10.

⁸⁶⁶ *Id.*

ensuring that marriages solemnized in Massachusetts are received and enforced in other states. As such, the court held that the statute should apply where the marriage would be void *and* where it would be prohibited in the home state;⁸⁶⁷ however, it left open the question of whether a non-resident whose home state is silent on the issue of gender and marriage should be permitted to marry in Massachusetts.

Finally, the court struck down the plaintiffs' claim under the Privileges and Immunities Clause of the U.S. Constitution. In a two-step analysis, the court found first that the right to travel to marry is not fundamental, and second, where a state interest is substantial, such as that found in Massachusetts, a degree of discrimination is permissible. In August 2004, the plaintiffs announced that they would appeal the ruling.

d. Recent Developments in the United States

Other courts and legislatures also have been addressing whether gay men and lesbians should be entitled to enter civil marriages. The following is a relatively brief synopsis of what has been occurring in other jurisdictions.

i. Judicial Decisions in Other States

Since the *Goodridge* decisions, lower courts in three other states – Arizona, New Jersey, and Washington – have ruled explicitly on the constitutionality of restricting marriage to heterosexual couples. Each of these decisions was rendered by a lower court and each is being appealed.

⁸⁶⁷ MASS. GEN. LAWS ch. 207 § 12 (1997) provides: “Before issuing a license to marry a person who resides and intends to continue to reside in another state, the officer having authority to issue the license shall satisfy himself, by requiring affidavits or otherwise, that such person is not prohibited from intermarrying by the laws of the jurisdiction where he or she resides.” *Id.*

(1) Arizona

Immediately after the Supreme Court decision in *Lawrence v. Texas*, an Arizona same-sex couple applied for a marriage license from the Clerk of the Superior Court of Arizona, Maricopa County. The Clerk rejected the request on the basis of Arizona statutes that prohibit marriages between persons of the same sex and define marriage as between a man and a woman.⁸⁶⁸ The couple petitioned the Superior Court of Arizona to declare Arizona's statutes unconstitutional and the Arizona Court of Appeals declared special action jurisdiction.⁸⁶⁹ The petitioners argued that Arizona's prohibition of same-sex marriage infringed upon their fundamental right to marry, thereby violating the due process provisions of the federal and state constitutions and the privacy and equal protection provisions of the Arizona Constitution.⁸⁷⁰

The Arizona appeals court held that the opportunity for anyone to marry a person of the opposite sex is a fundamental right, the opportunity to marry a person of the same sex is not.⁸⁷¹ Thus, the court used rational basis analysis, as opposed to strict scrutiny in reviewing the equal protection, substantive due process and right-to-privacy challenges to the constitutionality of the statutes prohibiting same-sex marriages. Under the rational basis test, the court held that the statutes limiting marriage to opposite-sex couples were not unduly broad, as they furthered the interests of encouraging procreation

⁸⁶⁸ ARIZ. REV. STAT. § 25-101(C) (1996); ARIZ. REV. STAT. § 125(A) (1980); *Standhardt v. Superior Ct.*, 77 P.3d 451, 453-54 (Ariz. Ct. App. 2003).

⁸⁶⁹ *Standhardt*, 77 P.3d at 454.

⁸⁷⁰ *Id.* at 451.

⁸⁷¹ *Id.* at 460.

and child-rearing within a marital relationship; interests the court believed to be legitimate governmental interests.⁸⁷²

(2) New Jersey

On November 5, 2003, seven same-sex New Jersey couples brought a claim stating “that the State’s failure to permit them to marry deprives them of statutory protections, benefits, and mutual responsibilities.”⁸⁷³ Specifically, plaintiffs alleged that this refusal to issue marriage licenses violated their rights to privacy and equal protection under the New Jersey Constitution.⁸⁷⁴

In February 2003, defendants filed a motion to dismiss, asserting that the parties could not overcome the presumption that the New Jersey marriage laws are constitutional; New Jersey marriage laws do not permit same-sex couples to marry; and plaintiffs’ rights are not violated by their inability to enter into a same-sex marriage. The court, in addressing the issue of constitutionality, looked to the standard set forth in *Brown v. State*,⁸⁷⁵ which held that to overcome the presumed constitutionality of a statute, the plaintiff must demonstrate that there are no conceivable grounds to support its

⁸⁷² *Id.* at 463. Interestingly, ARIZ. REV. STAT. § 25-101(B) (1996) provides that first cousins may marry if both are sixty-five years of age or older or if one or both first cousins are under sixty-five years of age, upon approval of any superior court judge in the state if proof has been presented to the judge that one of the cousins is unable to reproduce.

⁸⁷³ *Lewis v. Harris*, 2003 WL 23191114, at *1 (N.J. Super. Nov. 5, 2003) (“*Lewis*”). Specifically, plaintiffs alleged they were denied the rights and benefits that flow from marriage, including rights and benefits relating to taxation, health insurance, victim’s rights, education financing, incapacitation, tort remedies, health care, family medical leave, hospital visitation, spousal financial obligations, workers’ compensation, burial rights, property rights, alimony, and parenting matters in the event that a same-sex couple terminates their relationship. *Id.*

⁸⁷⁴ *Id.*

⁸⁷⁵ 811 A.2d 501 (N.J. Super. A.D. 2002).

validity.⁸⁷⁶ The court took great care to recognize that “courts will not second-guess the Legislature’s policy decisions regarding economic, social and philosophical issues.”⁸⁷⁷

The court found that New Jersey marriage laws do not support a conclusion that the legislature intended for same-sex couples to have the authority to marry.⁸⁷⁸ The court held that although there is a constitutional basis under the due process clause for the fundamental right of heterosexual couples to marry, that basis does not extend to gay and lesbian couples.

Thus, the court determined that same-sex couples are not similarly situated to opposite sex couples for purposes of access to marriage, and further that it is rational for New Jersey to protect the rights of its gay and lesbian citizens in ways other than extending marriage rights.⁸⁷⁹ For all of these reasons, the court held that a constitutional claim could not succeed. The court strongly urged, however, that the legislature consider a comprehensive alternative to marriage, such as domestic partnerships or civil unions.⁸⁸⁰ The *Lewis* decision is now on appeal.

⁸⁷⁶ *Lewis*, at *2.

⁸⁷⁷ *Id.*; *Brown*, 811 A.2d at 506.

⁸⁷⁸ *Lewis*, at *3. The court relied upon *M.T. v. J.T.*, 355 A.2d 204, 207-08 (N.J. Super. A.D. 1976) (“[I]t is so firmly implied from a full reading of the statutes that a different legislative intent, one which would sanction a marriage between persons of the same sex, cannot be fathomed.”). The *Lewis* court noted that “[n]owhere has any legal challenge to a prohibition on same sex marriage resulted in a right for couples of the same gender to marry.” *Lewis*, at *8. After *Goodridge*, this observation no longer is accurate.

⁸⁷⁹ *Lewis*, at *28.

⁸⁸⁰ *Id.* In considering the impact denying marriage licenses to same-sex couples would have on gay and lesbian couples, the court concluded that, because of the increasing protections available to gay and lesbian couples, the impact would be minimal as compared with the State’s interest in preserving the tradition of marriage. *Id.* at *24-25.

(3) Washington State

Three important decisions were handed down from courts in Washington State in August and September 2004. First, on August 4, 2004, in *Anderson v. King County*,⁸⁸¹ the Superior Court held that the State’s Constitution required same-sex couples to have equal access to marriage. Plaintiffs in this case challenged the Privileges and Immunities Clause, the Due Process Clause, and the Equal Rights Amendment to the Washington State Constitution.⁸⁸² The court was thus faced with the following three questions: When Washington “denies the option of marriage for a loving and committed couple that is ‘other than a male and a female,’ is there a privilege that is not being made equally available to all citizens upon the same terms?”;⁸⁸³ “[I]s there a liberty interest that has been denied without substantive . . . due process?”;⁸⁸⁴ and when a Washington statute “denies a woman the right to marry her chosen life partner when that partner is a female, is a right being denied on account of sex?”⁸⁸⁵ The court’s ruling, which has been stayed pending appellate review, concluded that the exclusion of same-sex couples from the rights and responsibilities of marriage is not rationally related to any legitimate or compelling state interest and is not narrowly tailored toward such interest.⁸⁸⁶

⁸⁸¹ *Anderson v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Aug. 4, 2004) (“*Anderson*”).

⁸⁸² *Id.* at *4.

⁸⁸³ *Id.* at *3.

⁸⁸⁴ *Id.* at *4.

⁸⁸⁵ *Id.*

⁸⁸⁶ *Id.* at *8-11.

On September 7, 2004, the Thurston County Superior Court, in *Castle v. State*,⁸⁸⁷ addressed the question of whether Washington’s mini-DOMA violated the State Constitution.⁸⁸⁸ The plaintiffs had challenged the mini-DOMA as violative of Washington State Constitution’s Privileges and Immunities Clause, as well as the rights to privacy and due process found in the State and Federal Constitutions. The court first examined the statute in light of the Privileges and Immunities Clause of the Washington Constitution, which states that “[n]o law shall be passed granting any citizen [or] class of citizens . . . privileges or immunities which upon the same terms shall not equally belong to all citizens.”⁸⁸⁹ The court recognized marriage as a fundamental right and held that same-sex couples constituted a suspect class.⁸⁹⁰

Under this rubric, the court applied strict scrutiny to the State’s DOMA statute, requiring the State to establish a compelling interest in excluding same-sex couples from marrying.⁸⁹¹ The court rejected the Legislature’s justification of DOMA – to protect the historical interpretation of marriage – as a “conclusory statement that is devoid of any meaningful content.”⁸⁹² The court also rejected the State’s further rationale of “preserving the family,” observing that it ran counter to same-sex couples, who can

⁸⁸⁷ *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Sept. 7, 2004) (“*Castle*”).

⁸⁸⁸ *Id.* at *10.

⁸⁸⁹ WA. CONST. art. 1, § 12.

⁸⁹⁰ *Castle*, at *13. The court chose not to opine on the relative merits of domestic partnership and marriage, instead leaving those to the discretion of the Legislature.

⁸⁹¹ *Id.*

⁸⁹² *Id.* at *14.

freely have children through artificial insemination and adoption in Washington state.⁸⁹³

The court concluded:

For the government this is not a moral issue. It is a legal issue. Though these issues are often the same, they are also quite different. The conscience of the community is not the same as the morality of any particular class . . . What fails strict scrutiny here is a government approved civil contract for one class of the community not given to another class of the community.⁸⁹⁴

Having decided the issue on the Privileges and Immunities Clause of the Washington Constitution, the court did not address the plaintiffs' state or federal due process and privacy claims.⁸⁹⁵

In the third case originating in Washington, the United States Bankruptcy Court for the District of Washington State reached the opposite conclusion when weighing in on the constitutionality of the federal Defense of Marriage Act ("DOMA"). On August 14, 2004, the Bankruptcy Court upheld the constitutionality of the statute when faced with a joint bankruptcy filing by a same-sex couple who had been married in British Columbia, Canada.⁸⁹⁶ Finding that there is no fundamental right to same-sex marriage, and further that DOMA does not create sex-based categories, the court employed the rational basis test to conclude that the statute passed constitutional muster.⁸⁹⁷ Applying the deferential rational basis analysis, contrary to the court's

⁸⁹³ *Id.* at *17.

⁸⁹⁴ *Id.* at *17.

⁸⁹⁵ *Id.* at *16.

⁸⁹⁶ *Kandu*, No. 315 B.R. 123 (Bankr. W.D. Wash. Aug. 17, 2004). In December 2003, the Court filed an Order to Show Cause for Improper Joint Filing. In response, the surviving debtor (Ms. Ann C. Kandu passed away in March 2004) challenged the constitutionality of DOMA, raising claims under the Tenth Amendment, the principles of comity, and the Fourth and Fifth (due process and equal protection) Amendments. Ms. Kandu did not raise claims under the Full Faith and Credit clause. *Id.* at 131-44.

⁸⁹⁷ *Id.* at 144-48. The court acknowledged that, in holding that there is no fundamental right to same-sex marriage, it "disagrees with the contrary conclusion recently reached by the Superior court for King

expressed personal view, the court held that DOMA’s “limitation of marriage to one man and one woman is not wholly irrelevant to the achievement of the government’s interest.”⁸⁹⁸

ii. State Legislative Actions and Ballot Initiatives

The vast majority of actions taken by state legislatures have been to institute or to reinforce bans prohibiting same-sex couples from marrying or from obtaining other state sanctions for their relationships. Thirty-nine states have adopted mini-DOMA’s, which vary in their content but which generally prohibit the state from permitting same-sex couples to marry and from recognizing such marriages conducted elsewhere.⁸⁹⁹

The initiatives that have made it to the public ballot have sought to achieve the same ends.⁹⁰⁰ Both of these approaches are discussed in greater detail *infra* at Section II.B.7 when the Report addresses existing and potential efforts to restrict marriage to heterosexual couples.

County, Washington.” *Id.* (citing *Anderson*). The court also noted more than once its personal disagreement with many of the arguments raised by the Trustee in support of DOMA, but concluded that it “cannot say that DOMA’s limitation of marriage to one man and one woman is not wholly irrelevant to the achievement of the government’s interest.” *Id.* at 146. *Cf. id.* (“this Court’s personal view that children raised by same-sex-couples enjoy benefits possibly different, but equal, to those raised by opposite-sex couples, is not relevant to the Court’s ultimate decision.”)

⁸⁹⁸ *Id.* at 146. *Kandu* did not challenge DOMA under the Full Faith and Credit Clause of the Federal Constitution or the Privileges and Immunities Clause of the Washington Constitution. *Id.* at 131. For further details about this case and about DOMA more generally, see *infra* Section III.F.3.

⁸⁹⁹ Marriage Watch, State Defense of Marriage Acts, available at <http://www.marriagewatch.org/states/doma.htm> (last visited August 30, 2004). See *infra* note 1135 for a list of the relevant state statutes. The eleven states which have not adopted DOMAs are: Connecticut, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Wisconsin, and Wyoming. *Id.* For a detailed discussion of mini-DOMA’s, see *infra* Section III.F.3.

⁹⁰⁰ *Id.*

iii. Municipal Developments

In the year since the *Goodridge* ruling, local municipalities have been the fora for much advocacy on all sides of the question of whether gay men and lesbians should be permitted to marry their partners. The Mayor of San Francisco, Gavin Newsom, responded to *Goodridge* by instructing the City to begin issuing marriage licenses to same-sex couples in his county. Nearly four thousand marriage licenses were issued before March 11, 2004,⁹⁰¹ when the California Supreme Court issued an interim stay preventing the City from issuing any more.⁹⁰² The court subsequently ruled that Mayor Newsom did not have the authority to issue marriage licenses to same-sex couples and declared the issued licenses invalid.⁹⁰³

On February 20, 2004, Sandoval County, N.M., issued 26 licenses to same-sex couples before State Attorney General Patricia Madrid ruled the licenses invalid under State law. Over 3,000 marriage licenses were issued to same-sex couples in Multnomah County, Oregon before County Circuit Judge Frank Bearden ordered the County to stop issuing licenses on April 20, 2004.⁹⁰⁴ By contrast, the city of Portland, Oregon began issuing marriage licenses to same-sex couples when the county attorney

⁹⁰¹ The Battle Over Same-Sex Marriage, S.F. CHRON., Mar. 21, 2004, at B1.

⁹⁰² *Lockyer v. City & County of S.F.*, No. 5122923, 2004 WL 473257 (Sup. Ct. Mar. 11, 2004); *Lewis v. Alfaro*, No. 5122865, 2004 WL 473258 (Cal. Mar. 11, 2004). The order directed San Francisco officials, while the cases are pending before the California Supreme Court, to enforce the current marriage statutes without regard to the officials' personal view of the constitutionality of such provisions and to refrain from issuing marriage licenses or certificates not authorized by such provisions. Prior to the court's August 2004 ruling, licenses that had been issued were not voided. Essentially, this was an interim stay of same-sex marriages, directing the city not to perform such marriages while the cases are pending before the court. See also Evelyn Nieves, *High Court Halts Gay Marriages*, WASHINGTON POST, Mar. 12, 2004, at A1.

⁹⁰³ *Lockyer v. City & County of S.F.*, 95 P.3d 459 (Cal. 2004).

⁹⁰⁴ *Judge Orders Stop to Gay Marriage in Multnomah County*, ASSOCIATED PRESS, April 20, 2004; Egelko, Bob, *Judge Halts Same-Sex Marriages In Oregon But He Orders State To Validate 3,000 Licenses Already Issued*, S.F. CHRON., Apr. 21, 2004, at A3.

declared that a refusal to do so would violate the State Constitution.⁹⁰⁵ Taking a different tack, the mayor of Seattle, Washington extended benefits to partners of city employees who marry elsewhere.⁹⁰⁶

The issue of whether same-sex couples can legally marry also has been addressed by New York courts.⁹⁰⁷ In addition, city officials in Asbury Park, New Jersey began issuing marriage licenses. They stopped, however, under pressure from the State Attorney General, who issued a public letter on March 9, 2004 stating that same-sex marriage licenses are not recognized under State law.⁹⁰⁸

In addition to these government actions, more lawsuits, similar to *Goodridge* and the pending *Lewis* case in New Jersey, have been brought in New York, Connecticut, Florida, Oregon, Tennessee, Washington, and elsewhere.⁹⁰⁹

e. International Developments

International recognition of same-sex partnerships has an impact not only on individuals and couples abroad, but also on those in the United States. Unlike heterosexual American spouses who can sponsor their partners for citizenship,⁹¹⁰ same-

⁹⁰⁵ See, e.g., Tomas Alex Tizon and Josh Getlin, *Gay Marriages Spread To Northwest; Oregon County Is Latest To Issue Same-Sex Licenses*, CHICAGO TRIB., Mar. 4, 2004, at A12, available at 2004 WL 71395984.

⁹⁰⁶ See, e.g., Gene Johnson, *Seattle to Recognize Gay Marriages Performed Elsewhere*, THE RECORD, Mar. 9, 2004, at A12, available at 2004 WL 59050029.

⁹⁰⁷ For example, one unpublished case held in dictum that New York marriage law does not preclude same-sex marriage. See *In re Petri*, N.Y.L.J., Apr. 4, 1994 at 29 (Sup. Ct. N.Y. County) (“Section 13 of the Domestic Relations Law has no requirement that applicants for a marriage license be of different sexes.”). For a discussion of New York cases, see *infra* Section III.D.1.c.ii.

⁹⁰⁸ Letter from N.J. Att’y Gen., *Validity of Marriage Licenses and Certificates of Marriage Issued to Same-Sex Couples*, Mar. 9, 2004.

⁹⁰⁹ See *supra* Section II.B.2.d.

⁹¹⁰ Under current law, a U.S. citizen or permanent legal resident may petition for his or her non-citizen or non-resident spouse to obtain a green card, an immigrant visa, or for the spouse to come to the United States. Immigration and Nationality Act (“INA”) § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i)

sex partners cannot do the same.⁹¹¹ As a result, same-sex couples often must move to the non-U.S. partner's home country, settle in a third country, or terminate their relationship.⁹¹²

This section provides a brief overview of the developments that have occurred outside of the United States addressing the rights of same-sex couples to gain access to marriage or to the rights and responsibilities that typically are associated with marriage.

In Canada, in *Barbeau v. British Columbia*, the British Columbia Court of Appeal ruled in May 2003 that the definition of marriage as between “one man and one

(2000). Until 1990, gay men and lesbians were specially excluded from immigration to the United States; the INA is now silent on the issue. *See, e.g.*, Robert Foss, *The Demise of the Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L. L. REV. 439, 446 (1994); INA of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (codified as amended at 8 U.S.C. § 1182(a)(4) (2000)). Employers also may petition for an employee to receive an immigrant or non-immigrant visa, in which case the worker's spouse and children also could obtain visas. INA § 203(b), 8 U.S.C. § 1153(d) (2000).

⁹¹¹ *See, e.g.*, *Adams v. Howerton*, 673 F.2d 1036, 1039 (9th Cir. 1982). In recent years legislation has been introduced to recognize same-sex relationships for immigration purposes, thereby removing it from the purview of the Defense of Marriage Act (“DOMA”) (discussed *infra* Section III.F.3). *See* Permanent Partners Immigration Act, H.R. 690, 107th Cong. (2001); *see also* Michael A. Scaperlanda, *Kulturkampf in the Backwaters: Homosexuality and Immigration Law*, 11 WIDENER J. PUB. L. 475 (2002); Desiree Alonso, Note, *Immigration Sponsorship Rights for Gay and Lesbian Couples: Defining Partnerships*, 8 CARDOZO WOMEN'S L.J. 207, 208 (2002); Christopher A. Duenas, Note, *Coming to America: The Immigration Obstacle Facing Binational Same-Sex Couples*, 73 S. CAL. L. REV. 811, 836-40 (2000); Brian McGloin, Comment, *Diverse Families with Parallel Needs: A Proposal for Same-Sex Immigration Benefits*, 30 CAL. W. INT'L L.J. 159, 170 (1999).

⁹¹² *See, e.g.*, Missy Ryan, *Gay Partners in Search of Green Cards*, 32 NAT'L J. 804 (2000). Another option is for the non-U.S. partner to seek asylum in the United States. A refugee may be granted asylum “if the person is found to have been persecuted or has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42)(A) (2001). During the asylum interview procedure, an applicant must prove that he or she has been persecuted in the past, or that he or she is fearful of future persecution. 8 U.S.C. § 1158(a)-(d) (2001); *see also Hernandez-Montiel v. Immigration & Naturalization Serv.*, 225 F.3d 1084, 1094 (9th Cir. 2000) (granting asylum claim of gay man on grounds that he was a member of a separate social group in Latin American society); Int. Dec. 3222 (No. A23-220-644) (BIA Mar. 12, 1990) (the BIA held, “[a]n applicant, who had the status of being a homosexual, both established his membership in a particular social group in Cuba and demonstrated that his freedom was threatened within the meaning of Section 243(h)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h)(1) (1990), on account of his membership in that group.”); William Branigin, *Gays' Cases Help to Expand Immigration Rights: More than 60 Homosexuals Claiming Persecution Have Been Granted Asylum in U.S.*, WASH. POST, Dec. 17, 1996, at A1.

woman” violated the Canadian Charter of Rights and Freedoms.⁹¹³ The court at first recommended a moratorium on same-sex marriage until July 2004, but lifted the moratorium when the Ontario Court of Appeal also ruled in favor of recognizing the right of gay men and lesbians to marry.⁹¹⁴ The unanimous June 10, 2003 ruling in *Halpern et al. v. Attorney General of Canada et al.* provided a new definition of marriage as the “voluntary union for life of two persons to the exclusion of all others.”⁹¹⁵ The Ontario court ruled that prohibiting same-sex marriage was against the Canadian Charter of Rights and Freedoms.

Early in its opinion, the court defined the case as being “ultimately about the recognition and protection of human dignity and equality in the context of the social structures available to conjugal couples in Canada.”⁹¹⁶ The court recognized marriage as a “fundamental societal institution,” access to which same-sex couples are denied “simply on the basis of their sexual orientation,”⁹¹⁷ which the court found unacceptable.

The *Halpern* court explained its decision as follows. Section 15(1) of the Canadian Charter of Rights and Freedoms (the “Charter”), the Canadian equivalent of the Equal Protection Clause, provides that “[e]very 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

⁹¹³ See *EGALE Canada Inc. v. Canada*, Nos. CA 029017, CA 029048, 2003 BC.C. LEXIS, 2711 (BC.C., May 1, 2003) (holding that the common law bar to same-sex marriage violated the plaintiffs’ rights under the Canadian Charter).

⁹¹⁴ See *Halpern v. Canada*, 65 O.R. (3d) 161 (2003).

⁹¹⁵ C39172 and C39174 (June 10, 2003).

⁹¹⁶ *Halpern*, 65 O.R. at 167.

⁹¹⁷ *Id.* at 168.

origin, colour, religion, sex, age or mental or physical disability.”⁹¹⁸ Under Canadian precedent these characteristics and other analogous grounds are protected by the Charter, and sexual orientation, the *Halpern* court concluded, is one such “analogous ground.”⁹¹⁹ The court then turned to Section 1 of the Charter, which subjects the protected rights and freedoms only “to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁹²⁰ The court could not find such a reasonable limit, concluding “that the common law definition of marriage violates the [plaintiffs’] equality rights” and is not justified.⁹²¹

On March 19, 2004, Quebec followed British Columbia and Ontario when the Province’s Court of Appeal affirmed a lower court ruling which held, like the British Columbia and Ontario courts, that prohibiting marriage between same-sex couples violates the Canadian Charter.⁹²² On July 7, 2004, the Yukon Supreme Court changed the common law definition of marriage to mean the voluntary union for life of two persons, after declaring the gender-specific definition unconstitutional.⁹²³ On September 16, 2004, Manitoba became the fifth Canadian Province to legalize marriage of same-sex couples, when the Court of Queen’s Bench declared the Province’s definition of marriage

⁹¹⁸ *Halpern*, 65 O.R. at 178-79. See, e.g., *Same Sex Marriage Legal, Yukon Pair Now Free to Wed*, CANADIAN PRESS, July 15, 2004, available at 2004 WL 85437266.

⁹¹⁹ *Id.* at 168.

⁹²⁰ *Id.* at 190.

⁹²¹ *Id.* at 196.

⁹²² See, e.g., *Gays Can Wed In Quebec*, CANADIAN PRESS, Apr. 2, 2004, available at 2004 WL 75405747.

⁹²³ *Territorial Government Won’t Fight Same-Sex Ruling*, CANADIAN PRESS, July 16, 2004, available at 2004 WL 85437368.

unconstitutional.⁹²⁴ On September 24, 2004, the Provincial Supreme Court of Nova Scotia ruled that banning same-sex unions was unconstitutional, making Nova Scotia the sixth Canadian Province to recognize marriages between same-sex couples.⁹²⁵

On April 1, 2001, The Netherlands became the first jurisdiction to provide same-sex couples complete access to civil marriage.⁹²⁶ Along with the right to marry, gay and lesbian Dutch citizens received full rights to adopt children.⁹²⁷ Notably, the Dutch acted by legislation, not by judicial decision.⁹²⁸ The extension of marriage followed three years in which same-sex partners were permitted to register their partnerships in The Netherlands.⁹²⁹ Such partnerships permitted couples to enjoy many, but not all of the benefits of marriage.⁹³⁰

Less than two years later, Belgium followed The Netherlands' lead. The Belgian Parliament extended the Nation's marriage laws to include same-sex couples in January 2003,⁹³¹ with the first marriages performed in June of that year.⁹³² The Belgian law later was amended to permit non-Belgians to marry so long as one person in the

⁹²⁴ The court's ruling followed an unprecedented decision by the federal government not to oppose, or ask for an adjournment of, a same-sex marriage lawsuit in Canada. See Michelle Macafee, *Manitoba Court Rules In Favour Of Gay Marriage, Unopposed By Ottawa*, CANADIAN PRESS, available at 2004 WL 93697961.

⁹²⁵ See, e.g., *N.S. Allows Same-Sex Marriages*, CANADIAN PRESS, Sept. 24, 2004, available at 2004 WL 92961952.

⁹²⁶ Isabel Conway & James Palmer, *Amsterdam Holds First Legal Gay Marriages*, THE INDEPENDENT (London), Apr. 2, 2001, at 15.

⁹²⁷ *Id.*

⁹²⁸ *Id.* Although there was some opposition, polls at the time showed that more than 75 percent of the Dutch people supported the measure.

⁹²⁹ *Id.*

⁹³⁰ *Id.*

⁹³¹ *Belgium Braces for Debate of Right of Gays to Adopt*, AGENCE FRANCE PRESSE, Dec. 27, 2003.

⁹³² *First Gay Wedding in Belgium*, AGENCE FRANCE PRESSE, June 6, 2003.

couple is a Belgian citizen or normally resides in the country.⁹³³ Unlike the Dutch law, the Belgian law did not provide same-sex couples with the right to adopt children.⁹³⁴

A number of other countries extend legal recognition to same-sex couples that are analogous to civil unions and domestic partnerships,⁹³⁵ but do not permit same-sex couples to marry. For example, Denmark, Iceland, Sweden and Norway extend most of the benefits of marriage through laws that permit registration by same-sex couples.⁹³⁶

Other jurisdictions – New Zealand; Finland; France; Germany; the Aragon, Catalonia, Navarra, and Valencia regions of Spain; the Geneva and Zurich cantons in Switzerland – extend different combinations of benefits, many of which resemble the array of marriage rights, but are not as complete.⁹³⁷ Such provisions also exist in the United Kingdom. In June 2004, however, their House of Lords rejected a Civil Union Bill that earlier had passed the House of Commons.⁹³⁸ Non-binding

⁹³³ *Foreigners to Benefit from Belgium's Same-sex Marriage Laws*, AGENCE FRANCE PRESSE, Feb. 6, 2004.

⁹³⁴ *Id.* In late December 2003, however, a bill was offered in Parliament to permit adoption by same-sex couples. Although at least one journal has reported that the bill is expected to garner the support of a small majority in the Parliament, no legislative action has been taken as of yet. *See Belgium Braces for Debate of Right of Gays to Adopt*, AGENCE FRANCE PRESSE, Dec. 27, 2003.

⁹³⁵ *See infra* Section II.B.3,4 for a more thorough description of civil unions and domestic partnerships.

⁹³⁶ *See International Experience: Registered Partnership and Registered Cohabitation, Citizenship 21: Together for Equality*, available at http://www.c21project.org.uk/citizenship_21/information_centre/lgb_issues/partnership/international_experience/registered_partn.html. For example, Denmark passed its Registered Partnership Act in 1989, which extends all the rights of marriage provided under their marriage statute, excepting the provisions of the Danish Adoption Act. *See Denmark: Registered Partnership Act, 1989*, available at <http://www.france.qrd.org/texts/partnership/dk/denmark-act.html> (last visited March 8, 2004).

⁹³⁷ *See id.* (giving summaries of each nation and region's laws with links to the statutes themselves).

⁹³⁸ Peter Moore, *UK Civil Unions Bill Defeated in Lords*, 365Gay.com Newsletter (June 24, 2004), available at <http://www.365gay.com/newscon04/06/062404ukPartner.htm>.

European Union resolutions also encourage member states to protect gay men and lesbians from discrimination.⁹³⁹

3. Civil Union

a. *Baker v. State: Homosexuals Cannot Be Excluded from the “Benefits and Protections” of Marriage*

Before *Goodridge*, there was *Baker v. State*,⁹⁴⁰ the Vermont ruling that drew a great deal of national attention in late 1999. The Supreme Court of Vermont took up the question of whether “the State of Vermont [may] exclude same-sex couples from the benefits and protections that its laws provide to opposite-sex married couples.”⁹⁴¹ The Court ruled that the State may not deprive same-sex couples of the protections that are enjoyed by opposite-sex couples under the Common Benefits Clause of the Vermont Constitution.⁹⁴²

We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel “domestic partnership” system or some equivalent statutory alternative, rests with the Legislature.

⁹³⁹ See European Union, Citizenship 21: Together for Equality, at http://www.c21project.org.uk/citizenship_21/information_centre/lgb_issues/europe/european_union/eu_lgb_rights.html (last visited March 8, 2004). For an overview of European treatment of same-sex relationships, see Christina Müller piece, *An Economic Analysis of Same Sex Marriage*, presented at the European Association of Law and Economics Nineteenth Annual Conference at the University of Athens, available at <http://eale2002.phs.uoa.gr/papers/Muller.doc> (“Müller”). Müller referenced an European Parliament resolution from March 2000 “which recommended that same-sex unions be granted the same legal recognition as heterosexual marriages,” calling “on all 15 members of the European Union ‘to make rapid progress in the area of mutual recognition of the various forms of living together legally, but not of a conjugal character, and of legal marriages between person of the same sex.’” Müller at 33.

⁹⁴⁰ 744 A.2d at 864.

⁹⁴¹ *Id.* at 867.

⁹⁴² *Id.* The court cites the Common Benefit Clause of the Vermont Constitution: That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.

Id.

Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.⁹⁴³

The court noted early in the decision that the question before it did “not turn on the religious or moral debate over intimate same-sex relationships, but rather on the statutory and constitutional basis for the exclusion of same-sex couples from the secular benefits and protections offered married couples.”⁹⁴⁴

The court first rejected the plaintiffs’ claim that they should be permitted to marry under the statutes in place at the time, writing that although marriage could conceivably mean something other than an opposite-sex pair, “there is no doubt that the plain and ordinary meaning of ‘marriage’ is the union of one man and one woman as husband and wife.”⁹⁴⁵

In recognizing that same-sex couples were entitled to enjoy the rights and responsibilities of marriage, the Vermont court based its decision on the Common Benefits Clause of the Vermont Constitution and not the Equal Protection Clause of the United States Constitution.⁹⁴⁶ The court explained that:

Vermont case law has consistently demanded in practice that statutory exclusions from publicly conferred benefits and protections must be “premised on an appropriate and overriding public interest.” The rigid categories utilized by the federal courts under the Fourteenth Amendment find no support in our early case law and, while routinely cited, are often effectively ignored in our more recent decisions.⁹⁴⁷

⁹⁴³ *Id.*

⁹⁴⁴ *Id.*

⁹⁴⁵ *Id.* at 868. The plaintiffs recognized this reading, yet still argued that the court should give the statutes a broad interpretation. The court refused to do so and turned to the constitutional claim.

⁹⁴⁶ *Baker*, 744 A.2d at 870.

⁹⁴⁷ *Id.* at 873 (citation omitted).

The court then stated that the Common Benefits Clause “express[es] broad principles,” and that “[c]hief among the[m is] the principle of inclusion.”⁹⁴⁸

To begin its analysis, the court noted that the Vermont marriage statute excluded “anyone who wishes to marry someone of the same sex.”⁹⁴⁹ The court then identified “the government’s interest in [the statute as] ‘furthering the link between procreation and child rearing.’”⁹⁵⁰ The court rejected this as a rational purpose because the law was too overinclusive: many opposite sex couples choose not to have children or must use reproductive assistance technology to do so, putting them in the same situation as same-sex couples.⁹⁵¹ Citing *Loving v. Virginia*,⁹⁵² which struck down Virginia’s anti-miscegenation law, for the proposition that “the freedom to marry has long been recognized as one of the vital personal rights,”⁹⁵³ the *Baker* court proceeded to describe the privileges and rights that flow from a marriage license in Vermont.⁹⁵⁴ The court

⁹⁴⁸ *Id.* at 875. After discussing the text of the Clause, the Court surveyed its history.

⁹⁴⁹ *Id.* at 880. The court asked whether the denial to part of the community of particular benefits has a “reasonable and just relation to the government purpose,” applying factors such as “(1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government’s stated goals; and (3) whether the classification is significantly underinclusive or overinclusive.”⁹⁴⁹

⁹⁵⁰ *Id.* at 881.

⁹⁵¹ *Id.* at 882. The court concluded:
[T]o the extent that the state’s purpose in licensing civil marriage was, and is, to legitimize children and provide for their security, the statutes plainly exclude many same-sex couples who are no different from opposite-sex couples with respect to these objectives. If anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against. In short, the marital exclusion treats persons who are similarly situated for purposes of the law, differently.

Id.

⁹⁵² 388 U.S. 1 (1967); *see infra* Section III.C.1 for a more complete discussion of this case.

⁹⁵³ *Baker*, 774 A.2d at 883 (quoting *Loving*, 388 U.S. at 12) (internal quotations omitted).

⁹⁵⁴ The court wrote:

While the laws relating to marriage have undergone many changes during the last century, largely toward the goal of equalizing the status of husbands and wives, the benefits of marriage have not diminished in value. On the contrary, the benefits and

determined that these rights are so substantial that “any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned.”⁹⁵⁵ Due to “the extreme logical disjunction between the classification and the stated purposes of the law” the court concluded that the exclusion of same-sex couples “falls substantially short of this standard.”⁹⁵⁶

protections incident to a marriage license under Vermont law have never been greater. They include, for example, the right to receive a portion of the estate of a spouse who dies intestate and protection against disinheritance through elective share provisions, under 14 V.S.A. §§ 401-404, 551; preference in being appointed as the personal representative of a spouse who dies intestate, under 14 V.S.A. § 903; the right to bring a lawsuit for the wrongful death of a spouse, under 14 V.S.A. § 1492; the right to bring an action for loss of consortium, under 12 V.S.A. § 5431; the right to workers’ compensation survivor benefits under 21 V.S.A. § 632; the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance, under 3 V.S.A. § 631; the opportunity to be covered as a spouse under group life insurance policies issued to an employee, under 8 V.S.A. § 3811; the opportunity to be covered as the insured’s spouse under an individual health insurance policy, under 8 V.S.A. § 4063; the right to claim an evidentiary privilege for marital communications, under V.R.E. 504; homestead rights and protections, under 27 V.S.A. §§ 105-108, 141-142; the presumption of joint ownership of property and the concomitant right of survivorship, under 27 V.S.A. § 2; hospital visitation and other rights incident to the medical treatment of a family member, under 18 V.S.A. § 1852; and the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce, under 15 V.S.A. §§ 751-752. Other courts and commentators have noted the collection of rights, powers, privileges, and responsibilities triggered by marriage.

Baker, 774 A.2d at 883-84.

⁹⁵⁵ *Id.* at 884.

⁹⁵⁶ *Baker*, 774 A.2d at 884. The court wrote:

As noted, Article 7 is intended to ensure that the benefits and protections conferred by the state are for the common benefit of the community and are not for the advantage of persons “who are a part only of that community.” When a statute is challenged under Article 7, we first define that “part of the community” disadvantaged by the law. We examine the statutory basis that distinguishes those protected by the law from those excluded from the state’s protection. Our concern here is with delineating, not with labelling the excluded class as “suspect,” “quasi-suspect,” or “non- suspect” for purposes of determining different levels of judicial scrutiny.

Id. at 878.

The State offered additional rationales,⁹⁵⁷ including its claim that the optimal setting for childrearing was with heterosexual, married parents.⁹⁵⁸ According to the court, however, the legislature had undercut this rationale through “endorsement of a policy diametrically at odds with the State’s claim,” when, in 1996, it permitted the adoption of children by same-sex couples and granted other legal protections for same-sex parents.⁹⁵⁹ The Court also rejected the argument that Vermont should be able to keep its marriage laws in line with other states; pointing out that in other respects the law is not consistent with those in other jurisdictions.⁹⁶⁰

Finally, the court addressed defendants’ assertion that “the long history of official intolerance of intimate same-sex relationships cannot be reconciled with an interpretation” of the Common Benefits Clause, which would extend marriage benefits to same-sex couples:

⁹⁵⁷ These were described in the opinion:
The State asserts that a number of additional rationales could support a legislative decision to exclude same-sex partners from the statutory benefits and protections of marriage. Among these are the State’s purported interests in “promoting child rearing in a setting that provides both male and female role models,” minimizing the legal complications of surrogacy contracts and sperm donors, “bridging differences” between the sexes, discouraging marriages of convenience for tax, housing or other benefits, maintaining uniformity with marriage laws in other states, and generally protecting marriage from “destabilizing changes.”

Id. at 884.

⁹⁵⁸ *Id.* According to the court, however, the legislature had undercut this rationale through “endorsement of a policy diametrically at odds with the State’s claim,” when in 1996, it permitted the adoption of children by same-sex couples and granted other legal protections for same-sex parents.

⁹⁵⁹ *Id.* To the court, such policies made the State’s arguments “patently without substance.” *Id.*

⁹⁶⁰ *Baker*, 774 A.2d at 885 (noting that Vermont’s consanguinity rules and permitting of same-sex adoption are not consistent with many other states). In addition, the court went on to declare: The State’s remaining claims (*e.g.*, recognition of same-sex unions might foster marriages of convenience or otherwise affect the institution in “unpredictable” ways) may be plausible forecasts as to what the future may hold, but cannot reasonably be construed to provide a reasonable and just basis for the statutory exclusion. The State’s conjectures are not, in any event, susceptible to empirical proof before they occur.

Id.

[T]o the extent that state action historically has been motivated by an animus against a class, that history cannot provide a legitimate basis for continued unequal application of the law. As we observed recently, “equal protection of the laws cannot be limited by eighteenth-century standards.” Second, whatever claim may be made in light of the undeniable fact that federal and state statutes – including those in Vermont – have historically disfavored same-sex relationships, more recent legislation plainly undermines the contention. In 1992, Vermont was one of the first states to enact statewide legislation prohibiting discrimination in employment, housing, and other services based on sexual orientation. Sexual orientation is among the categories specifically protected against hate-motivated crimes in Vermont. Furthermore, as noted earlier, recent enactments of the General Assembly have removed barriers to adoption by same-sex couples, and have extended legal rights and protections to such couples who dissolve their “domestic relationship.”⁹⁶¹

For all these reasons, the court “extend[ed] to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples.”⁹⁶²

Turning to address the proper remedy, the *Baker* court held that plaintiffs are entitled only to the benefits of marriage, not to the marriage license itself.⁹⁶³ The court concluded:

The past provides many instances where the law refused to see a human being when it should have. The future may provide instances where the law will be asked to see a human when it should not. The challenge for future generations will be to define what is most essentially human. The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.⁹⁶⁴

Two Justices drafted separate opinions. Although they both concurred in the result of providing equal benefits to same-sex couples, they took issue with other

⁹⁶¹ *Id.* at 885-86 (citations omitted).

⁹⁶² *Id.* at 886.

⁹⁶³ *Id.* at 887.

⁹⁶⁴ *Id.* at 889 (citations omitted).

aspects of the opinion. Justice Dooley, joined by Justice Johnson, in part, disagreed with the majority’s dismantling of tiered scrutiny, and stated that Vermont should retain levels of scrutiny so that there remains a “higher burden to justify discrimination against African-Americans or women than it does to justify discrimination against large retail stores.”⁹⁶⁵ Justice Johnson dissented in part. She believed that the court should institute an immediate remedy for the plaintiffs in the case.⁹⁶⁶ In addition, she believed that the opinion should have been based on a gender discrimination rationale.⁹⁶⁷

In response to *Baker*, the Vermont Legislature passed H.847, authorizing civil unions, but only for same-sex couples. The bill established the standards for entering into a civil union, the protections found therein, the dissolution of such a union, as well as legal definitions. The purpose of the act was “to provide eligible same-sex

⁹⁶⁵ *Id.* at 894 (Dooley, J., concurring in part) (indicating that same-sex couples would constitute a suspect class).

⁹⁶⁶ *Baker*, 774 A.2d at 898 (Johnson, J., dissenting in part). Justice Johnson made the following comparison:

In 1948, when the California Supreme Court struck down a state law prohibiting the issuance of a license authorizing interracial marriages, the court did not suspend its judgment to allow the legislature an opportunity to enact a separate licensing scheme for interracial marriages. Indeed, such a mandate in that context would be unfathomable to us today. Here, as in *Perez*, we have held that the State has unconstitutionally discriminated against plaintiffs, thereby depriving them of civil rights to which they are entitled.

Id. (citation omitted).

⁹⁶⁷ *Id.* at 905. Justice Johnson addressed a common argument against applying a gender discrimination rationale to analyze marriage laws:

The State’s second argument, also propounded by the majority, is that the marriage statutes do not discriminate on the basis of sex because they treat similarly situated males the same as similarly situated females. Under this argument, there can be no sex discrimination here because “if a man wants to marry a man, he is barred; a woman seeking to marry a woman is barred in precisely the same way. For this reason, women and men are not treated differently.” But consider the following example. Dr. A and Dr. B both want to marry Ms. C, an X-ray technician. Dr. A may do so because Dr. A is a man. Dr. B may not because Dr. B is a woman. Dr. A and Dr. B are people of opposite sexes who are similarly situated in the sense that they both want to marry a person of their choice. The statute disqualifies Dr. B from marriage solely on the basis of her sex and treats her differently from Dr. A, a man. This is sex discrimination.

Id. at 906 (citations omitted).

couples the opportunity to receive legal benefits and protections, and be subject to legal responsibilities equal to those that flow from civil marriage.”⁹⁶⁸

b. Issues Likely to Arise under the Civil Union Model

The Vermont civil union law extends “all the same benefits, protections and responsibilities” of marriage.⁹⁶⁹ In the event a couple wishes to dissolve their civil union, they must follow the same procedures as apply to the dissolution of marriage, including the residency requirement that one member of the partnership must live in Vermont for six months before filing divorce papers and then remain there for a year.⁹⁷⁰ Although the parties to a Vermont marriage may terminate their marriage in another state so long as they comply with that state’s divorce laws, if neither party to a civil union lives in Vermont, it is not clear whether, or where, they will be permitted to dissolve their union.⁹⁷¹

⁹⁶⁸ Summary of H.847 – As Passed By The House of Representatives. March 17, 2000. The bill had been subject to numerous committee meetings and public hearings. It passed the Assembly by a vote of 79 to 68 and passed the Senate by a vote of 2 to 1.

⁹⁶⁹ See 15 VT.STAT.ANN. § 1204(a) (2003) (“Parties to a civil union shall have all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage.”).

⁹⁷⁰ See 15 VT.STAT.ANN. § 1206 (2003) (“The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage in accordance with chapter 11 of this title, including any residency requirements.”); see also Human Rights Campaign, *Dissolving a Vermont Civil Union*, at www.hrc.org/Content/ContentGroups/Issues1/Civil_Unions/Dissolving_a_Vermont_Civil_Union.htm (last visited March 24, 2004) (“To legally dissolve a civil union, one [member of the couple] must live in Vermont for six months before filing divorce papers and then remain there for a year before the court will grant the final dissolution and resolve related matters, such as the division of property and financial support.”).

⁹⁷¹ See Human Rights Campaign, *Dissolving a Vermont Civil Union*, *supra* note 970. See also *infra* Section III.F.2 for a discussion of Full Faith and Credit. In *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002), a same-sex couple sought recognition of their Vermont civil union for purposes of a dissolution judgment in Connecticut. The court held that a foreign same-sex civil union was not a “marriage” recognized under Connecticut statute, which provides the court with subject matter jurisdiction over the dissolution of a marriage, because the civil union was not entered into between a man and a woman. See also *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002) A former spouse sought recognition of her Vermont civil union for purposes of a visitation order. The Georgia Court of Appeals held that the ex-partners were not married in Vermont, but instead had entered into a civil union, which does not bestow status of civil marriage; thus, the court held that the former spouse violated a consent order prohibiting

When a civil union is dissolved in Vermont and children are involved, custody and visitation issues are treated comparably to how they are treated under marriage. The Vermont civil union statute provides that “[t]he law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.”⁹⁷² More specifically,

[t]he rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural child during the marriage.⁹⁷³

Additionally, “adoption law and procedure” apply to civil unions as they do to marriages in Vermont.⁹⁷⁴

At least one case has provoked a jurisdictional debate over child custody rights following the dissolution of a civil union. Lisa Miller-Jenkins and Janet Miller-Jenkins had entered into a civil union prior to the birth of their daughter; as such, she was the legal child of both women. When, in July 2003, they sought to dissolve their union, the Family Court entered a temporary order awarding Lisa Miller-Jenkins, the biological mother, physical custody and Janet Miller-Jenkins visitation rights.⁹⁷⁵

visitation with children while cohabitating with an adult to whom the party is not legally married when she exercised visitation while cohabiting with her female companion. *But see Langan*, 765 N.Y.S.2d 411 (Sup. Ct. 2003), where the surviving same-sex partner to a civil union sought recognition of the civil union in New York for purposes of bringing a wrongful death action. The Supreme Court, Nassau County, held that the surviving spouse was entitled to bring the action. This matter now is before an appellate court.

⁹⁷² 15 VT.STAT.ANN. § 1204(d) (2003).

⁹⁷³ 15 VT.STAT.ANN. § 1204(f) (2003).

⁹⁷⁴ 15 VT.STAT.ANN. § 1204(e)(4) (2003).

⁹⁷⁵ *Lisa Miller-Jenkins v. Janet Miller-Jenkins*, No. 454-11-13 ReDMd (Rutland County, Vt., Fam. Ct. 2004).

Shortly thereafter, Lisa moved to Virginia with the child.⁹⁷⁶ On September 28, 2004, a Frederick County Court Judge in Virginia took jurisdiction of the case and awarded Lisa sole custody of the child, even though custody issues already had been determined by the Vermont court. The Virginia court relied on the State's newly-enacted "Marriage Affirmation Law," which provides that a Vermont civil union has no legal effect in Virginia.⁹⁷⁷ On petition by Janet, the Vermont Family Court found Lisa in contempt for violating the court's visitation order. Janet is planning to appeal the Virginia court's order.⁹⁷⁸

4. Domestic Partnership and Reciprocal Beneficiaries

Massachusetts and Vermont are unique among the fifty states in the recognition afforded to partners in same-sex relationships. Massachusetts is the only state that allows gay and lesbian couples to legally marry, and Vermont is the only state offering benefits and burdens similar to marriage in the form of civil unions.⁹⁷⁹ As of January 2005, California's system of legal recognition will look very similar to Vermont's, but it will be known as domestic partnership.

This section describes the different domestic partnership schemes of California, New Jersey, Hawai'i and the District of Columbia, which are among the only

⁹⁷⁶ The couple had lived in Virginia when they entered into a civil union; however, they had since moved to Vermont. *Id.*

⁹⁷⁷ *Lisa Miller-Jenkins v. Janet Miller-Jenkins*, No. CH04000280-00 (Frederick Cty. Cir. Ct. 2004) (citing VA. CODE ANN § 20-45.3 (2004)).

⁹⁷⁸ See Justin Bergman, *Custody Fight May Test Va. Las; Mother of Child Seeks Sole Custody After Civil Union To Woman Ends*, RICHMOND TIMES-DISPATCH, Aug. 24, 2004, at B2, available at 2004 WL 61912579.

⁹⁷⁹ See discussion *supra* Sections II.B.2.a,b and II.B.3.

states or U.S. entities offering statewide domestic partnership systems.⁹⁸⁰ The provisions of these four jurisdictions provide a range of benefits and protections; none of them, however, is analogous to marriage.

a. California

i. Creation of Domestic Partnerships

Under the California Family Code, “[d]omestic partners are two adults who have chosen to share one another’s lives in an intimate and committed relationship of mutual caring.”⁹⁸¹ In order to establish a domestic partnership, a couple must meet all of the following requirements:

- the couple must share a common residence;
- the couple must “agree to be jointly responsible for each other’s basic living expenses incurred during the domestic partnership”;
- both individuals must be unmarried and not currently registered in another domestic partnership;
- the individuals must not be related by blood in a way that would prevent them from getting married in California;
- both individuals must be eighteen years of age or older;

⁹⁸⁰ See Human Rights Campaign Foundation, *Domestic Partners*, available at http://www.hrc.org/Template.cfm?Section=Domestic_partners1&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=23&ContentID=10326 (last visited Feb. 24, 2004). Hawai’i allows same-sex couples to register as reciprocal beneficiaries. See discussion *infra* Section III.B.4.c. For the purposes of this discussion, the District of Columbia is treated as a state. In 2004 Maine Governor John Baldacci signed into law a statewide domestic partner registry for unmarried opposite-sex and same-sex couples. *Marriage & Partner Recognition Legislative Notes*, Lesbian /Gay Law Notes, 85 (May 2004). The registry provides affirmative rights. For purposes of intestate succession and elective shares, registered partners will be treated the same as spouses. *Id.* Registered partners will also be deemed next-of-kin for purposes of the right to control disposition of a body. *Id.*

⁹⁸¹ CAL. FAM. CODE § 297(a) (First of two) (Deering 2004). A revised version of this statute becomes effective January 1, 2005 but this language is substantively the same. CAL. FAM. CODE § 297(a) (Second of two) (Deering 2004).

- both individuals must be of the same sex;⁹⁸²
- both individuals must be capable of consenting to domestic partnership; and
- the couple must file a Declaration of Domestic Partnership with the Secretary of State.

A couple meeting these requirements must complete the domestic partnership registration form, have it notarized and submit it to the Secretary of State's office by mail or in person with a ten-dollar filing fee.⁹⁸³ To terminate a domestic partnership, at least one of the domestic partners must file a termination form with the same office.⁹⁸⁴

California's first statewide registry for domestic partners became effective in 2000.⁹⁸⁵ Domestic partners who registered under this scheme obtained visitation rights in hospitals and received health care coverage for dependents of some State government employees.⁹⁸⁶ The State legislature later passed more comprehensive domestic

⁹⁸² CAL. FAM. CODE § 297(b) (First of two) (Deering 2004). A revised version of this statute becomes effective January 1, 2005 but these provisions are substantively the same. CAL. FAM. CODE § 297(b) (Second of two) (Deering 2004). Individuals of opposite sexes may also register as domestic partners if "[o]ne or both of the persons meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals. Notwithstanding any other provision of this section, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62." CAL. FAM. CODE § 297(b)(6)(B) (First of two) (Deering 2004).

⁹⁸³ CAL. FAM. CODE § 298.5 (Deering 2004); *see also* California Secretary of State, *Domestic Partners Registry*, available at <http://www.ss.ca.gov/dpregistry/index.htm> (last visited Feb. 26, 2004). If the couple chooses to file in person, they must pay an additional \$15.00 fee for special handling. *Id.*

⁹⁸⁴ CAL. FAM. CODE § 299 (Deering 2004); *see also* California Secretary of State, *Domestic Partners Registry*, available at <http://www.ss.ca.gov/dpregistry/index.htm> (last visited Feb. 26, 2004).

⁹⁸⁵ A.B. 26, 1999-2000 Sess. (Cal. 1999). Assembly Bill 26 was:
An act to add Division 2.5 (commencing with Section 297) to the Family Code, to add Article 9 (commencing with Section 22867) to Chapter 1 of Part 5 of Division 5 of Title 2 of the Government Code, and to add Section 1261 to the Health and Safety Code, relating to domestic partners.

Id.

⁹⁸⁶ A.B. 26, 1999-2000 Sess. (Cal. 1999).

partnership legislation, effective January 1, 2002, which substantially increased the scope of domestic partnership.⁹⁸⁷

As of January 1, 2005, domestic partners in California will see a dramatic increase in their rights and obligations, making the State's system more analogous to that found in Vermont.⁹⁸⁸ Under the new law, registered, former and surviving domestic partners will virtually "have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon" spouses and former and surviving spouses.⁹⁸⁹ In addition,

⁹⁸⁷ A.B. 25, 2001-2002 Sess. (Cal. 2001). The coverage of domestic partnership includes:

- the establishment of a cause of action for negligence (including negligent infliction of emotional distress and wrongful death) equivalent to that of a surviving spouse;
- the ability of a domestic partner to petition for the adoption of the child of his or her domestic partner using the same procedures as a stepparent;
- the eligibility of a surviving domestic partner and his or her children to receive continuing health care and other benefits provided by state and local employers in the event of the death of the covered domestic partner;
- the authorization for a domestic partner to make health care decisions on behalf of his or her partner in certain circumstances;
- the requirement that group health care service plans and disability insurance policies providing hospital, medical, or surgical expense benefits to an insured domestic partner also offer coverage to the insured's domestic partner;
- the requirement that employers who allow employees to use sick leave to care for a sick child, parent, or spouse also allow employees to care for a sick domestic partner or child of a domestic partner;
- the inclusion of domestic partners in succession rights under probate law;
- the extension of certain state tax benefits related to medical expenses;
- the extension of unemployment benefits to a domestic partner who, by accompanying his or her domestic partner to another geographical location, is no longer able to commute to work; and
- the authorization for one domestic partner to make a disability claim on behalf of the other if he or she is mentally unable to make the claim. *Id.*

⁹⁸⁸ In contrast to both Massachusetts and Vermont, California made this change without facing judicial pressure. Bill Ainsworth, *Governor Signs Measure Giving New Rights To Domestic Partners*, SAN DIEGO UNION-TRIBUNE, Oct. 15, 2001, at A1.

⁹⁸⁹ CAL. FAM. CODE §§ 297.5(a), (b), (c) (Deering 2004). *But see infra* note 998 and accompanying text.

domestic partners will have the same rights and obligations regarding a child of either partner as do current, former or surviving spouses.⁹⁹⁰

In a move that in an important way expands the rights of domestic partners in California beyond the rights of those who enter a civil union in Vermont, if a California law adopts, refers to or relies on a federal law in a way that “would cause registered domestic partners to be treated differently than spouses, registered domestic partners shall be treated by California law as if federal law recognized a domestic partnership in the same manner as California law.”⁹⁹¹ For income tax purposes, however, domestic partners must use the same filing status on their state returns as on their federal returns, and earned income may not be considered community property for state income tax purposes.⁹⁹² Beyond these exceptions, though, “[n]o public agency in [California] may discriminate against any person or couple on the ground that the person is a registered domestic partner rather than a spouse or that the couples are registered domestic partners rather than spouses.”⁹⁹³

⁹⁹⁰ CAL. FAM. CODE § 297.5(d) (Deering 2004).

⁹⁹¹ CAL. FAM. CODE § 297.5(e) (Deering 2004).

⁹⁹² CAL. FAM. CODE § 297.5(g) (Deering 2004). Domestic partners will not enjoy the ability to file joint state income tax returns (in contrast to parties to a Vermont civil union, who are able to file joint state income taxes); an exemption from reassessment under Prop. 13 of jointly held property between partners upon separation or termination of the relationship or after death; an exemption from property tax on the homes of survivors of veterans who died during active duty; partial exemption from property tax provided survivors of certain veterans; or the unlimited exemptions from federal gift and estate taxes on transfers to one’s partner, all of which are provided to married heterosexual couples. Lambda Legal, *California’s New Domestic Partnership Law: An Overview* (2003). However, in an effort to diminish these disparities, on September 13, 2004 California Governor Arnold Schwarzenegger signed into law a comprehensive health insurance bill that makes it unlawful for insurance companies to offer any insurance policies in California that do not provide equal coverage to domestic partners and spouses. 2004 Cal. Legis. Serv. Ch. 488 (WEST). Likewise, property rights and interests governed by federal law, such as tax, bankruptcy, estate, copyright, and patent, are not protected for domestic partners, while they are protected for married spouses. See *infra* Section III.F.3 for a discussion of DOMA.

⁹⁹³ CAL. FAM. CODE § 297.5(h) (Deering 2004). The statute also provides:

Although the California domestic partnership scheme is broad, it is not the equivalent of marriage. In fact, California has banned marriage between same-sex partners.⁹⁹⁴ This prohibition represents more than a distinction in nomenclature. California's domestic partnership laws continue to offer fewer rights and protections for domestic partners than California's marriage laws offer to married couples. In addition to the differential tax and property rights described *supra*, domestic partners will not have the recognition of relationship under the California Political Reform Act and Prop.34; the exclusion of interest in the income of one's partner from certain conflict of interest laws; coverage of relationships under conflict of interest rules governing Coastal Commission members and employees; or the requirement to file court proceedings in all cases where the relationship is being terminated. As with same-sex partnership schemes in other states, interstate recognition of California domestic partnerships is not guaranteed.⁹⁹⁵

(i) This act does not preclude any state or local agency from exercising its regulatory authority to implement statutes providing rights to, or imposing responsibilities upon, domestic partners.

(j) This section does not amend or modify any provision of the California Constitution or any provision of any statute that was adopted by initiative.

(k) This section does not amend or modify federal laws or the benefits, protections, and responsibilities provided by those laws.

(l) Where necessary to implement the rights of domestic partners under this act, gender-specific terms referring to spouses shall be construed to include domestic partners.

CAL. FAM. CODE § 297.5(i)-(l) (Deering 2004).

⁹⁹⁴ See CAL. FAM. CODE § 308.5 (Deering 2000). A further consequence of the establishment of this separate track of relationship recognition is that same-sex couples will not have their domestic partnerships submitted to county clerks who track vital statistics.

⁹⁹⁵ CAL. FAM. CODE § 297.5(h) (Deering 2004). Further, no rights or duties under federal law will accrue to California domestic partners; and, any federal laws prohibiting discrimination based on being or not being in a legal relationship do not apply. *Id.*

ii. Domestic Partnerships and Custody Issues

Second parent adoptions are permitted in California.⁹⁹⁶ The California Family Code’s section on adoption declares that “[a] domestic partner . . . desiring to adopt a child of his or her domestic partner may for that purpose file a petition in the county in which the petitioner resides.”⁹⁹⁷ As the domestic partnership law now stands, however, there is no automatic parental responsibility bestowed on one party in relation to the child of their partner. Therefore, without an adoptive relationship, a former domestic partner would not be deemed a “parent” in the eyes of the law after the termination of the partnership.⁹⁹⁸

Effective January 1, 2005, the domestic partnership law also will provide more expansive rights in relation to children:⁹⁹⁹

The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses.¹⁰⁰⁰

⁹⁹⁶ *Sharon S. v. Superior Ct.*, 73 P.3d 554, 572 (Cal. 2003). “Nothing on the face of the domestic partnership provisions, or in their history as revealed in the record, states or implies a legislative intent to forbid, repeal, or disapprove second parent adoption.”

⁹⁹⁷ CAL. FAM. CODE § 9000(b) (Deering 2004).

⁹⁹⁸ *See, e.g., Guardianship of Oliva J.*, 84 Cal. App. 4th 1146, 1152 (Cal. App. 1st Dist. 2000) (noting in a case where plaintiff sought guardianship of her former domestic partner’s child that “[a]lthough appellant describes her relationship with the minor as a parent-child relationship, she *does not* seek a declaration of the existence of a parent-child relationship under the Uniform Parentage Act, and concedes, for the purpose of this proceeding, that *she does not have the legal status of a parent*”) (emphasis in original).

⁹⁹⁹ CAL. FAM. CODE § 297.5(a) (Deering 2004).

¹⁰⁰⁰ CAL. FAM. CODE § 297.5(d) (Deering 2004).

Finally, California courts do not generally take sexual orientation into consideration when making custody and visitation decisions¹⁰⁰¹ outside the structure of domestic partnerships.¹⁰⁰²

¹⁰⁰¹ For a review of the legal approaches and representative cases from different states regarding custody and visitation of children by gays and lesbians in general, see WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 1065-1178 (2d ed. 2004) (“Eskridge & Hunter”). Eskridge and Hunter describe the evolution from treating gays and lesbians as *per se* disqualified from custody, “to a rule requiring judges to consider the overall best interests of the child, but slanting the inquiry by insisting that morality and homophobic third-party reactions be considered.” *Id.* at 1166. “In more gay-friendly jurisdictions,” write Eskridge and Hunter, a more “neutral best interests of the child inquiry” has prevailed: “[T]he court required a *nexus* between the parent’s sexual orientation and harm to the child for the orientation to be relevant in a child custody case.” *Id.* This *nexus* approach, as first laid out in *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980), has been accepted by an increasing number of jurisdictions. Eskridge & Hunter, at 1169-70.

Notwithstanding the general move away from *per se* disqualification of gay and lesbian parents, there are recent examples of judges still embracing such an approach. Former Chief Justice Moore of the Alabama Supreme Court has written:

I write specially to state that homosexual conduct of a parent – conduct involving a sexual relationship between two persons of the same gender – creates a strong presumption of unfitness that alone is sufficient for denying that parent custody of his or her own children or prohibiting the adoption of the children of others Homosexual conduct is, and has been, considered abhorrent, immoral, detestable, a crime against nature, and a violation of the laws of nature and of nature’s God upon which this Nation and our laws are predicated.

Ex parte H.H., 830 So. 2d 21, 26 (Ala. 2002) (Moore, C.J., concurring). Another state justice, concurring in part and dissenting in part in a South Dakota Supreme Court case, wrote in 1992:

[The l]esbian mother has harmed these children forever. To give her rights of reasonable visitation so that she can teach them to be homosexuals, would be the zenith of poor judgment for the judiciary of this state. Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (see Leviticus 18:22), she should be totally estopped from contaminating these children. After years of treatment, she could then petition for rights of visitation. My point is: she is not fit for visitation at this time. Her conduct is presently harmful to these children. Thus, she should have no visitation.

Chicoine v. Chicoine, 479 N.W.2d 891, 896 (S.D. 1992).

¹⁰⁰² See Human Rights Campaign, *California Laws Affecting GLBT People*, available at www.hrc.org (last visited March 14, 2004) (“California has a good record on custody and visitation rights for gay and lesbian parents. Sexual orientation is generally not viewed as a factor in custody and visitation cases in the state. With respect to custody and visitation disputes between same-sex couples, California courts will generally recognize the rights of legal parents over those who have no biological or adoptive connection to the child - unless the nonbiological or nonadoptive parent has obtained a second-parent adoption, in which case both parents are on firm legal footing to seek custody or visita[tion].”).

By contrast, the Human Rights Campaign database on Hawai’ian law reports that while second parent adoptions are permitted, it is not clear whether courts will permit gay men and lesbians to adopt or whether sexual orientation would be taken into account in a custody dispute. See Hawai’i Laws Affecting GLBT People, Human Rights Campaign, at www.hrc.org (last visited March 14, 2004).

b. New Jersey

New Jersey's Domestic Partnership Act, which became effective on July 10, 2004, defines domestic partners as individuals "who choose to live together in important personal, emotional and economic committed relationships with another individual."¹⁰⁰³ In order to register as domestic partners in New Jersey, a couple must meet all of the following requirements:

- the couple must share a common residence and be "otherwise jointly responsible for each other's common welfare as evidenced by joint financial arrangements or joint ownership of real or personal property";
- both individuals must agree to be jointly responsible for each other's basic living expenses
- both people must be unmarried, and neither can be in another domestic partnership;
- the individuals must not be related by blood or affinity "up to and including the fourth degree of consanguinity";¹⁰⁰⁴
- both individuals must be of the same sex (unless both partners are over age 62);¹⁰⁰⁵
- both individuals must "have chosen to share each other's lives in a committed relationship of mutual caring";

¹⁰⁰³ N.J. STAT. ANN. § 26:8A-2(a) (West 2004); *see also* P.L. 2003, c.246, 210th Leg., 2d Reg. Sess. (N.J. 2004). New Jersey was the fifth state to recognize some form of legal relationship between individuals of the same sex. *See Partnership Rights for Gays*, N.Y. TIMES, Jan. 13, 2004, at A24. The other states are California, Hawai'i, Massachusetts and Vermont. *Id.* *See also generally* this Section and Section II.B. Some commentators have noted that the passage of New Jersey's Domestic Partnership Act appears to have caused little commotion or controversy. *See, e.g.* Joanna Grossman, *The New Jersey Domestic Partnership Law: Its Formal Recognition of Same-Sex Couples, and How It Differs From Other States' Approaches* (Jan. 13, 2004) available at <http://writ.news.findlaw.com/grossman/20040113.html> (last visited Feb. 27, 2004). The passage of New Jersey's Domestic Partnership Act was "not a concession required by a court decision." *Id.* Its passage may, however, have been prompted by a pending decision by the state's highest court.

¹⁰⁰⁴ N.J. STAT. ANN. § 26:8A-1 Heterosexual couples, in comparison, may not marry ancestors or descendants related by whole or half blood. N.J. STAT. ANN. § 37:1-1 (West 2004).

¹⁰⁰⁵ N.J. STAT. ANN. § 26:8A-1 "[E]xcept that two persons who are each 62 years of age or older and not of the same sex may establish a domestic partnership if they meet the requirements set forth in this section." N.J. STAT. ANN. § 26:8A-4(b)(5) (West 2004).

- both individuals must be at least 18 years of age;
- the couple must file the proper form jointly; and
- neither individual has terminated a domestic partnership in the previous six months.¹⁰⁰⁶

A couple meeting all of these requirements may file an Affidavit of Domestic Partnership with the local registrar.¹⁰⁰⁷ To terminate a domestic partnership, the couple must file an action with the New Jersey Superior Court, which has jurisdiction over all proceedings related to the termination of domestic partnerships created pursuant to New Jersey law.¹⁰⁰⁸

Registered domestic partners are eligible for “certain rights and benefits . . . accorded to married couples under the laws of New Jersey.”¹⁰⁰⁹ These rights and benefits include:

- statutory protection against various forms of discrimination against domestic partners;¹⁰¹⁰
- the right to visit a domestic partner in a health care facility;¹⁰¹¹
- the right of one domestic partner to make important health care decisions and execute health care directives on behalf of the other;¹⁰¹²
- the right to consent to the autopsy of, organ donation by or release of the death certificate of a domestic partner;¹⁰¹³

¹⁰⁰⁶ N.J. STAT. ANN. § 26:8A-4(b) (West 2004).

¹⁰⁰⁷ N.J. STAT. ANN. § 26:8A-4(a) (West 2004).

¹⁰⁰⁸ N.J. STAT. ANN. § 26:8A-10(a)(1) (West 2004).

¹⁰⁰⁹ N.J. STAT. ANN. § 26:8A-2(d) (West 2004).

¹⁰¹⁰ See N.J. STAT. ANN. §§ 10:5-5(qq), 12 (West 2004).

¹⁰¹¹ See N.J. STAT. ANN. § 26:2H-12.22 (West 2004).

¹⁰¹² See N.J. STAT. ANN. §§ 26:2H-32, 57-58 (West 2004).

¹⁰¹³ See N.J. STAT. ANN. §§ 26:5C-12, 26:6-50, 6-57-58.1, 26:6-63 (West 2004).

- the option of a taxpaying domestic partner to claim a deduction – from state income taxes only – for a domestic partner not filing separately;¹⁰¹⁴
- the option of a public employee to claim a domestic partner as a dependent for the purposes of receiving health care benefits;¹⁰¹⁵ and
- the inclusion of domestic partners as beneficiaries in various state pension and retirement plans.¹⁰¹⁶

In addition, New Jersey will recognize as valid any “domestic partnership, civil union or reciprocal beneficiary relationship entered into outside of [New Jersey], which is valid under the laws of the jurisdiction under which the partnership was created.”¹⁰¹⁷

The rights afforded to domestic partners under the New Jersey scheme are different from those afforded married couples. For example, the law does not provide for support or property sharing if the domestic partnership is terminated.¹⁰¹⁸ Further, domestic partners do not automatically acquire rights and obligations regarding any children.¹⁰¹⁹ The law also does not include domestic partners in intestate succession

¹⁰¹⁴ See N.J. STAT. ANN. §§ 54A:1-2, 3-1 (West 2004) (effective July 10, 2004). This deduction is the same as that of married spouses. *Id.* The transfer of real or personal property between domestic partners is taxed under the same circumstances and at the same rate as for married spouses. See N.J. STAT. ANN. § 26:8A-6(c) (West 2004).

¹⁰¹⁵ See N.J. STAT. ANN. § 52:14-17.26 (West 2004) (effective July 10, 2004). Companies licensed by the state of New Jersey to provide hospital, medical and dental expense benefits must offer coverage to domestic partners of insureds. See N.J. STAT. ANN. §§ 17:48-6bb, 17:48A-7aa, 17:48E-35.26, 17B:26-2.1x, 17B:27-46.1bb, 17B:27A-7.9, 17B:27A-19.12, 17:48C-8.2, 17:48D-9.5, 26:2J-4.27, 34:11A-20 (West 2004).

¹⁰¹⁶ See N.J. STAT. ANN. § 43:15A-6 (West 2004) (effective July 10, 2004) (State, County and Municipal Employees); N.J. STAT. ANN. § 43:16A-1 (West 2004) (effective July 10, 2004) (Policemen, Firemen and Traffic Officers), (West 2004) (effective July 10, 2004); N.J. STAT. ANN. § 43:6A-3 (West 2004) (effective July 10, 2004) (Judicial Retirement System); N.J. STAT. ANN. § 18A:66-2 (West 2004) (effective July 10, 2004) (Teachers); N.J. STAT. ANN. § 53:5A-3 (West 2004).

¹⁰¹⁷ N.J. STAT. ANN. § 26:8A-6 (West 2004).

¹⁰¹⁸ Joanna Grossman, *The New Jersey Domestic Partnership Law: Its Formal Recognition of Same-Sex Couples, and How It Differs From Other States' Approaches* (Jan. 13, 2004) available at <http://writ.news.findlaw.com/grossman/20040113.html> (last visited Feb. 27, 2004).

¹⁰¹⁹ *Id.*

schemes, though it does specifically include domestic partners in the assessment of inheritance taxes.¹⁰²⁰ Finally, the legislature did not give a domestic partner standing to bring tort claims resulting from the injury or death of the other domestic partner.¹⁰²¹

c. Hawai'i

The only other statewide registry for same-sex couples is Hawai'i's reciprocal beneficiary scheme. Hawai'i's legislature created the category of reciprocal beneficiaries as part of its response to the 1993 decision of the state's highest court in *Baehr v. Lewin*.¹⁰²² In *Baehr*, the plaintiffs were denied marriage licenses because they were of the same sex.¹⁰²³ The couples filed suit against the Department of Health alleging that the Department's interpretation and application of Hawai'i Statute 572, prohibiting same-sex marriage, violated their right to privacy¹⁰²⁴ and their rights to equal protection and due process of law, as guaranteed by the Hawai'i Constitution.¹⁰²⁵

The First Circuit Court, City and County of Honolulu, granted defendant's motion for judgment on the pleadings;¹⁰²⁶ the Hawai'i Supreme Court vacated and

¹⁰²⁰ *Id.*

¹⁰²¹ *Id.*

¹⁰²² 852 P.2d 44 (Haw. 1993) ("*Baehr*"); see also Mary Louise Fellows, *Pride and Prejudice: A Study of Connections*, 7 VA. J. SOC. POL'Y & L. 455, 459-60, 484 (2000) ("Fellows") (describing Hawai'i state legislature acting in response to court decision). Notably, Hawai'i's legislature, like those of Massachusetts and Vermont, reacted to a decision by the highest court in the state. In California and New Jersey, on the other hand, the state legislatures initiated domestic partnership schemes without judicial provocation. See discussion of *Goodridge*, *supra* Section II.B.2; discussion of *Baker*, *supra* Section II.B.3; discussion of California and New Jersey domestic partnership schemes, *supra* Section II.B.4.

¹⁰²³ *Baehr*, 852 P.2d at 49.

¹⁰²⁴ HAW. CONST. art. 1, § 6 (1988) ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.").

¹⁰²⁵ *Id.* § 5 ("No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.").

¹⁰²⁶ *Baehr*, 852 P.2d at 49.

remanded the case, however, holding that the lower court's order "[ran] aground on the shoals of the Hawai'i Constitution's equal protection clause."¹⁰²⁷

Although the Hawai'i Supreme Court held that the section of the Hawai'i Constitution in question did not give rise to a fundamental right of persons of the same sex to marry, it concluded that the statute restricting the marital relationship only to males partnered with females established a sex-based classification, which was subject to a "strict scrutiny" test.¹⁰²⁸ Upon remand to the trial court, the Supreme Court directed that the State must demonstrate a compelling state interest why same-sex couples should be denied the right to marry; absent such a finding, the Court held that same-sex couples should be permitted to marry.¹⁰²⁹

In 1996, the circuit court ruled that the state failed to show a compelling state interest for denying marriage licenses to same-sex couples,¹⁰³⁰ holding that "[t]he sex-based classification in [Hawai'i law], on its face and as applied, is unconstitutional and in violation of the equal protection clause of . . . the Hawai'i Constitution."¹⁰³¹ The

¹⁰²⁷ *Id.* at 65-69; *see also* HAW. CONST. art. I, § 5. That clause specifies that "[n]o person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry."

¹⁰²⁸ *Baehr*, 852 P.2d at 68. Further, the Court took issue with the lower court's conclusion that the existing marriage statute "is obviously designed to promote the general welfare interests of the community by sanctioning [only] traditional man-woman family units and procreation." *Id.* at 53-54. As a result, a great deal of the testimony and evidence presented to the Circuit Court revolved around whether gay men and lesbians could constitute fit parents.

¹⁰²⁹ *Baehr*, 852 P.2d at 68.

¹⁰³⁰ *Baehr v. Muike*, Civ. No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

¹⁰³¹ *Id.* As part of its ruling, the Court found that "in general, gay and lesbian parents are as fit and loving parents as non-gay persons and couples." *Id.* at *5 (quoting the expert testimony of Dr. Kyle Pruett of Yale University).

circuit court did, however, allow the state time to appeal the decision before requiring it to issue marriage licenses.¹⁰³²

By the time the Hawai'i Supreme Court revisited the case in 1999 on a further appeal, the State legislature had passed, and the electorate had ratified, an amendment to the State Constitution providing that “[t]he legislature shall have the power to reserve marriage to opposite-sex couples.”¹⁰³³ The Hawai'i Supreme Court found that

[t]he passage of the marriage amendment placed [the state's marriage statute] on new footing. The marriage amendment validated [the state's marriage statute] by taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex couples. Accordingly, whether or not in the past it was violative of the equal protection clause in the foregoing respect, [the state's marriage statute] no longer is. In light of the marriage amendment, [the state's marriage statute] must be given full force and effect.¹⁰³⁴

As a result of the marriage amendment, same-sex couples currently may not obtain marriage licenses or enter into legally recognized marriages.¹⁰³⁵

As the Amendment only permits the barring of same-sex marriage and does not mandate it, however, the state legislature may rescind the ban.

¹⁰³² See *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391, at *6 (Haw. Dec. 11, 1999).

¹⁰³³ HAW. CONST. art. I, § 23; see also H.B. 117, 19th Leg., Reg. Sess. (Haw. 1997).

¹⁰³⁴ *Baehr*, 1999 Haw. LEXIS 391, at *6-7.

¹⁰³⁵ See *id.* at *8. A 1998 Alaska case regarding the rights of a gay couple to marry followed a trajectory similar to that of *Baehr*. In *Brause*, the state Superior Court ruled that because Alaska's “Marriage Code implicates [state] constitutional [privacy and equal protection] provisions, . . . [t]he parties are directed to set necessary further hearings to determine whether a compelling state interest can be shown for the ban on same-sex marriage found in the Alaska Marriage Code.” *Brause*, 1998 WL 88743, at *6. By January, 1999, the Alaska Constitution was amended to define marriage as “only between one man and one woman,” effectively mooting the couple's constitutional claims. *Brause v. Dep't of Health & Soc. Servs.*, 21 P.3d 357, 358 (Alaska 2001).

In addition to passing the marriage amendment to the State Constitution, the legislature enacted the Reciprocal Beneficiaries Act on July 8, 1997.¹⁰³⁶ The purpose of the statute is “to extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law.”¹⁰³⁷ The ability to register as reciprocal beneficiaries is not reserved for same-sex couples. Rather, a reciprocal beneficiary may be any “individual[] who ha[s] significant personal, emotional, and economic relationships with another individual yet [is] prohibited by such legal restrictions from marrying . . . such as a widowed mother and her unmarried son, or two individuals who are of the same gender.”¹⁰³⁸ The legislature was clear that “the rights and benefits extended [to reciprocal beneficiaries] shall be narrowly interpreted and [not] construed nor implied to create or extend rights or benefits not specifically provided herein.”¹⁰³⁹

In order to qualify for registration as reciprocal beneficiaries, two individuals must:¹⁰⁴⁰

- be at least eighteen years old;
- be unmarried and not in another reciprocal beneficiary relationship;
- be legally prohibited from marrying each other in Hawai’i; and
- consent freely.

¹⁰³⁶ 1997 HAW. SESS. LAWS, Act 383; *see also* Fellows, *supra* note 1022, at 460.

¹⁰³⁷ HAW. REV. STAT. § 572C-1 (2003).

¹⁰³⁸ HAW. REV. STAT. § 572C-2 (2003).

¹⁰³⁹ 1997 HAW. SESS. LAWS, Act 383 § 74.

¹⁰⁴⁰ HAW. REV. STAT. § 572C-4 (2003).

If two individuals meet these criteria, they may register as reciprocal beneficiaries by filing a signed, notarized declaration of reciprocal beneficiary relationship with the director of health and paying an eight-dollar fee.¹⁰⁴¹ Either party may terminate the relationship by filing a signed, notarized declaration of termination of reciprocal beneficiary relationship with the same department and paying the same fee.¹⁰⁴² In addition, a reciprocal beneficiary relationship is automatically terminated if one of the parties marries.¹⁰⁴³

Once two individuals are properly registered, they are “entitled to those rights and obligations” that Hawai’i law provides to reciprocal beneficiaries,¹⁰⁴⁴ which include:

- standing to sue for wrongful death and other tort claims;¹⁰⁴⁵
- the right of a surviving reciprocal beneficiary to an elective share of a deceased reciprocal beneficiary’s estate;¹⁰⁴⁶
- the right of a surviving reciprocal beneficiary to receive certain death benefits if the deceased reciprocal beneficiary was employed by the state;¹⁰⁴⁷
- property rights, including joint tenancy;¹⁰⁴⁸

¹⁰⁴¹ HAW. REV. STAT. § 572C-5 (2003).

¹⁰⁴² HAW. REV. STAT. § 572C-7 (2003).

¹⁰⁴³ HAW. REV. STAT. § 572C-7 (2003).

¹⁰⁴⁴ HAW. REV. STAT. § 572C-6 (2003).

¹⁰⁴⁵ HAW. REV. STAT. § 663-1, 663-3 (2003).

¹⁰⁴⁶ HAW. REV. STAT. § 560:2-202 (2003).

¹⁰⁴⁷ *See, e.g.*, HAW. REV. STAT. § 88-84 (2003) (ordinary death benefit); HAW. REV. STAT. § 88-85 (2003) (accidental death benefits); HAW. REV. STAT. § 88-163 (2003) (funeral expenses for surviving reciprocal beneficiaries of police force of fire department members); HAW. REV. STAT. § 88-189 (2003) (state pension).

¹⁰⁴⁸ HAW. REV. STAT. § 509-2 (2003).

- the right to visit a reciprocal beneficiary in a hospital and the authority to make health care decisions for him or her;¹⁰⁴⁹
- the right to donate or refuse to donate the organs of a deceased reciprocal beneficiary;¹⁰⁵⁰
- the right to consent to an autopsy of a deceased reciprocal beneficiary;¹⁰⁵¹
- the availability of health insurance for a dependent reciprocal beneficiary under certain circumstances;¹⁰⁵²
- the right to inherit property without a will;¹⁰⁵³ and
- protection under Hawai'i's domestic violence laws.¹⁰⁵⁴

Hawai'i's reciprocal beneficiary law provides same-sex and opposite-sex couples with limited rights and responsibilities and allows for easy entrance and dissolution of the relationship; however, the law provides fewer benefits and responsibilities than those that accompany marriage, domestic partnership or civil union.

d. District of Columbia

Narrower still is the domestic partnership scheme in the District of Columbia ("D.C."). In 1992, Congress passed the Health Care Benefits Expansion Act, which authorized unmarried people to register as domestic partners in D.C. in order to receive health care insurance coverage if one of the partners worked for the D.C.

¹⁰⁴⁹ HAW. REV. STAT. § 323-2 (2003).

¹⁰⁵⁰ HAW. REV. STAT. § 327-3 (2003).

¹⁰⁵¹ HAW. REV. STAT. § 453-15 (2003).

¹⁰⁵² HAW. REV. STAT. § 431:10A-601 (2003). Employers are not required to offer benefits to reciprocal beneficiaries if their health plans are provided by mutual benefit societies or health maintenance organizations. *Id.* Reciprocal beneficiaries of individuals receiving state pension are eligible for free medical aid if their annual income is below \$2,400.00. HAW. REV. STAT. § 88-4 (2003).

¹⁰⁵³ HAW. REV. STAT. § 560:2-301 (2003).

¹⁰⁵⁴ HAW. REV. STAT. § 709-906 (2003).

government and to ensure mutual visitation rights in hospitals and nursing homes.¹⁰⁵⁵

Until 2002, however, Congress did not appropriate any money for the D.C. government to implement the law.¹⁰⁵⁶

The D.C. code defines domestic partners as those in a “committed relationship,” which is “a familial relationship between 2 individuals characterized by mutual caring and the sharing of a mutual residence.”¹⁰⁵⁷ Those wishing to register as domestic partners in D.C. must be:¹⁰⁵⁸

- at least 18 years old;
- competent to contract;
- the sole domestic partner of the other person; and
- unmarried.

If two individuals, who need not be of the same sex, meet these requirements, they may file a declaration of domestic partnership in person for a fee of forty-five dollars and proof of D.C. residence.¹⁰⁵⁹ To terminate the domestic partnership, at least one of the partners must file a termination form with the District and pay a twenty-five dollar fee.¹⁰⁶⁰

¹⁰⁵⁵ See D.C. CODE ANN. § 32-701 (2003) (annotations include legislative history of D.C. Law 9-114, effective June 11, 1992).

¹⁰⁵⁶ See District of Columbia Department of Health, *If the Law was Passed in 1992, Why is it Only Being Implemented in 2002?*, available at http://dchealth.dc.gov/faqs/domestic_part_reg_faqs.shtm#3 (last visited Mar. 2, 2004).

¹⁰⁵⁷ D.C. CODE ANN. § 32-701(1), (3) (2003).

¹⁰⁵⁸ D.C. CODE ANN. § 32-701(3)(A)-(C) (2003).

¹⁰⁵⁹ D.C. CODE ANN. § 32-702(a) (2003); see also District of Columbia Department of Health, *Frequently Asked Questions*, available at http://dchealth.dc.gov/faqs/domestic_part_reg_faqs.shtm (last visited Mar. 2, 2004).

¹⁰⁶⁰ D.C. CODE ANN. § 32-702(d) (2003); see also District of Columbia Department of Health, *Frequently Asked Questions*, available at http://dchealth.dc.gov/faqs/domestic_part_reg_faqs.shtm (last

After two individuals are registered as domestic partners, they are eligible for certain enumerated rights and benefits:

- the partners and their family members may visit each other in hospitals and nursing homes;¹⁰⁶¹
- D.C. government employees may take sick leave to care for a sick domestic partner or minor child of either partner or to care for a domestic partner on maternity or paternity leave;¹⁰⁶²
- D.C. government employees may take funeral leave to make arrangements for or attend a funeral of a domestic partner or family member; and¹⁰⁶³
- D.C. government employees may take leave to make necessary arrangements when either the employee or the employee’s domestic partner is adopting a child.¹⁰⁶⁴

Like Hawai’i’s reciprocal beneficiaries and California’s domestic partners, dissolution is extremely easy, and there are no provisions for an equitable division of assets. Likewise, there are no guarantees of recognition of the partnership in other states.

5. Developments in New York State

New York State does not permit same-sex couples to marry, but various governmental entities – including the State – have extended certain benefits to all

visited Mar. 2, 2004). A domestic partnership may be terminated automatically if one partner dies, either or both of the partners marry, or one of the partners abandons their mutual residence. District of Columbia Department of Health, *Frequently Asked Questions*, available at http://dchealth.dc.gov/faqs/domestic_part_reg_faqs.shtm (last visited Mar. 2, 2004).

¹⁰⁶¹ D.C. CODE ANN. § 32-704 (2003). D.C. CODE ANN. defines “family member” as:

(A) A domestic partner; or

(B) A dependent child of a domestic partner, which shall include, for the purposes of this section, an unmarried person under 22 years of age, an unmarried person under 25 years of age who is a full-time student, or an unmarried person regardless of age who is incapable of self-support because of a mental or physical disability that existed before age 22. A dependent child of a domestic partner shall include a natural child, adopted child, stepchild, foster child, or child in the legal custody of a domestic partner.

D.C. CODE ANN. § 32-701(7) (2003).

¹⁰⁶² D.C. CODE ANN. § 32-705(a)-(b) (2003).

¹⁰⁶³ D.C. CODE ANN. § 32-705(c) (2003).

¹⁰⁶⁴ D.C. CODE ANN. § 32-705(d) (2003).

workers and their residents. Further, as described below, although the Mayor of New Paltz, New York is enjoined from marrying any more same-sex couples, those married by him in early 2004 remain married under New York State law.¹⁰⁶⁵ This section will provide some historical information about the rights of lesbian and gay couples in New York State, will review the State's current marriage statute and relevant sections of the State Constitution, and will more fully describe the current legal status of same-sex couples in the State.

a. State and Local Government Action

New York State, since 1995, has offered medical benefits to the same and opposite sex domestic partners of its employees.¹⁰⁶⁶ Bills have been introduced in the State legislature that would explicitly prohibit same-sex couples from getting married and others that would explicitly permit same-sex couples to marry.¹⁰⁶⁷ One bill would create a statewide domestic partner registry accompanied by the extension of certain rights and benefits to domestic partners.¹⁰⁶⁸

¹⁰⁶⁵ See *infra* Section III.D.1.c.ii discussing the marriage of same-sex couples in New Paltz, New York in early 2004.

¹⁰⁶⁶ Human Rights Campaign, *New York Laws Affecting GLBT People*, available at http://www.hrc.org/Template.cfm?Section=Search_the_Law_Database&Template=/CustomSource/Law/StateDisplay.cfm&StateCode=NY&LawFlag=1&StatusInd=lawcurrent. New York's domestic partner benefits are offered through a 1995 union contract negotiated by the Civil Service Employees Association. Recently, New York extended benefits to state employees of the state Senate. *Id.* See also Lambda Legal, *New York State Law*, available at <http://www.lambdalegal.org/cgi-bin/iowa/states/record?record=32> (last visited Mar. 6, 2004).

¹⁰⁶⁷ In addition, bills in both the Assembly and Senate would amend New York's domestic relations law to grant full marriage rights to same-sex couples. See A.B. 7392, 2003 Leg. Sess. (N.Y.); S.B. 1205, 2001 Leg. Sess. (N.Y.). Another bill, introduced by Assemblymember Anthony Seminerio (D, Queens) would void any marriage contracted by two persons of the same sex, regardless of whether such marriage were recognized in another jurisdiction. See A.B. 2998, 2003-2004 Leg. Sess. (N.Y.); S.B. 2220, 2003-2004 Leg. Sess. (N.Y.).

¹⁰⁶⁸ See A.B. 7304A, 2003 Leg. Sess. (N.Y.); S.B. 3393A, 2003 Leg. Sess. (N.Y.).

At least eleven localities within New York State provide domestic partner benefits. (See Table 3).

Table 3: New York Localities that Offer Domestic Partner Health Benefits¹⁰⁶⁹

Employer Name	Municipality	State	Type of Couples Eligible for Coverage	Year Domestic Partner Benefits became Available
Albany, City of	Albany	NY	Same & Opposite	2000
Brighton, City of	Brighton	NY	Same Only	2001
Eastchester, Town of	Eastchester	NY	Same Only	2001
Greenburgh, Town of	Greenburgh	NY	Same Only	2000
Ithaca, City of	Ithaca	NY	Same & Opposite	1997
Ithaca, Town of	Ithaca	NY	Same & Opposite	2000
New York, City of	New York	NY	Same & Opposite	1993
Rochester, City of	Rochester	NY	Same & Opposite	1994
Albany, County of		NY	Same & Opposite	2002
Tompkins, County of		NY	Same & Opposite	
Westchester, County of		NY		1998

New York City first created a domestic partnership registry in 1993, when then-Mayor David Dinkins issued two Executive Orders. The first, Executive Order 48, provided for the establishment of a Domestic Partnership Registration Program,¹⁰⁷⁰ whereby couples could register their partnerships with the City Clerk, who would be responsible for recording domestic partnerships. Under the Order, one partner may

¹⁰⁶⁹ Human Rights Campaign, *Local Governments & Quasi-Governmental Agencies that Offer Domestic Partner Health Benefits*, available at http://www.hrc.org/Template.cfm?Section=Search_the_Database&Template=/CustomSource/WorkNet/WorkplacePolicySearch.cfm&DPHealth=state&submitted=1&refresh=1 (last visited Mar. 6, 2004). Blank fields in this chart indicate data not provided by the Human Rights Campaign.

¹⁰⁷⁰ Executive Order No. 48: Domestic Partnership Registration Program, The City of New York, Office of the Mayor, January 7, 1993. Domestic partners were defined as:

[T]wo people, both of whom are eighteen years of age or older, neither of whom is married or related by blood in a manner that would bar their marriage in New York State, who have a close and committed personal relationship, who live together and have been living together on a continuous basis, who have registered as domestic partners and have not terminated the domestic partnership in accordance with Section 4 of this Executive Order.

Id.

terminate a domestic partnership by submitting a signed termination statement and agreeing to notify the other partner via certified mail. There is no requirement for both partners to sign the statement, or for there to be a joint agreement of any kind.

Mayoral Executive Order 49, also promulgated in 1993, provided benefits and responsibilities to domestic partners. These include bereavement leave; child care leave of absence without pay; visitation rights in City correctional facilities; visitation rights in city health care and hospital facilities; occupancy rights for City Housing Authority tenants and housing succession rights.¹⁰⁷¹

In 1998, New York City Mayor Rudolph Giuliani signed a local Domestic Partnership Law that codified the previous executive orders and broadened the base of protections and benefits afforded to domestic partners.¹⁰⁷² Under the new law, domestic partners still go to the City Clerk to file for a domestic partnership, but now must sign an Affidavit of Domestic Partnership, thereby formalizing the process.

New York City's domestic partnership law is considered "one of the most comprehensive [such] ordinances in the United States, both in extending benefits and in imposing responsibilities on domestic partners."¹⁰⁷³ Among other things, the law eliminates a specific waiting period before couples may register as domestic partners, grants health benefits to domestic partners of current and retired City employees and states that it is the City's policy to provide commensurate benefits to either spouses or

¹⁰⁷¹ Executive Order No. 49: Domestic Partnership Registration Program, The City of New York, Office of the Mayor, January 7, 1993.

¹⁰⁷² NEW YORK, NY, LOCAL LAW 27, INT. 303-A (1998); *see also* Empire State Pride Agenda, *New York City Takes Historic Step*, July 8, 1998, available at <http://www.espany.org>.

¹⁰⁷³ Scire, *supra* note 85, at 361. For an account of the evolution of New York's domestic partnership legislation, *see id.* at 362-63; *see also* Empire State Pride Agenda, *NYC Domestic Partner Legislative History*, available at <http://www.prideagenda.org/pride/nycleghistory.html> (last visited Mar. 6, 2004).

domestic partners of City employees.¹⁰⁷⁴ As it does for spouses of City employees, the law requires registered domestic partners of City employees to file financial disclosure statements if the partner's position has some kind of decision-making authority.¹⁰⁷⁵ This ordinance survived a court challenge asserting that the city did not have the authority to legislate in the areas of marriage and domestic partnership.¹⁰⁷⁶

In 2004, the New York City Council voted to require all contractors for the City of New York to extend domestic partner benefits to their employees.¹⁰⁷⁷ The measure was vetoed by Mayor Bloomberg, but the City Council voted to override the veto.¹⁰⁷⁸ Mayor Bloomberg has promised to take court action to block the implementation of the new law, set to take effect in November 2004.¹⁰⁷⁹

b. Executive and Legislative Action

i. Executive Actions following 9/11

After the terrorist attacks of September 11, 2001, New York Governor George Pataki issued a series of Executive Orders declaring a disaster emergency in New York.¹⁰⁸⁰ As a part of these orders, the Governor announced that domestic partners

¹⁰⁷⁴ Scire, *supra* note 85, at 363; *see also* N.Y.C. ADMIN. CODE § 3-240 (2001) (city code establishing domestic partnerships); 51 N.Y.C.R.R. § 4-01 (2001) (city rules pertaining to domestic partnerships). For a summary of the changes to New York City rules and legislation upon the passage of domestic partnership legislation, *see* Empire State Pride Agenda, *Summary of New York City Domestic Partner Legislation and Rules Changes*, available at <http://www.prideagenda.org/pride/nycrulechg.html> (last visited Mar. 6, 2004).

¹⁰⁷⁵ Scire, *supra* note 85, at 363.

¹⁰⁷⁶ *See Slattery v. City of New York*, 697 N.Y.S.2d 603, 605 (1st Dep't 1999).

¹⁰⁷⁷ N.Y.C. LOCAL LAW 27, INT. 0137-2004 (2004).

¹⁰⁷⁸ N.Y.C. INT. 0137-2004 (2004). Full legislative history available at <http://www.nycouncil.info/issues/>.

¹⁰⁷⁹ Rupal Parekh, *NYC Contractors Must Offer Partner Benefits*, 38-27 Bus. Ins. 4 (2004); *see, e.g., Slattery*, 697 N.Y.S.2d at 605 (1st Dep't 1999) (holding that New York City does have the authority to legislate in the area of domestic partnership).

¹⁰⁸⁰ Executive Order No. 112.1, 2001 N.Y. Laws 1185.

would hold the same legal standing as married couples for payments made to victims' families by the State Crime Victims Board.¹⁰⁸¹

The Executive Order temporarily suspended the dependent's requirement to show "principal support" on a victim, requiring instead that the dependent demonstrate a unilateral dependence on the victim or a mutual interdependence between them.¹⁰⁸²

Second, the order directed the Board generally to lower its definition of "principal support" from seventy-five percent to fifty percent.¹⁰⁸³ Similarly, the federal government has awarded survivor benefits to the same-sex partner of a civilian Army employee killed in the September 11th attack on the Pentagon.¹⁰⁸⁴ On October 11, 2002, Governor Pataki extended the Executive Order relating to victims of 9/11 to apply to all qualifying same and opposite-sex partners of homicide victims.¹⁰⁸⁵

¹⁰⁸¹ Executive Order No. 113.30, 2001 N.Y. St. Reg., No. XXIII, at 85, temporarily suspending N.Y. EXEC. LAW § 624(1)(c) (McKinney 1996 & Supp. 2004).

¹⁰⁸² *Id.* Executive Order No. 113.30, 2001 N.Y. St. Reg., No. XXIII, at 85. The Order states that: [S]uch dependent person shall be eligible for awards upon a showing of unilateral dependence or mutual interdependence upon such a victim, which may be evidenced by a nexus of factors, including but not limited to common ownership of property, common householding, shared budgeting and the length of the relationship between such person and the victim.

Id. This order has been renewed since then in a series of 30-day supplemental orders.

¹⁰⁸³ *Id.*

¹⁰⁸⁴ See, e.g., Sheryl McCarthy, Still, a Small Price to Pay for Lifetime Partner, *NEWSDAY*, Jan. 27, 2003, at 22, available at 2003 WL 3286354; News Releases, *Federal Government Awards Survivor Benefits to Lesbian Whose Partner Was Killed in 9/11 Attack*; Lambda Legal Says Recognition Is First of Its Kind, Lambda Legal, January 23, 2003, available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1193>.

¹⁰⁸⁵ 2001 N.Y. St. Reg., No. XXIII, at 85. The Executive Order amended the sub-section of the Crime Victims Board Law that defined as eligible those claimants considered to be a "dependent" of a deceased crime victim. N.Y. Exec. Law § 624(1)(c) (McKinney 1996 & Supp. 2004).

ii. SONDA

On December 17, 2002, Governor Pataki signed the Sexual Orientation Non-Discrimination Act (“SONDA”), into law.¹⁰⁸⁶ SONDA, which took effect in January 2003, bars discrimination based on actual or perceived sexual orientation in employment, housing, education, commercial occupancy, trade, credit and public accommodation.¹⁰⁸⁷ SONDA does not create separate statutes; rather, it adds the words “sexual orientation” to relevant passages in existing executive, civil rights and education

¹⁰⁸⁶ N.Y. EXEC. LAW § 291 (McKinney 2003); enacted A.B. 1971 (225th Gen. Assembly, 1st Special Session 2002) (enacted Dec. 17, 2002). Statewide non-discrimination bans against sexual orientation discrimination currently are in effect in fourteen states and the District of Columbia. These states are: California, Connecticut, District of Columbia, Hawai’i, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont and Wisconsin. Human Rights Campaign, *States Banning Employment Discrimination Based on Sexual Orientation*, available at http://www.hrc.org/Content/NavigationMenu/Work_Life/Get_Informed2/Laws_Legal_Resources2/Workplace_Discrimination_Laws/States_Banning_Discrimination.htm (last visited Jan. 25, 2004). In the other 36 states, an employer may legally fire an employee based on actual or perceived sexual orientation unless local antidiscrimination laws apply. See Human Rights Campaign, *Gay, Lesbian, Bisexual and Transgender Workplace Issues*, available at http://www.hrc.org/Template.cfm?Section=Workplace_Discrimination&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=52&ContentID=13337 (last visited Jan. 25, 2004). Ten other states prohibit sexual orientation discrimination in housing, seven in education, six in credit and eleven in public accommodation. These states are: Connecticut, Hawai’i, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont and Wisconsin (housing); California, Connecticut, Massachusetts, Minnesota, New Jersey, Vermont and Wisconsin (education); Connecticut, Massachusetts, Minnesota, Rhode Island, Vermont and Wisconsin (credit); California, Connecticut, Hawai’i, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont and Wisconsin (public accommodation). See Lambda Legal, *Summary of States Which Prohibit Discrimination Based on Sexual Orientation* (Jan. 6, 2003), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=185> (last visited Feb. 3, 2004). The District of Columbia prohibits sexual orientation discrimination in all of these categories. See Lambda Legal, *Washington, D.C.: Anti-Discrimination Law*, available at <http://www.lambdalegal.org/cgi-bin/iowa/states/record?record=48#Anti-Discrimination> (last visited Feb. 3, 2004). Although a federal ban on sexual orientation discrimination has been introduced in Congress, it has not yet been enacted. ENDA would prohibit discrimination based on sexual orientation in employment, employment agencies, labor unions and training programs, hiring, compensation, terms or conditions of employment and privileges of employment. See Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong. § 4 (2003); Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. § 4 (2003).

¹⁰⁸⁷ N.Y. EXEC. LAW § 291 (McKinney 2003); enacted A.B. 1971 (225th Gen. Assembly, 1st Special Session 2002) (enacted Dec. 17, 2002).

law.¹⁰⁸⁸ SONDA does not provide for legal marriage between partners of the same sex,¹⁰⁸⁹ and does not address domestic partner benefits.¹⁰⁹⁰

During SONDA's thirty-one year journey into law, a patchwork of villages and municipalities and counties throughout the state passed antidiscrimination

¹⁰⁸⁸ Before SONDA, New York courts did not allow gay men and lesbians to bring discrimination claims based upon marital status under the State and City of New York Human Rights Laws. *See Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 490 (2001) (citing *Manhattan Pizza Hut v. New York State Human Rights Appeal Bd.*, 51 N.Y.2d 506 (1980) and *Hudson View Props. v. Weiss*, 59 N.Y.2d 733 (1983)). SONDA's enactment, however, has not resulted in a flood of litigation. In the single relevant case in 2003, the Nassau County Supreme Court used the state's sexual orientation antidiscrimination legislation as one justification for allowing a gay man to sue for the wrongful death of his partner. *See Langan v. St. Vincent's Hosp.*, 765 N.Y.S.2d at 411 and discussion thereof, *supra* Section I.H.1.

¹⁰⁸⁹ "Nothing in this legislation should be construed to create, add, alter or abolish any right to marry that may exist under the constitution of the United States, or this state and/or the laws of this state." N.Y. EXEC. LAW § 291 (McKinney 2003); enacted A.B. 1971 (225th Gen. Assembly, 1st Special Session 2002) (enacted Dec. 17, 2002).

¹⁰⁹⁰ For example, subsection 1 of New York Executive Law section 291 now reads, "The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, *sexual orientation*, military status, sex or marital status is hereby recognized as and declared to be a civil right" (emphasis added). N.Y. EXEC. LAW § 291(1) (McKinney 2003); *see also* N.Y. EXEC. LAW § 292(27) (McKinney 2003) (defining sexual orientation as "heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived"); N.Y. EXEC. LAW § 295(8), (9) (McKinney 2003) (authorizing human rights advisory councils to study sexual orientation discrimination and providing for the development of plans and policies to minimize or eliminate sexual orientation discrimination); N.Y. EXEC. LAW § 296(1)(a)-(d) (McKinney 2003) (making sexual orientation discrimination by employers, licensing agencies, employment agencies and labor organizations unlawful); N.Y. EXEC. LAW § 296(1-a)(b)-(d) (McKinney 2003) (making sexual orientation discrimination in training programs unlawful); N.Y. EXEC. LAW § 296(2)(a) (McKinney 2003) (making sexual orientation discrimination in public accommodation unlawful); N.Y. EXEC. LAW § 296(2-a)(a)-(c) (McKinney 2003) (making sexual orientation discrimination in public housing unlawful); N.Y. EXEC. LAW § 296(3-b) (McKinney 2003) (making sexual orientation discrimination in real estate transactions unlawful); N.Y. EXEC. LAW § 296(4) (McKinney 2003) (making sexual orientation discrimination in non-sectarian educational institutions unlawful); N.Y. EXEC. LAW § 296(5) (McKinney 2003) (making sexual orientation discrimination in housing unlawful (except in single-family or owner-occupied two-family homes)); N.Y. EXEC. LAW § 296(9)(a) (McKinney 2003) (making sexual orientation discrimination in fire departments unlawful); N.Y. EXEC. LAW § 296(13) (McKinney 2003) (making sexual orientation discrimination in commerce unlawful); N.Y. EXEC. LAW § 296-a(1)-(2) (McKinney 2003) (making sexual orientation discrimination by creditors unlawful); N.Y. CIV. RIGHTS LAW § 40-c (McKinney 2003) (recognizing equal protection for citizens of all sexual orientations); N.Y. EDUC. LAW § 313(1)(a) (McKinney 2003) (making sexual orientation discrimination in education unlawful); N.Y. EDUC. LAW § 313(3) (McKinney 2003) (making sexual orientation discrimination in admissions to educational institutions unlawful). Although SONDA is comprehensive in the areas in which it seeks to provide equal protection to gay, lesbian and bisexual New Yorkers, it does not create "special rights" for these citizens. For instance, SONDA does not mandate the creation of hiring quotas, require religious organizations to hire gay, lesbian or bisexual employees or force the owners of single-family or owner-occupied two-family homes seeking rental income to rent out rooms to individuals with whom they are uncomfortable.

legislation to protect gay, lesbian and bisexual citizens. The Village of Alfred was, in 1974, the first locality in New York to protect its residents from discrimination based on sexual orientation.¹⁰⁹¹ By 2001, another nineteen jurisdictions had enacted some form of legislation making discrimination based on sexual orientation unlawful, including New York City in 1986, Onondaga County (Syracuse) in 1998, Westchester County in 1999 and the Buffalo Board of Education in 2000. When Governor Pataki stated in his January 9, 2002, State of the State address that “[t]here is no place in our society for bigotry, intolerance or hatred,” his message reflected the State’s increasing legal protections against sexual orientation discrimination.¹⁰⁹²

6. Action Taken by the Business Communities and by Other Localities Outside of New York State

In addition to the statewide schemes available in Massachusetts, Vermont, California, New Jersey and Hawai’i, a number of businesses and localities outside of

¹⁰⁹¹ Alfred, N.Y., Vill. Ordinance art. II, § 1 (1974); *see also* Empire State Pride Agenda, *Sexual Orientation Non-Discrimination Act: Chronology*, at http://www.espany.org/sonda/SONDA_Chronology.PDF (last visited Jan. 25, 2004).

¹⁰⁹² Governor George E. Pataki, Governor’s Remarks: State of the State Address (January 9, 2002), *available at* <http://www.state.ny.us/sos2002text.html>. A similar message is contained in SONDA’s legislative findings and intent:

The legislature reaffirms that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life, and that the failure to provide such equal opportunity . . . not only threatens the rights and proper privileges of its inhabitants, but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.

The legislature further finds that many residents of this state have encountered prejudice on account of their sexual orientation, and that this prejudice has severely limited or actually prevented access to employment, housing and other basic necessities of life, leading to deprivation and suffering. . . . [T]he legislature makes clear its action is not intended to promote any particular attitude, course of conduct or way of life. Rather its purpose is to ensure that individuals who live in our free society have the capacity to make their own choices, follow their own beliefs and conduct their own lives as they see fit, consistent with existing law.

N.Y. EXEC. LAW § 291 (McKinney 2003), enacted A.B. 1971 (225th Gen. Assembly, 1st Special Session 2002) (enacted Dec. 17, 2002).

New York have made available more limited benefits to gay and lesbian couples. Some of these options are public and others private. Some businesses and localities provide domestic partnership benefits to people of any sexual orientation, although others provide them for only gay men and lesbians.¹⁰⁹³ This section provides a broad overview of the options available from the business community and state and local governments.¹⁰⁹⁴

a. Business Community

Although decisions about extending civil marriage rights are not made by business leaders, starting in the early 1980's, the business community started to provide certain benefits to its gay and lesbian employees that it already was providing to its married employees.¹⁰⁹⁵ In 1982, the Village Voice, a New York City-based weekly newspaper, became the first private employer in the nation to do so.¹⁰⁹⁶ Nine years later, the Montefiore Medical Center in Bronx, New York, became the largest private employer in the United States to provide health benefits for partners of gay and lesbian employees on a par with those of the husbands and wives of heterosexual employees.¹⁰⁹⁷ In 1992, Lotus Development Corporation became the first publicly traded company to offer

¹⁰⁹³ See Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 178 (1995) ("O'Brien"). The rationale for excluding heterosexuals from some schemes is that they have the option of marriage, while gay men and lesbians do not. *Id.*

¹⁰⁹⁴ About two hundred colleges and universities also provide domestic partner benefits. Human Rights Campaign Worknet, *Employers that Offer Domestic Partner Health Benefits*, available at http://www.hrc.org/Template.cfm?Section=The_Issues&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=26&ContentID=13399 (last visited Mar. 6, 2004).

¹⁰⁹⁵ See O'Brien, *supra* note 1093, at 177.

¹⁰⁹⁶ Heidi Eischen, *For Better or Worse: An Analysis of Recent Challenges to Domestic Partner Benefits Legislation*, 31 U. TOL. L. REV. 527, 532 (2000) ("Eischen").

¹⁰⁹⁷ O'Brien, *supra* note 1093, at 178. Montefiore limited domestic partnership benefits "to those who are unable to marry because of laws prohibiting marriage of persons of the same sex." *Id.*

domestic partnership benefits.¹⁰⁹⁸ Now, over two hundred of the Fortune 500 and nearly seven thousand private sector employers offer some form of domestic partner health benefits to their employees.¹⁰⁹⁹ The scope of these benefits frequently is limited, however, both with regard to the actual benefits available and those eligible to receive them.¹¹⁰⁰

Companies offer domestic partnership benefits for a number of reasons. Providing benefits creates some parity between married and unmarried employees.¹¹⁰¹ The availability of such benefits sends a signal to prospective employees that the work environment is free from discrimination, which may give a company a competitive advantage in attracting new workers.¹¹⁰² Finally, offering domestic partner benefits minimizes the risk of lawsuits arising from the violation of either a company's antidiscrimination policy or a state or local antidiscrimination law.¹¹⁰³

¹⁰⁹⁸ Human Rights Campaign Worknet, *How to Achieve Domestic Partner Benefits in Your Workplace*, available at http://www.hrc.org/Template.cfm?Section=The_Issues&CONTENTID=10910&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Mar. 6, 2004).

¹⁰⁹⁹ Human Rights Campaign Worknet, *Domestic Partner Benefits: Employers that Offer Domestic Partner Health Benefits*, available at http://www.hrc.org/Template.cfm?Section=The_Issues&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=26&ContentID=13399 (last visited Mar. 6, 2004). Fortune 500 companies offering domestic partnership benefits include General Motors, General Electric, IBM, AT&T, Time Warner, Proctor & Gamble and Pfizer. Private companies include AARP, ABN AMRO, AETNA, Apple, Best Buy, Blockbuster, CBS and Delta Airlines. *Id.*

¹¹⁰⁰ Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 338 (1997) ("Knauer"). Benefits may range from relatively inexpensive bereavement leave to a full package of health and retirement benefits. *Id.* at 340. That parity is limited, however, because benefits provided to same-sex couples are taxed, while benefits provided to married couples are not. *Id.* at 351. *See supra* Section I.D, discussing the tax implications for unmarried partners and for married spouses.

¹¹⁰¹ Benefits can account for up to forty percent of employee compensation. Scire, *supra* note 85, at 375.

¹¹⁰² Scire, *supra* note 85, at 375-76. Offering domestic partner benefits also improves workplace morale, raises productivity and increases the rate of employee retention. *Id.* at 376.

¹¹⁰³ Scire, *supra* note 85, at 376-77.

b. State and Local Governments Outside of New York State

State and local governments providing domestic partner health benefits typically do so in their capacity as employers.¹¹⁰⁴ The number of jurisdictions that provide such benefits is relatively small.¹¹⁰⁵ Currently, only ten states and one hundred thirty city and county governments offer some form of benefits to their employees.¹¹⁰⁶ (See Tables 1 and 2).

*Table 1: State Governments that Offer Domestic Partner Health Benefits*¹¹⁰⁷

Employer Name	State	Type of Couples Eligible for Coverage	Year Domestic Partner Benefits became Available
State of California	CA	Same Only	1999
State of Connecticut	CT	Same Only	2000
State of Iowa	IA	Same & Opposite	2003
State of New Jersey	NJ	Same Only	2004
State of New Mexico	NM	Same & Opposite	2003
State of New York	NY	Same & Opposite	1995
State of Oregon	OR	Same & Opposite	1998
State of Rhode Island	RI	Same & Opposite	2001
State of Vermont	VT	Same & Opposite	1994
State of Washington	WA	Same Only	2001

*Table 2: Local Governments & Quasi-Governmental Agencies that Offer Domestic Partner Health Benefits*¹¹⁰⁸

¹¹⁰⁴ Nancy J. Knauer, *supra* note 1100, at 338; *see also* Eischen, *supra* note 1096, at 531.

¹¹⁰⁵ *See* William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 B.Y.U. L. REV. 961, 992 (2001) (“Duncan”).

¹¹⁰⁶ *See* Human Rights Campaign Worknet, *Domestic Partner Benefits: Employers that Offer Domestic Partner Health Benefits*, available at http://www.hrc.org/Template.cfm?Section=The_Issues&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=26&ContentID=13399 (last visited Mar. 6, 2004).

¹¹⁰⁷ Human Rights Campaign, *State Governments that Offer Domestic Partner Health Benefits*, available at http://www.hrc.org/Template.cfm?Section=Search_the_Database&Template=/CustomSource/WorkNet/WorkplacePolicySearch.cfm&DPHealth=state&submitted=1&refresh=1 (last visited Mar. 6, 2004).

¹¹⁰⁸ Human Rights Campaign, *Local Governments & Quasi-Governmental Agencies that Offer Domestic Partner Health Benefits*, available at http://www.hrc.org/Template.cfm?Section=Search_the_

Employer Name	City	State	Type of Couples Eligible for Coverage	Year Domestic Partner Benefits became Available
Juneau, City of	Juneau	AK	Same & Opposite	2003
Phoenix, City of	Phoenix	AZ		2000
Scottsdale, City of	Scottsdale	AZ	Same & Opposite	2001
Tempe, City of	Tempe	AZ	Same & Opposite	1999
Tucson, City of	Tucson	AZ	Same Only	1997
Pima, County of		AZ	Same & Opposite	1997
Alameda, City of	Alameda	CA		1994
Berkeley, City of	Berkeley	CA	Same & Opposite	1984
Beverly Hills, City of	Beverly Hills	CA	Same & Opposite	2002
Claremont, City of	Claremont	CA	Same & Opposite	2000
Concord, City of	Concord	CA	Same Only	2001
Laguna Beach, City of	Laguna Beach	CA	Same & Opposite	1990
Long Beach, City of	Long Beach	CA	Same & Opposite	2001
Los Angeles, City of	Los Angeles	CA	Same & Opposite	1988
Mission Viejo, City of	Mission Viejo	CA	Same Only	2000
Oakland, City of	Oakland	CA	Same & Opposite	1996
Palo Alto, City of	Palo Alto	CA	Same & Opposite	1996
Petaluma, City of	Petaluma	CA		1999
Sacramento, City of	Sacramento	CA	Same & Opposite	1992
San Diego, City of	San Diego	CA	Same & Opposite	1994
San Francisco, City of	San Francisco	CA	Same & Opposite	1991
Santa Barbara, City of	Santa Barbara	CA	Same & Opposite	1998
Santa Cruz, City of	Santa Cruz	CA	Same & Opposite	1986
Santa Monica, City of	Santa Monica	CA	Same Only	2001
Ventura, City of	Ventura	CA	Same & Opposite	2001
West Hollywood, City of	West Hollywood	CA	Same & Opposite	1985
Alameda, County of		CA	Same & Opposite	1996
Contra Costa, County of		CA		
Los Angeles, County of		CA	Same & Opposite	1995
Marin, County of		CA		
Monterey, County of		CA		2001
Riverside, County of		CA	Same & Opposite	2002
Sacramento, County of		CA	Same & Opposite	2002
San Diego, County of		CA	Same & Opposite	2001
San Luis Obispo, County of		CA	Same & Opposite	2000
San Mateo, County of		CA	Same & Opposite	1992

Database&Template=/CustomSource/WorkNet/WorkplacePolicySearch.cfm&DPHealth=state&submitted=1&refresh=1 (last visited Mar. 6, 2004). Blank fields in this chart indicate data not provided by the Human Rights Campaign.

Employer Name	City	State	Type of Couples Eligible for Coverage	Year Domestic Partner Benefits became Available
Santa Barbara, County of		CA	Same & Opposite	1999
Santa Clara, County of		CA	Same Only	2000
Santa Cruz, County of		CA	Same & Opposite	1989
Solano, County of		CA		2003
Sonoma, County of		CA	Same & Opposite	2000
Ventura, County of		CA	Same Only	2000
Boulder, City of	Boulder	CO	Same & Opposite	2000
Colorado Springs, City of	Colorado Springs	CO	Same & Opposite	2004
Denver, City of	Denver	CO	Same & Opposite	1996
Glendale, City of	Glendale	CO	Same Only	2002
Summit, County of		CO	Same & Opposite	2001
Avon, Town of	Avon	CT	Same Only	2001
Cromwell, Town of	Cromwell	CT		
East Granby, Town of	East Granby	CT		
Mansfield, City of	Mansfield	CT		2000
North Stonington, Town of	North Stonington	CT		
Simsbury, Town of	Simsbury	CT		
West Hartford, Town of	West Hartford	CT	Same & Opposite	1998
Washington, City of	Washington	DC	Same & Opposite	2002
New Castle, County of		DE	Same & Opposite	1997
Gainesville, City of	Gainesville	FL	Same & Opposite	1999
Key West, City of	Key West	FL	Same & Opposite	1998
Miami Beach, City of	Miami Beach	FL	Same & Opposite	2001
West Palm Beach, City of	West Palm Beach	FL		1992
Broward, County of		FL	Same & Opposite	1999
Monroe, County of		FL	Same & Opposite	1999
Atlanta, City of	Atlanta	GA	Same & Opposite	1999
Decatur, City of	Decatur	GA	Same Only	2002
DeKalb, County of		GA	Same & Opposite	2001
Fulton, County of		GA	Same Only	2003
Iowa City, City of	Iowa City	IA	Same Only	1994
Chicago, City of	Chicago	IL	Same Only	1997
Oak Park, Village of	Oak Park	IL		1994
Cook, County of		IL	Same Only	1999
Bloomington, City of	Bloomington	IN	Same & Opposite	1997
New Orleans, City of	New Orleans	LA	Same Only	1997
Brookline, City of	Brookline	MA	Same & Opposite	1998
Cambridge, City of	Cambridge	MA		

Employer Name	City	State	Type of Couples Eligible for Coverage	Year Domestic Partner Benefits became Available
Provincetown, City of	Provincetown	MA		
Springfield, City of ¹¹⁰⁹	Springfield	MA		1997
Baltimore, City of	Baltimore	MD	Same Only	1995
Greenbelt, City of	Greenbelt	MD	Same & Opposite	2003
Takoma Park, City of	Takoma Park	MD		1988
Montgomery, County of		MD	Same & Opposite	1999
Bar Harbor, City of	Bar Harbor	ME	Same & Opposite	1999
Camden, City of	Camden	ME	Same & Opposite	2000
Portland, City of	Portland	ME	Same & Opposite	2001
Cumberland, County of		ME		2002
Ann Arbor, City of	Ann Arbor	MI		1992
Kalamazoo, City of	Kalamazoo	MI	Same Only	2000
Ingham, County of		MI	Same Only	2003
Washtenaw, County of		MI	Same Only	2000
Minneapolis, City of	Minneapolis	MN	Same & Opposite	
Missoula, County of		MT	Same & Opposite	2003
Carrboro, Town of	Carrboro	NC	Same & Opposite	1994
Chapel Hill, City of	Chapel Hill	NC	Same & Opposite	1995
Durham, City of	Durham	NC	Same & Opposite	2003
Durham, County of		NC	Same Only	2004
Orange, County of		NC	Same & Opposite	2005
Exeter, Town of	Exeter	NH	Same & Opposite	2003
Albuquerque, City of	Albuquerque	NM	Same & Opposite	2000
Las Cruces, City of	Las Cruces	NM	Same & Opposite	2004
Albany, City of	Albany	NY	Same & Opposite	2000
Brighton, City of	Brighton	NY	Same Only	2001
Eastchester, Town of	Eastchester	NY	Same Only	2001
Greenburgh, Town of	Greenburgh	NY	Same Only	2000
Huntington, Town of	Huntington	NY	Same Only	2004
Ithaca, City of	Ithaca	NY	Same & Opposite	1997
Ithaca, Town of	Ithaca	NY	Same & Opposite	2000
New York, City of	New York	NY	Same & Opposite	1993
Rochester, City of	Rochester	NY	Same & Opposite	1994
Albany, County of		NY	Same & Opposite	2002
Tompkins, County of		NY	Same & Opposite	
Westchester, County of		NY		1998

¹¹⁰⁹ On May 27, 2004, Springfield Mayor Charles Ryan notified the city clerk that because same-sex couples now could marry in the state, he was rescinding all prior executive orders allowing unmarried domestic partners to participate in the city's group health insurance program.

Employer Name	City	State	Type of Couples Eligible for Coverage	Year Domestic Partner Benefits became Available
Cleveland Heights, City of	Cleveland Heights	OH	Same Only	2002
Corvallis, City of	Corvallis	OR	Same & Opposite	1995
Eugene, City of	Eugene	OR	Same & Opposite	1998
Gresham, City of	Gresham	OR		1999
Portland, City of	Portland	OR	Same & Opposite	1994
Multnomah, County of		OR	Same & Opposite	1993
Pittsburgh, City of	Pittsburgh	PA	Same & Opposite	1999
Providence, City of	Providence	RI	Same Only	2000
Travis, County of		TX	Same & Opposite	1993
Brattleboro, Town of	Brattleboro	VT	Same Only	1999
Burlington, City of	Burlington	VT	Same & Opposite	1993
Middlebury, Town of	Middlebury	VT	Same & Opposite	1995
Burien, City of	Burien	WA	Same & Opposite	2002
Olympia, City of	Olympia	WA	Same & Opposite	1994
Seattle, City of	Seattle	WA	Same & Opposite	1990
Tumwater, City of	Tumwater	WA	Same & Opposite	1997
Vancouver, City of	Vancouver	WA		1998
King, County of		WA	Same & Opposite	1993
Snohomish, County of		WA	Same & Opposite	2001
Madison, City of	Madison	WI	Same & Opposite	1999
Milwaukee, City of	Milwaukee	WI	Same & Opposite	2002
Dane, County of		WI	Same & Opposite	2000

In addition to the market-based reasons that state and local governments adopt domestic partner benefit laws, a number of municipalities assert other purposes.¹¹¹⁰

One purpose is the expansion of the notion of family.¹¹¹¹ Another theme in statements of

¹¹¹⁰ Duncan, *supra* note 1105, at 965.

¹¹¹¹ Ann Arbor, Michigan, for example, found that “[t]he city . . . has an interest in strengthening and supporting all caring, committed and responsible family forms.” Ann Arbor, Mich., Code ch. 110, § 9:86 (2004). Cambridge, Massachusetts acknowledged that “[p]erpetuation of the traditional definitions of ‘family’ excludes a significant segment of the Cambridge population.” Cambridge, Mass., Ordinance § 2.119.010 (2003). Both Iowa City, Iowa and Minneapolis, Minnesota “recognized that nationwide debate has advanced an expanded concept of familial relationships beyond traditional marital and blood relationships.” Iowa City, Iowa, Code ch. 6 § 2-6-1 (2003); Minneapolis, Minn., Code of Ordinances § 142.10 (2003). By enacting its domestic partner ordinance, Ithaca, New York intended to “strengthen[] and support[] all caring, committed and responsible family forms.” ITHACA, N.Y., CODE § 215-20(A) (2004).

purpose is diversity.¹¹¹² Localities also cite the importance of fairness and equal treatment.¹¹¹³ Finally, localities have acknowledged a need to recognize and validate the relationships of unmarried couples.¹¹¹⁴

Specific domestic partner benefits offered by state and local governments vary widely from jurisdiction to jurisdiction.¹¹¹⁵ On one end of the spectrum, some jurisdictions offer only symbolic recognition of domestic partners accompanied by no actual benefits.¹¹¹⁶ At least five municipalities offer the same benefits to domestic partners of municipal employees as they do married spouses of municipal employees.¹¹¹⁷ Between the extremes, jurisdictions offer an array of benefits that may or may not include health insurance coverage, hospital visitation rights, sick and bereavement leave, right of succession in public housing, exemption from taxes on

¹¹¹² Duncan, *supra* note 1105, at 966. Ann Arbor, Michigan, Cambridge and Provincetown, Massachusetts and Montgomery County, Maryland all recognized the importance of diversity in the language of their domestic partner benefit ordinances. *Id.*

¹¹¹³ *Id.* Broward County, Florida, for example, stated:

Domestic partners are often denied public and private sector benefits because there is no established system for such relationships to be registered and/or recognized. In addition, because of the status of their relationship, domestic partners in many cases are not extended certain employment benefits that are otherwise made available to other employees.

Broward County, Fla., Code of Ordinances § 16½-151 (2003). Montgomery County, Maryland agreed that “it is unfair to treat employees differently based solely on whether the employee’s partner is legally recognized as a spouse.” Montgomery County, Md., Code of Ordinances § 33-22 (2003).

¹¹¹⁴ Duncan, *supra* note 1105, at 967. Los Angeles County, California, for instance, saw that: [a]s domestic partnerships have become more prevalent among individuals who reside or are employed within the county, a corresponding need has arisen on the part of persons in such relationships and on society’s part generally for a means for such persons to give public notice of their relationships.

Los Angeles County, Cal., Code § 2.210.010 (2004). The ordinances of San Francisco and Marin County, California, Multnomah County, Oregon and Ann Arbor, Michigan express similar sentiments. Duncan, at 967.

¹¹¹⁵ Duncan, *supra* note 1105, at 974.

¹¹¹⁶ *Id.*

¹¹¹⁷ *Id.* These jurisdictions are Berkeley, California; Cambridge, Massachusetts; Ithaca, New York; Key West, Florida and Montgomery County, Maryland. *Id.*

property transfers and survivor pensions.¹¹¹⁸ In addition, San Francisco, California requires that any private employer contracting with the city offer domestic partner benefits to its employees.¹¹¹⁹

7. Prohibitions

a. Statutory Prohibitions

In the summer of 1996, Congress passed the Defense of Marriage Act (“DOMA”),¹¹²⁰ which provided that:

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.¹¹²¹

As the federal government provides numerous rights and benefits to married couples that it does not provide to unmarried couples (*e.g.*, in the realm of immigration, social security, and tax law), the effect of the law is quite sweeping.

Congress had two goals in passing DOMA: “[To] articulate[] a marriage exception to the general rule that states must grant full faith and credit to the judgments and public acts of sibling states, and [to] define[] marriage, for federal purposes . . . as being valid only between one man and one woman.”¹¹²² Congress enacted DOMA in an

¹¹¹⁸ *Id.* at 974-75.

¹¹¹⁹ *Id.* at 976. San Francisco’s ordinance survived a court challenge by various airlines doing business in the city. *See Air Transp. Ass’n v. City & County*, 266 F.3d 1064, 1068 (9th Cir. 2001). *See supra* Section II.B.5.a for a discussion of a similar law enacted in New York City, but being challenged in court by the City’s Mayor.

¹¹²⁰ *See* 28 U.S.C. § 1738C (2003).

¹¹²¹ *Id.* For additional discussion of the impact of DOMA, *see supra* Section III.F.3.

¹¹²² Jennifer Gerarda Brown, *Extraterritorial Recognition of Same-Sex Marriage: When Theory Confronts Praxis*, 16 QUINNIPIAC L. REV. 1 (1996).

effort to ensure that the Full Faith and Credit Clause of the Constitution is interpreted only as broadly as Congress determines.¹¹²³

The Congressional debate contained many of the themes found in the broader societal debate regarding same-sex unions.¹¹²⁴ Proponents of DOMA believed it reflected the government’s “interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and childrearing.”¹¹²⁵ Other commentators heralded the measure, warning that without DOMA, a forum state would be forced to honor the prior judgment of a sister state, “even though it conflicts with a profound policy” of that forum state.¹¹²⁶

In addition to protecting a traditional notion of marriage, many of DOMA’s proponents did not want to advocate homosexual conduct, believing that homosexuality is “inherently wrong and harmful to individuals, families, and societies.”¹¹²⁷ During the debate on DOMA, Members of Congress stated that extending

¹¹²³ H.R. Rep. No. 104-664 at 26 (1996). Specifically, Congress cited Article IV, Section I of the U.S. Constitution, which provides: “Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.” U.S. CONST. art. IV § 1. In 2003, the Court reaffirmed the doctrine that the Full Faith and Credit Clause did not require “a State to substitute the statutes of other States for its own statutes dealing with a subject matter concerning which it is competent to legislate.” *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 494 (2003) (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988)) (internal quotations omitted). For a more complete discussion of Full Faith and Credit, see *infra* Section III.F.2.

¹¹²⁴ See *supra* Section II.B.2 re: ensuing Goodridge debate.

¹¹²⁵ Eskridge & Hunter, *supra* note , at 1094 (quoting the House Judiciary Committee sponsors of the bill).

¹¹²⁶ Jeff Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 448 (1998).

¹¹²⁷ Eskridge & Hunter, *supra* note 1001, at 1095 (quoting 142 Cong. Rec. 17075 (July 12, 1996) (remarks of Rep. Funderburk)). Representative Canady asked: “Should this Congress tell the children of America that it is a matter of indifference whether they establish families with a partner of the opposite sex or cohabit with someone of the same sex?” *Id.*

marriage rights to same-sex couples would “belittle,” “demean,” trivialize,” and ultimately “destroy” marriage.¹¹²⁸

Many persons opposed to DOMA believed it was premature because no state had ever issued a marriage license to a same-sex couple.¹¹²⁹ Opponents also charged that DOMA was discriminatory. Representative John Lewis declared it “a mean bill,” and went on to say: “I have known racism. [This] bill stinks of the same fear, hatred and intolerance.”¹¹³⁰

Forty states have enacted their own statutes – sometimes dubbed “mini-DOMAs,” “junior DOMAs” or “baby DOMAs” – that deny recognition of marriages between same-sex couples in their states.¹¹³¹ Three years before Congress enacted DOMA, Utah acted in the wake of *Baehr v. Lewin*¹¹³² and became the first state to prohibit marriages between individuals of the same sex.¹¹³³ Two years later it declared that it would not recognize such marriages from other jurisdictions.¹¹³⁴ In the ensuing years, largely in the wake of federal DOMA, many other states passed similar statutes.¹¹³⁵

¹¹²⁸ 142 Cong. Rec. H7480-05, H7492 (daily ed. July 12, 1996).

¹¹²⁹ Eskridge & Hunter, *supra* note 1001, at 1095.

¹¹³⁰ *Id.* at 1095 (quoting 142 Cong. Rec. 16972 (July 11, 1996) (remarks of Rep. Lewis)).

¹¹³¹ See Josephine Ross, *Marriage and History: Analyzing the Continued Resistance to Same-Sex Marriage*, 55 SMU L. REV. 1657, 1658 (2002) (“Anti-marriage legislation has been sweeping across this country, referred to as DOMA (the federal Defense of Marriage Act) and mini-DOMAs.”); see *infra* note 1132 for a list of the applicable statutes.

¹¹³² 852 P.2d at 44.

¹¹³³ See Eskridge & Hunter, *supra* note 1001, at 1090.

¹¹³⁴ *Id.*

¹¹³⁵ See ALA. CODE § 30-1-19 (2004); ARIZ. REV. STAT. ANN. §§ 25-101, 25-112 (2004); ARK CODE ANN. §§ 9-11-208(b), 9-11-208(c), 9-11-207 (Michie 2004); CAL. FAM. CODE § 308.5 (West 2004); COLO. REV. STAT. ANN. § 14-2-104 (West 2004); 13 DEL. CODE ANN. § 101 (2003); FLA. ADMIN. CODE ANN. r. 741.04, 741.212 (2004); GA. CODE ANN. § 19-3-3.1 (2004); HAW. REV. STAT. ANN. § 572-1 (2003); IDAHO CODE § 32-209 (Michie 2004); 750 ILL. COMP. STAT. ANN. 5/212 (2004); IND. CODE ANN. § 31-11-1-1 (West 2004); IOWA CODE ANN. § 595.2 (West 2004); KAN STAT. ANN. § 23-101 (2003); KY. REV. STAT.

Although most seem to take their cue from the federal DOMA, declaring that any marriage between individuals of the same sex is invalid in their state, some incorporate additional language and stricter prohibitions. For example, in 2004, Virginia enacted the strictest mini-DOMA in the country. Virginia's Domestic Relations Law specifically prohibits the state from recognizing any contract or system that bestows marriage-like rights to same-sex couples.¹¹³⁶ Michigan explicitly noted the State's "special interest in encouraging, supporting, and protecting [heterosexual] relationship[s] in order to promote, among other goals, the stability and welfare of society and its children."¹¹³⁷ In addition to defining marriage as limited to opposite-sex couples and prohibiting recognition of marriages between same-sex partners entered into elsewhere, Georgia created additional limits on the legal recognition of such relationships:

Any contractual rights granted by virtue of such [same-sex marriage] license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or

ANN. § 402.005 (Banks-Baldwin 2004); LA. CIV. CODE ANN. art. 96 (West 2004); 19-A ME. REV. STAT. ANN. § 701(5) (West 2004); MICH. COMP. LAWS ANN. § 551.1 (West 2004); MINN. STAT. ANN. § 517.03(4) (West 2004); MISS. CODE ANN. § 93-1-1(2) (2004); MO. ANN. STAT. § 451.022(2) (West 2004); MONT. CODE ANN. § 40-1-103 (2003); N.H. REV. STAT. ANN. § 457:1 (2004); N.C. GEN. STAT. ANN. § 51-1.2 (West 2004); N.D. CENT. CODE § 14-03-01 (2003); OHIO REV. CODE ANN. § 3101.01 (2004); 43 OKLA. STAT. ANN. § 3.1 (West 2004); OR. REV. STAT. § 106.010 (2004); 23 PA CONS. STAT. ANN. § 1704 (West 2004); S.C. CODE ANN. § 20-1-15 (Law. Co-op. 2003); S.D. CODIFIED LAWS § 25-1-1 (Michie 2004); TENN. CODE ANN. § 36-3-113 (2004); TEX. FAM. CODE ANN. § 2.001 (Vernon 2004); UTAH CODE ANN. § 30-1-2 (2004); 15 VT. STAT. ANN. § 1201(4) (2004); VA. CODE ANN. § 20-45.2 (Michie 2004); WASH. REV. CODE ANN. § 26.04.010 (West 2004) (held unconstitutional by *Castle v. State*, 2004 WL 1985215, and *Anderson v. King County*, 2004 WL 1738447); W.VA. CODE § 48-2-603 (2004); WIS. STAT. ANN. § 765.01 (2004); WYO. STAT. ANN. § 20-1-101 (Michie 2004).

¹¹³⁶ VA CODE ANN. § 20-45.3 (2004) provides: "A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable." *Id.*

¹¹³⁷ 1996 Mich. Pub. Acts 324.

otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage.¹¹³⁸

In February 2004, Ohio enacted an expansive statute prohibiting same-sex marriage, denying state benefits to domestic partners, and barring any form of legal recognition another state might extend to a same-sex couple.¹¹³⁹

b. Constitutional Prohibitions

Due to concern that the federal DOMA would not withstand a court challenge – and with the increased likelihood for such a challenge in the wake of *Goodridge* and the issuing of marriage licenses in a number of U.S. localities¹¹⁴⁰ – many opponents to marriage between individuals of the same sex are seeking to amend the United States Constitution to define marriage as between one man and one woman.¹¹⁴¹

¹¹³⁸ GA CODE § 19-3-3.1(b).

¹¹³⁹ OH REV. CODE ANN. § 3101.01 (2004). See James Dao, *Ohio Legislature Votes to Ban Same-Sex Unions*, N.Y. TIMES, Feb. 4, 2004, at A12. The Ohio bill, modeled on federal legislation approved by Congress in 1996, declares marriage between persons of the same sex to be “against the strong public policy of this state.” But it goes beyond the federal act, and most of the so-called defense of marriage acts passed by the states, by denying state benefits to domestic partners of the same or opposite sex. It also prohibits the state from recognizing any “public act, record or judicial proceeding” from any jurisdiction that extends the benefits of marriage to nonmarital unions. The bill’s sponsors say the provision is needed to ensure that courts cannot require Ohio to recognize same-sex unions of any type granted by other states, cities or countries. OH REV. CODE ANN. § 3101.01 (2004).

¹¹⁴⁰ See *supra* Section II.B.

¹¹⁴¹ On May 21, 2003, Representative Musgrave, introduced a joint resolution that proposed the following amendment to the Constitution:

Marriage in the United States shall consist only of the union of a man and a woman.

Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

See H.J. Res. 56, 108th Cong. (2003), available at <http://thomas.loc.gov>. According to website of the Human Rights Campaign, there are currently 109 co-sponsors of the House resolution. See *Talking Points: Information about the Anti-Gay Constitutional Amendment Relating to Marriage*, available at http://www.hrc.org/Template.cfm?Section=Federal_Constitutional_Marriage_Amendment&CONTENTID=14667&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Feb. 25, 2004). Senator Allard introduced the same resolution to the Senate on November 25, 2003. See S.J. Res. 26, 108th Cong. (2003), available at <http://thomas.loc.gov>.

Although proponents of this amendment suffered a set back when the Senate defeated a draft presented to Congress, the issue remains very much alive.

President Bush pronounced his support for such an amendment on February 24, 2004 and has continued to advocate for its passage.¹¹⁴² In his February statement the President referenced *Goodridge* as well as the issuance of marriage licenses to gay and lesbian couples in San Francisco in his statement.¹¹⁴³ The President went on to declare:

The union of a man and woman is the most enduring human institution, honored and encouraged in all cultures and by every religious faith. Ages of experience have taught humanity that the commitment of a husband and wife to love and to serve one another promotes the welfare of children and the stability of society. Marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society. Government, by recognizing and protecting marriage, serves the interests of all. Today, I call upon the Congress to promptly pass and to send to the states for ratification an amendment to our Constitution defining and protecting marriage as a union of a man and woman as husband and wife. The amendment should fully protect marriage, while leaving the state legislatures free to make their own choices in defining legal arrangements other than marriage.¹¹⁴⁴

¹¹⁴² See *Bush Calls for Ban on Same-Sex Marriages*, at <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage/index.html> (“The president said he decided to endorse an amendment because of the Massachusetts Supreme Judicial Court’s recent decision granting marriage rights to same-sex couples, and San Francisco Mayor Gavin Newsom’s decision two weeks ago to begin giving marriage licenses to gay and lesbian couples.”); President George W. Bush, Acceptance Speech at the 2004 Republican National Convention (September 2, 2004) (“Because the union of a man and a woman deserves an honored place in our society, I will continue to appoint federal judges who know the difference between personal opinion and the strict interpretation of the law.”)

¹¹⁴³ *President Remarks About Constitutional Amendment on Marriage*, N.Y. TIMES, Feb. 25, 2004, at A18.

¹¹⁴⁴ *Id.*

On July 15, 2004, the Senate rejected the Federal Marriage Amendment; the procedural vote of 48-50 fell 12 votes short of the 60 needed to keep the measure alive.¹¹⁴⁵ Proponents of the measure plan to introduce it again in the next Congress.¹¹⁴⁶

The question of constitutional change has arisen at the state level as well. Twelve states will vote in 2004 whether to change their constitutions to limit marriage to opposite-sex couples.¹¹⁴⁷ Similar measures were defeated in the legislature of 15 other states in 2004 and will not go to the people for a vote.¹¹⁴⁸

As noted earlier in this Report,¹¹⁴⁹ Massachusetts has taken the preliminary steps to amend its Constitution to ban same-sex marriage and institute civil unions.¹¹⁵⁰ The proposal has already been given first passage by the legislature; but it again must be approved again by both chambers of the legislature in 2005 and then be ratified in a ballot initiative to become effective.¹¹⁵¹ The earliest the proposed

¹¹⁴⁵ *US Senate Rejects Amendment Banning Gay Marriage*, Dow Jones International News, July 14, 2004. For an amendment to the federal Constitution to take effect, it must be passed by a 3/5 majority in the legislature and then be approved by 2/3 of the states. U.S. CONST. art. V.

¹¹⁴⁶ *See, e.g.*, Shailagh Murray, *Gay-Marriage Amendment Fails to Advance in the Senate*, WALL STREET JOURNAL, July 15, 2004, at A14, available at 2004 WL-WSJ 56934758.

¹¹⁴⁷ In 2004, Arkansas, Georgia, Kentucky, Louisiana (passed by voters, then declared unconstitutional because of procedural fault), Michigan, Mississippi, Missouri (approved by voters on August 3, 2004), Montana, North Dakota, Oklahoma, Oregon and Utah citizens will vote on state constitutional amendments prohibiting same-sex couples from marrying. *See, e.g.*, Dale Wetzel, *Marriage Amendment Gets on N.D. Ballot*, ASSOCIATED PRESS NEWSWIREs, Sept. 2, 2004.

¹¹⁴⁸ The legislatures in Alabama, Arizona, Delaware, Kansas, Idaho, Illinois, Indiana, Iowa, Maine, Maryland, Minnesota, North Carolina, Vermont and Washington defeated measures that would have begun the process of amending their respective state constitutions and bringing the matter before the people for a vote. Human Rights Campaign, *Proposed State Constitutional Amendments Limiting Marriage in 2004*, August 5, 2004, available at <http://www.hrc.org/Template.cfm?Section=Marriage&Template=/ContentManagement/ContentDisplay.cfm&ContentID=21180>.

¹¹⁴⁹ *See supra* Section II.B.2.c discussing the legal aftermath of the *Goodridge* decisions.

¹¹⁵⁰ Elizabeth Mehren, *Massachusetts Legislature Moves to Bar Gay Marriages*, LOS ANGELES TIMES, Mar. 30, 2004, at A1. *See also supra* Section II.B.2.c, "Post-Goodridge Developments."

¹¹⁵¹ *Id.*

amendment can be included on the ballot is November 2006.¹¹⁵² In the interim, same-sex couples who are residents of the state or who intend to become residents are permitted to marry in Massachusetts.

In addition to the “mini-DOMAs,” Alaska already has constitutional provisions that define marriage as between a man and a woman,¹¹⁵³ and Hawai’i’s constitution states that “[t]he legislature shall have the power to reserve marriage to opposite-sex couples.”¹¹⁵⁴ The constitutions of Nebraska and Nevada also prohibit same-sex marriage.¹¹⁵⁵

¹¹⁵² *Id.*

¹¹⁵³ *See, e.g.*, AK CONST. art. 1, § 25. Alaska also has a statutory prohibition. *See* AK STAT. § 25.05.011 (2001).

¹¹⁵⁴ HAW. CONST. art. 1, § 23.

¹¹⁵⁵ *See* NE 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.”); NV CONST. art. 1, § 21 (“Only a marriage between a male and female person shall be recognized and given effect in this state.”).

PART III

A LEGAL AND CONSTITUTIONAL ANALYSIS OF ACCESS TO MARRIAGE BY SAME-SEX COUPLES

There have been numerous state and federal constitutional challenges by same-sex couples seeking to marry, the majority of which historically have been denied.¹¹⁵⁶ More recently, however, a number of courts have recognized the right of same-sex couples to marry.¹¹⁵⁷ Virtually all of the cases – earlier and later – have raised claims under the Federal Constitution and the corresponding state constitutions, focusing in particular on the right to Equal Protection and the right to Due Process.

There currently are at least nine cases pending in New York State that ultimately may affect the future status of the institution of marriage within our borders. At least five of these cases have been brought by same-sex couples seeking to marry or to confirm that they are already married.¹¹⁵⁸ For that reason, among others, this section of

¹¹⁵⁶ See, e.g., *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (rejecting claims under state statutes and the federal constitution that the state should recognize same-sex marriage); *Morrison v. Sadler*, No. 49D13-0211-PL-001946, 2003 WL 23119998 (Ind. Super. Ct. May 7, 2003) (rejecting state and federal constitutional claims to same-sex marriage); *Jones v. Hallahan*, 501 S.W.2d 588, 589-90 (Ky. Ct. App. 1973) (rejecting the claim of same-sex marriage applicants who invoked the constitutional rights of free exercise of religion, freedom of association, and freedom to marry); *Baker v. Nelson*, 191 N.W.2d 185, 186-87 (Minn. 1971) (rejecting same-sex marriage applicants' equal protection and due process claims), appeal dismissed, 409 U.S. 810 (1972); *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Law. Div. Nov. 5, 2003) (rejecting all constitutional arguments advanced by same-sex marriage applicants); *In re Cooper*, 592 N.Y.S.2d 797 (2d Dep't 1993) (denial of marriage licenses to same-sex partners violates no constitutional guarantee); *Singer v. Hara*, 522 P.2d 1187, 1195-97 (Wash. Ct. App. 1974) (rejecting the claim of same-sex marriage applicants despite an equal rights amendment to the state constitution). But see *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Baehr v. Milke*, 90 P.2d 112 (Haw. Ct. App. 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6592 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); *Baker v. State*, 744 A.2d 864 (Vt. 1999); *Goodridge v. Depar't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004) (stating that civil union legislation, as contrasted to marriage, would not satisfy the equal protection and due process clauses of the Constitution of Massachusetts).

¹¹⁵⁷ See *supra* Section II.B.2.c, discussing the more recent marriage cases.

¹¹⁵⁸ See, e.g., *Shields v. Madigan*, No. 1458/04 (Sup. Ct. Rockland County 2004) (ten same-sex couples assert that the New York Domestic Relations Law should be interpreted to allow same-sex couples to marry and that limitation of marriage to a man and a woman violates New York State Constitution's equal protection and due process clauses; these claims were denied by a State Supreme Court Justice on

the Report starts with a review of pertinent New York State law. From there it turns to complex questions of constitutional law, explaining why this “family law” issue requires constitutional evaluation and setting forth the standards that a court might use to assess such claims, examining both federal and state constitutional standards.

The Report then examines the four key Supreme Court cases that are likely to have particular bearing on whether marriage may remain an institution available only to opposite-sex couples. These cases – *Loving v. Virginia*, *Turner v. Safley*, *Romer v. Evans*, and *Lawrence v. Texas* – all closely parse the meaning of Equal Protection and Due Process and give much guidance.

The Report continues with an assessment of how the State and Federal Equal Protection and Due Process clauses bear upon the question of whether same-sex couples may marry. Although the Committee cannot predict how the federal courts or the State Court of Appeals will rule, it has found that it would be difficult for a court to uphold marriage in its current form if any elevated level of scrutiny were applied (*e.g.*, if plaintiffs are deemed a suspect class or a population for which strict or heightened scrutiny should be used, or, if marriage is deemed a fundamental right for same-sex

October 22, 2004, ruling that New York Domestic Relations Law’s reference to “husband” and “wife” evinced an intent to limit marriage to heterosexual couples; an appeal is planned); *Samuels v. New York State Dep’t of Health*, No. 1967-04 (Sup. Ct. Albany County 2004) (thirteen same-sex couples seek declaratory judgment that restricting marriage licenses to opposite-sex couples violates New York State Constitution’s due process and equal protection clauses and the right to freedom of expression); *Kane v. Marsolais*, No. 3473-04 (Sup. Ct. Albany County 2004) (two same-sex couples married by a Unitarian minister raise equal protection and due process violations and assert that § 25 of the Domestic Relations Law entitles them to declaratory judgment that they are already married); *Seymour v. Holcomb*, No. 2004-0458 (Sup. Ct. Tompkins County 2004) (twenty-five same-sex couples seek declaratory judgment that restriction of marriage to opposite-sex couples violates New York State Domestic Relations Law and the State and Federal Constitutions’ Equal Protection and Due Process clauses); *Hernandez v. Robels*, No. 103434/2004 (Sup. Ct. N.Y. County 2004) (five same-sex couples assert that New York State’s refusal to issue marriage licenses to same-sex couples violates the State Constitution’s Equal Protection and Due Process clauses). Other cases involve the prosecution of Mayor Jason West of New Paltz, New York and of members of the clergy who conducted marriage ceremonies for same-sex couples in early 2004. See *infra* Section III.D.1.c.ii for a more complete discussion of these cases.

couples, as well as for opposite-sex couples).¹¹⁵⁹ If elevated scrutiny is not required and the less rigorous rational basis standard is applied, determining how a court would rule on the issues considered in this Report becomes a harder task. In general, of course, it is virtually impossible to predict how the courts will actually rule on these issues.

This Part of the Report concludes with an examination of the impact of the doctrine of Full Faith and Credit, the Federal Defense of Marriage Act and the State-enacted “mini-DOMAs.” These issues are increasingly likely to appear in our State and Federal courts as same-sex couples married in Massachusetts, five provinces in Canada, or a number of European countries, travel and move to New York.

A. THE STATUS OF THE RIGHT TO MARRY IN NEW YORK STATE

This section reviews the current status of the right to marry in New York State, starting with the Domestic Relations Law, and then moves to a discussion of judicial interpretations of the words “family” and “spouse” in other State statutes.

1. The New York Domestic Relations Law

a. Marriage Understood as Permitted Only between Heterosexuals

The qualifications and solemnization procedures set forth in Articles Two and Three of New York Domestic Relations Law contain the complete statutory definition of marriage in New York State.¹¹⁶⁰ The statutes do not specifically state whether parties to a marriage must be of the same or opposite sex;¹¹⁶¹ they traditionally have been interpreted, however, to require that the parties be opposite sex.

¹¹⁵⁹ See *infra* Section III.B.3 for a discussion of marriage as a fundamental right.

¹¹⁶⁰ See generally N.Y. DOM. REL. LAW §§ 5-25.

¹¹⁶¹ See generally *id.*

As long ago as 1880, the United States Circuit Court for the Northern District of New York defined marriage “as the civil status of one man and one woman, united in law for life, under the obligation to discharge to each other and to the community those duties which the community, by its laws, imposes.”¹¹⁶² This interpretation stands today¹¹⁶³ and is the dominant definition in the United States.¹¹⁶⁴

In March 2004, New York State Attorney General Eliot Spitzer, in an Informal Opinion, stated that, “[a]lthough the [Domestic Relations Law] does not explicitly prohibit same-sex marriages, it is our view that the Legislature did not intend to authorize same-sex marriage.”¹¹⁶⁵ The Attorney General reached this conclusion based on the inclusion of some gender-specific language in other areas of the Domestic Relations Law and the historical context in which the law was passed.¹¹⁶⁶ He added that “[t]he exclusion of same-sex couples from eligibility for marriage, however, presents

¹¹⁶² *Campbell v. Crampton*, 2 F. 417, 424 (C.C. N.Y. 1880) (citing 1 BISHOP ON MARRIAGE AND DIVORCE, § 3).

¹¹⁶³ For a discussion of marriage generally, although not addressing whether same-sex couples may marry, see *B v. B*, 355 N.Y.S.2d 712, 716 (Sup. Ct. 1974); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 500 (Sup. Ct. 1971); *Morris v. Morris*, 220 N.Y.S.2d 590, 591 (Sup. Ct. 1961); *In re Estate of Jenkins*, 506 N.Y.S.2d 1009, 1011 (Surr. Ct. Queens County 1986); *In re Erlanger's Estate*, 259 N.Y.S. 610, 750 (Surr. Ct. N.Y. County 1932). The specific question whether same-sex couples may legally marry has never reached the Court of Appeals. See Att’y Gen. Informal Op. No. 2004-1 (Mar. 3, 2004) (stating “New York courts have not yet ruled on this issue.”). Cf. *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 287 (1997). In *Storrs v. Holcomb*, the Tompkins County Supreme Court decided “that the *ratio decidendi* forged by the [Appellate Division in the Second Department] includes holdings that marriage, in this State, is limited to opposite sex couples and that the gender classification serves a valid public purpose.” *Id.* In deciding whether two men had been lawfully denied a marriage license in Ithaca, the *Storrs* court “conclude[d] that New York does not recognize or authorize same sex marriage and that the City Clerk correctly refused to issue the license.” *Id.* at 288. The Appellate Court in the Third Department dismissed the case on procedural grounds without considering the merits. *Id.* at 838. Because of the nature of this dismissal, *Storrs* “does not stand as authority for any proposition.” *Langan*, 765 N.Y.S.2d 411, 422 (Sup. Ct. Nassau County 2003).

¹¹⁶⁴ See 52 Am. Jur. 2d *Marriage* § 1. Massachusetts is the exception, permitting same-sex couples to marry. See *supra* Sections II.B.2.a-c discussing the status of marriage law in Massachusetts.

¹¹⁶⁵ 2004 N.Y. Att’y Gen. Op. (March 2004).

¹¹⁶⁶ *Id.* at 7-11.

serious constitutional concerns,”¹¹⁶⁷ and advised that marriages between same-sex partners legally entered into in other jurisdictions probably are valid in New York.¹¹⁶⁸ Finally, he noted that his advisory opinion would not be the last word on the subject, commenting that “New York courts . . . are the proper forum for resolution of this matter.”¹¹⁶⁹

b. Additional Requirements for Marriage

The Domestic Relations Law regulates marriage in a number of other ways. It begins with a ban on incestuous, bigamous and fraudulent marriages.¹¹⁷⁰ For example, two people do not qualify for marriage if they are: “(1) [a]n ancestor and a descendant; (2) [a] brother and sister of either the whole or the half blood; [or] (3) [a]n uncle and niece or an aunt and nephew.”¹¹⁷¹ A person also does not qualify for marriage if his or her former spouse is still living, unless the previous marriage has been annulled or dissolved by divorce.¹¹⁷² In addition, both parties to a marriage must be more than eighteen years old,¹¹⁷³ be capable of consenting to marriage, be physically able to engage in sexual relations,¹¹⁷⁴ and be free from mental illness for at least five years before the

¹¹⁶⁷ *Id.* at 6.

¹¹⁶⁸ *Id.* at 26-27. *See infra* Section III.F.2 for a discussion of Full Faith and Credit.

¹¹⁶⁹ *Id.* at 2; *see infra* notes 1174-86 and accompanying text (surveying New York courts’ longstanding involvement in the interpretation of marriage).

¹¹⁷⁰ *See generally* N.Y. DOM. REL. LAW §§ 5-8.

¹¹⁷¹ *Id.* § 5.

¹¹⁷² *Id.* §§ 5, 8.

¹¹⁷³ Although section 15-a of New York domestic relations law specifically prohibits “any marriage in which either party is under the age of fourteen years,” *Id.* § 15-a, a court may use its discretion to allow individuals over fourteen but under eighteen to marry. *Id.* § 7(1).

¹¹⁷⁴ N.Y. DOM. REL. LAW § 7(3) reads: “A marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto . . . [i]s incapable of entering into the married state from physical cause.” *Id.* § 7(3). Physical incapacity is interpreted as the inability to perform sexually.

marriage.¹¹⁷⁵ Finally, each of the parties must have consented to the marriage free of force, duress or fraud.¹¹⁷⁶

Article Three of New York Domestic Relations Law concerns the solemnization, proof and effect of marriage.¹¹⁷⁷ The statute begins by noting that “[m]arriage, so far as its validity in law is concerned, continues to be a civil contract.”¹¹⁷⁸ Further, a marriage is valid only if solemnized by an individual authorized by the state, such as a member of the clergy of any religion, certain judges or a mayor, or by a written contract between the parties witnessed by at least two other people.¹¹⁷⁹ New York does not require a specific type of ceremony for a marriage to be valid, but “the parties must solemnly declare” in the presence of an authorized individual and witnesses “that they take each other as *husband and wife*.”¹¹⁸⁰ Although Article Two, concerning the qualifications for marriage, contains no gender specific language, Article Three contains this one instance of gender specificity. In addition to appropriate solemnization, individuals intending to marry in New York must obtain a license from a town or city clerk and give it to the person who will perform the marriage ceremony.¹¹⁸¹ The couple

See Steinberger v. Steinberger, 33 N.Y.S.2d 596, 597 (Sup. Ct. Bronx County 1940). Conditions arising after the marriage do not qualify as physical incapacity. *See Anonymous v. Anonymous*, 49 N.Y.S.2d 314 (Sup. Ct. Bronx County 1944). Sterility and the inability to bear children are not physical incapacities. *See Devanbagh v. Devanbagh*, 6 Paige Ch. 175 (N.Y. Ch. 1836) (holding that sterility is not a basis for obtaining an annulment on the grounds of physical incapacity); *Lapides v. Lapides*, 254 N.Y. 73 (1930) (holding that the inability to bear children is not physical incapacity).

¹¹⁷⁵ N.Y. DOM. REL. LAW § 7.

¹¹⁷⁶ *Id.*

¹¹⁷⁷ *See generally id.* §§ 10-25.

¹¹⁷⁸ *Id.* § 10.

¹¹⁷⁹ *Id.* § 11.

¹¹⁸⁰ *Id.* § 12.

¹¹⁸¹ N.Y. DOM. REL. LAW § 12.

must deliver the license to the officiator within sixty days of obtaining it and before the ceremony occurs.¹¹⁸²

2. Judicial Interpretations of “Family” and “Spouse”

Although New York courts traditionally have defined marriage as a union between a man and a woman, parties involved in disputes specific to same-sex partnerships but involving issues associated with the benefits and obligations of marriage have petitioned the courts for redress. For example, in *Braschi v. Stahl Associates Co.*, the New York Court of Appeals was called upon to determine whether a surviving same-sex partner was a “family member” for the purposes of housing succession rights under New York City rent control regulations.¹¹⁸³

The Court concluded that “two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence . . . comports both with our society’s traditional concept of ‘family’ and

¹¹⁸² *Id.* See Appendix A for a copy of the marriage license form suggested by N.Y. DOM. REL. LAW § 14. The form suggested by the statute contains no indication of the sex of the individuals seeking the license. Section 15 of the N.Y. DOM. REL. LAW, however, states in relevant part:

1. (a) It shall be the duty of the town or city clerk when an application for a marriage license is made to him or her to require each of the contracting parties to sign and verify a statement or affidavit before such clerk or one of his or her deputies, containing the following information. *From the groom:* Full name of husband, place of residence, social security number, age, occupation, place of birth, name of father, country of birth, maiden name of mother, country of birth, number of marriage. *From the bride:* Full name of bride, place of residence, social security number, age, occupation, place of birth, name of father, country of birth, maiden name of mother, country of birth, number of marriage.

N.Y. DOM. REL. LAW § 15 (emphasis added).

¹¹⁸³ See *Braschi v. Stahl Assoc. Co.*, 74 N.Y.2d 201 (1989). The New York City Rent and Eviction Regulations provided that “upon the death of a rent-control tenant, the landlord may not dispossess ‘either the surviving spouse of the deceased tenant or some other member of the deceased tenant’s family who has been living with the tenant.’” The court did not consider the meaning of the word “spouse” for the purposes of this case, but only “the meaning of the term ‘family’ as it is used in this context.” *Id.* at 206.

with the expectations of individuals who live in such nuclear units.”¹¹⁸⁴ The dissent, concerned that the court had “expanded the [definition of ‘family’] indefinitely,” argued that the majority’s interpretation was “inconsistent with the legislative scheme underlying rent regulation.”¹¹⁸⁵ For the purposes of New York City rent control regulations, however, same-sex partners now may seek to prove that their relationship rises to the definition of “family” in accordance with the factors enumerated in *Braschi*.¹¹⁸⁶

Only two years after *Braschi*, the Court of Appeals considered whether the former lesbian partner of a biological parent had standing to seek visitation rights for the child they had agreed to raise together.¹¹⁸⁷ The two ex-partners, Alison D. and Virginia

¹¹⁸⁴ *Id.* at 211. The Supreme Court had held that Mr. Braschi’s ten-year, interdependent relationship with the deceased tenant “fulfill[ed] any definitional criteria of the term ‘family.’” *Braschi*, 74 N.Y.2d at 206. The Appellate Division reversed, holding that the definition included only “family members within traditional, legally recognized familial relationships.” *Id.* 74 N.Y.2d 201, 206 (1989).

¹¹⁸⁵ *Id.* at 216 (J. Simons, dissenting).

¹¹⁸⁶ The Court of Appeals based its factors on those considered by lower New York courts: including the exclusivity and longevity of the relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance placed upon one another for daily family services. These factors are most helpful, although it should be emphasized that the presence or absence of one or more of them is not dispositive since it is the totality of the relationship as evidenced by the dedication, caring and self-sacrifice of the parties which should, in the final analysis, control.

Id. at 212-13 (citations omitted). Another, more recent, Court of Appeals case regarding same-sex partners and housing did not turn on the definition of marital status but on an analysis of disparate impact on the basis of sexual orientation. *Levin v. Yeshiva Univ.*, 730 N.Y.S.2d 15 (2001) (holding that while school’s housing policy, which restricted housing to medical students and their spouses and children, did not on its face discriminate on the basis of marital status, students’ complaint was sufficient to allege a disparate impact on basis of sexual orientation, in violation of New York City Civil Rights Law).

¹¹⁸⁷ *See Alison D. v. Virginia M.*, 77 N.Y.2d 651, 655 (1991). This case arose before second-parent adoptions – creating a legal relationship between a child and the non-biological/non-adoptive parent – were recognized or performed as regularly as they are today. Same-sex couples are increasingly utilizing second-parent adoptions. *See, e.g., In re Adoption of a Child by J.M.G.*, 632 A.2d 550, 551 (N.J. Super. Ct. Ch. Div. 1993) (finding that adoption would provide financial and emotional benefits to children of same-sex couples, and further stating “the rights of parents cannot be denied, limited, or abridged on the basis of sexual orientation”); *see generally In re Guardianship of Astonn H.*, 635 N.Y.S.2d 418, 422 (Fam. Ct. 1995) (reasoning that prospective parents’ sexual orientation was not determinative of her fitness to be child’s guardian); *In re Adoption of Camilla*, 620 N.Y.S.2d 897, 900 (Fam. Ct. 1994) (noting that an unmarried adult may not be denied adoption rights based solely on sexual orientation); *see also* Henry J. Reske, *Lesbian Loses Custody*, 79 A.B.A. J. 24, 25 (1993) (addressing family law expert, Sanford N.

M., “planned for the conception and birth of the child and agreed to share jointly all rights and responsibilities of child-rearing.”¹¹⁸⁸ Under the Domestic Relations Law, either parent of a child may seek visitation rights, *inter alia*, by applying to the Supreme Court.¹¹⁸⁹ The Court of Appeals determined, however, that Alison D. was a “biological stranger” to the child, and therefore did not qualify as a parent according to the statute.¹¹⁹⁰ The court held that Alison D’s claims to be a “de facto” parent or parent “by estoppel” were “insufficient” under State law and determined, therefore, that Alison D. did not have standing to seek visitation rights.¹¹⁹¹

The dissent argued that the majority’s interpretation of the word “parent” was unrealistic and that a court should at least be able to hear the merits of a petition for visitation rights.¹¹⁹² Drawing on the court’s *Braschi* decision, the dissent further suggested that courts use a set of factors to determine the relevant interests on a case-by-case basis.¹¹⁹³ The majority held, however, that the word “parent” does not include the

Katz’s, statement that courts are permitting lesbians to adopt children of their partners, hence indicating trend toward acceptance of gay parenting arrangements).

¹¹⁸⁸ *Alison D.*, 77 N.Y.2d at 655. Alison D. and Virginia M. began their six-year relationship in September 1977. In March 1980, they decided to have a child, who was carried by Virginia M., who was artificially inseminated. As a couple, they planned for the conception and birth of the child and shared jointly in the costs and support of the pregnancy. In July 1981, Virginia M. gave birth to a baby boy, A.D.M. After A.D.M.’s birth, Alison D. continued to provide support and throughout his first two years, Alison D. and Virginia M. jointly cared for and made decisions regarding A.D.M. In November 1983, when A.D.M. was two years and four months old, Alison D. and Virginia M. terminated their relationship and Alison D. moved out of their jointly owned home. Until 1986, Alison D. continued to pay one-half of the mortgage and major expenses on the home and visited A.D.M. on a pre-arranged schedule. In 1987, Virginia M. cut off all contact with Alison D., and refused to allow Alison D. to visit the child or send correspondence. Alison D. commenced an action seeking visitation rights.

¹¹⁸⁹ N.Y. DOM. REL. LAW § 70.

¹¹⁹⁰ *Alison D.*, 77 N.Y.2d at, 654-55.

¹¹⁹¹ *Id.* at 656-57.

¹¹⁹² *Id.* at 658 (J. Kaye, dissenting).

¹¹⁹³ *Id.* at 662 (J. Kaye, dissenting).

same-sex (or, absent marriage, an opposite sex) partner of a biological or adoptive parent under New York law, even if the two agreed to raise a child together, unless the partner has created a legal relationship with the child, such as through adoption. In the absence of that formal relationship, the partner has no standing to seek visitation rights.¹¹⁹⁴

New York also has addressed the question “whether the survivor of a homosexual relationship, alleged to be a ‘spousal relationship,’ is entitled to a right of election against [a] decedent’s will.”¹¹⁹⁵ In *In re Cooper*, a surviving same-sex partner claimed that he was “entitled to spousal rights” because he and the deceased “were living in a spousal-type relationship” at the time of the decedent’s death.¹¹⁹⁶ The Appellate Division disagreed.¹¹⁹⁷ The court found that interpreting the legislature’s definition of “surviving spouse” to include a surviving same-sex partner would be too broad.¹¹⁹⁸ The court acknowledged that *Braschi* had extended the meaning of the word “family,” but also observed that the *Braschi* holding did not compel the court in *In re Alison D.* to include a same-sex partner in the definition of “parent.”¹¹⁹⁹ Accordingly, the court rejected as “meritless” the survivor’s contention that “the traditional definition of the term ‘surviving spouse’ must be rejected, and replaced with a broader definition that would include the petitioner.”¹²⁰⁰

¹¹⁹⁴ See *supra* Section I.E.2 for a discussion of second-parent adoptions.

¹¹⁹⁵ *In re Cooper* 592 N.Y.S.2d 797, 797 (2d Dep’t 1993), *appeal dismissed by* 82 N.Y.2d 801 (1993).

¹¹⁹⁶ *Id.* at 130.

¹¹⁹⁷ *Id.* at 798.

¹¹⁹⁸ *Id.* at 798-99. The surviving partner argued that “[t]he only reason [the decedent and he] were not legally married is because marriage license clerks in New York State will not issue licenses to persons of the same sex.” *Id.* at 798.

¹¹⁹⁹ *Id.* at 799.

¹²⁰⁰ *Id.* at 799. The court also rejected the surviving partner’s equal protection claims, finding that the State had a rational basis for its definition of “surviving spouse.” *Id.* at 799-801. The Court of Appeals

By contrast, a lower court has interpreted New York law to allow a surviving partner of a civil union to bring a wrongful death claim as if he or she were a surviving heterosexual spouse.¹²⁰¹ In *Langan v. St. Vincent's Hospital*, the Nassau County Supreme Court held that the civil union of a same-sex couple who had “a validly contracted marriage in the State of Vermont . . . will be recognized in the State of New York for the purposes of the wrongful death statute.”¹²⁰² The court noted that a Vermont civil union is “indistinguishable from marriage, notwithstanding that the Vermont legislature withheld the title of marriage from application to the union.”¹²⁰³ Although the situation presented in the *Langan* decision is fact-specific, and allows a surviving same-sex partner to bring a wrongful death action only if the couple previously has achieved marital or equivalent status in another state, the opinion may have larger implications both within New York State and in other states.¹²⁰⁴ The *Langan* decision was appealed and in June, 2004, oral arguments were heard in the Appellate Division.¹²⁰⁵

B. CONSTITUTIONAL STANDARDS

1. Why Constitutional Law is Relevant to the Inquiry

Although to many the question of whether same-sex couples should be permitted to marry may be one of family law or of public policy, the question ultimately

dismissed the appeal without opinion, stating that no substantial constitutional question was involved. *See Cooper*.

¹²⁰¹ See 765 N.Y.S.2d 411 (Sup. Ct. Nassau County 2003).

¹²⁰² *Id.* at 414 (citation omitted).

¹²⁰³ *Id.* at 417-18. The court further noted that “the concepts of marriage evolve over time.” *Id.* at 420.

¹²⁰⁴ For a complete discussion of *Langan* and the similar wrongful death case that preceded it, *Raum v. Restaurant Associates, Inc.*, 675 N.Y.S.2d 343, *see* Section I.H.1.

¹²⁰⁵ See Michael Weissenstein, *Court Weighs Appeal in Same-Sex Union Case*, TIMES UNION, June 23, 2004, at B3, available at 2004 WL 59378555.

is most likely to be resolved through an assessment of constitutional claims. Indeed, in New York State, same-sex couples are raising Equal Protection and Due Process claims under both the State and Federal Constitutions in their attempts to gain access to marriage. At the time of the publication of this Report, at least nine cases challenging or defending the constitutionality of New York State’s prohibition on permitting same-sex couples to marry have been filed; all are in early stages of litigation.¹²⁰⁶

2. Equal Protection Clause

a. The Standard of Assessment under Equal Protection

The Equal Protection clause of the United States Constitution is triggered whenever the government treats two groups differently – as, in this case, opposite-sex couples and same-sex couples.¹²⁰⁷ In such cases, the government is required to justify the differential treatment by showing that it relates, at a minimum, to a legitimate state

¹²⁰⁶ See, e.g., *Shields v. Madigan*, No. 1458/04 (Sup. Ct. Rockland County 2004) (ten same-sex couples assert that the New York Domestic Relations Law should be interpreted to allow same-sex couples to marry and that limitation of marriage to a man and a woman violates New York State Constitution’s equal protection and due process clauses; these claims were denied by a State Supreme Court Justice on October 22, 2004, ruling that New York Domestic Relations Law’s reference to “husband” and “wife” evinced an intent to limit marriage to heterosexual couples; an appeal is planned); *Samuels v. New York State Dep’t of Health*, No. 1967-04 (Sup. Ct. Albany County 2004) (thirteen same-sex couples seek declaratory judgment that restricting marriage licenses to opposite-sex couples violates New York State Constitution’s due process and equal protection clauses and the right to freedom of expression); *Kane v. Marsolais*, No. 3473-04 (Sup. Ct. Albany County 2004) (two same-sex couples married by a Unitarian minister raise equal protection and due process violations and assert that § 25 of the Domestic Relations Law entitles them to declaratory judgment that they are already married); *Seymour v. Holcomb*, No. 2004-0458 (Sup. Ct. Tompkins County 2004) (twenty-five same-sex couples seek declaratory judgment that restriction of marriage to opposite-sex couples violates New York State Domestic Relations Law and the State and Federal Constitutions’ Equal Protection and Due Process clauses); *Hernandez v. Robles*, No. 103434/2004 (Sup. Ct. N.Y. County 2004) (five same-sex couples assert that New York State’s refusal to issue marriage licenses to same-sex couples violates the State Constitution’s Equal Protection and Due Process clauses).

¹²⁰⁷ Equal Protection safeguards under the United States Constitution protect individuals from acts of the state and not of individuals, unless those individuals are acting under the constraints of state law.

interest.¹²⁰⁸ Certain kinds of differential treatment (*e.g.*, treatment based on race) are treated with great suspicion by the courts; this is known as “strict scrutiny.”¹²⁰⁹

Differential treatment based on gender receives “heightened scrutiny.”¹²¹⁰ Most other forms of differential treatment receive “rational basis” review.¹²¹¹ Although courts differ on the appropriate standard that should be applied when assessing the rights of gay men and lesbians, most courts have applied a “rational basis” review.¹²¹²

¹²⁰⁸ The promise of Equal Protection – whether state-based or federal – is tempered by the “practical necessity” that “most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.” *See Romer v. Evans*, 517 U.S. 620, 631 (1996) (“*Romer*”).

¹²⁰⁹ *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny).

¹²¹⁰ *See, e.g., United States v. Virginia*, 518 U.S. 515, 555 (1996) (“*Virginia*”) (“[A]ll gender-based classifications today’ warrant ‘heightened scrutiny.’”) (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994)); *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (equal protection claims brought on the basis of gender must meet intermediate scrutiny).

¹²¹¹ *See, e.g., Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 111 (1949) (when right involved is not fundamental, state’s regulation will pass constitutional review if it meets rationality test); *Heller v. Doe*, 509 U.S. 312, 319 (1993) (social or economic legislation is generally examined under the rational basis test).

¹²¹² *See Cooper*, 592 N.Y.S.2d at 800 (applying rational basis review in response to 14th Amendment claims challenging classifications based on sexual orientation); *Romer*, 517 U.S. at 632 (law discriminating on the basis of sexual orientation was struck down under rational basis review, because the “sheer breadth[of the law was] so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward the class it affect[ed]”; court did not have to address whether higher standard of review needed to be applied); *Doe v. Perry Community School Dist.*, 316 F. Supp. 2d 809, 830 (S.D. Iowa 2004) (in the Eighth Circuit, discrimination based on sexual orientation is subject to rational basis review); *Miguel v. Guess*, 51 P.3d 89 (Wash. 2002) (concluding that court need not reach question of suspect classification based upon sexual orientation as policy in question violated federal Equal Protection Clause based even upon rational basis test); *Weaver v. Nebo School Dist.*, 29 F. Supp. 2d 1279 (D.Utah 1998) (holding that decision not to assign teacher to position of volleyball coach based on her sexual orientation had no rational basis and violated Equal Protection Clause); *Cleaves v. City of Chicago*, 21 F. Supp. 2d 858, 862 (N.D. Ill. 1998) (sexual orientation does not involve a suspect classification or impact a fundamental interest, and thus, equal protection claims on this basis are examined under the rational basis test); *Anderson*, 2004 WL 1738447 (finding homosexuals not a suspect class on basis that older federal cases had rules homosexuals were not a suspect class). *But see Castle*, 2004 WL 1985215 (homosexuals are a suspect class); *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) (dismissing case in which same-sex couples sought to be married based on intervening amendment to the state constitution, but noting that sexual orientation constitutes a suspect classification and therefore would be subject to heightened scrutiny); *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 524 (Or. 1998) (“*Tanner*”) (same-sex couples constitute a suspect class for purposes of constitutional discrimination analysis); *Brause*, 1998 WL 88743, at *6 (recognizing that the personal choice of a life partner is fundamental and that such a choice may include persons of the same sex). *Cf. Watkins v. United States Army*, 847 F.2d 1329 (9th Cir.

i. Rational Basis Review

In “rational basis” review, the plaintiff must show that the differential treatment is not “rationally related to a legitimate state interest.”¹²¹³ Thus, to maintain the status quo in the marriage context, a court would have to find only that: (1) the denial of marriage rights bears some rational relationship to a state interest, and (2) that the state interest is legitimate.¹²¹⁴ This standard generally requires a low level of scrutiny and, as a result, few laws fail this test.¹²¹⁵ Even under this standard, however, the Supreme Court has in recent cases restricted the ability of states to discriminate or inappropriately classify on the basis of sexual orientation.¹²¹⁶ Indeed, the bare desire to harm a politically unpopular group is not a legitimate government interest.¹²¹⁷ Using the rational basis standard, the Supreme Court has rejected two attempts to limit the rights of gay men and

1988), *vacated en banc*, 875 F.2d 699 (9th Cir. 1989) (applying strict scrutiny and holding that the Army could not exclude a gay man from service who had informed the Army of his homosexuality when he first enrolled and who had put in 14 years of exemplary service; the full circuit skirted the constitutional issue, instead finding that the Army was estopped from discharging the plaintiff because it had re-enlisted him for so many years, knowing the full time that he was gay).

¹²¹³ See *Romer*, 517 U.S. at 631; *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-42 (1985) (“*Cleburne*”); *New Orleans v. Dukes*, 427 U.S. 297 (1976).

¹²¹⁴ “[I]f a law neither burdens a fundamental right nor targets a suspect class,” the court will “uphold the legislative classification so long as it bears a rational relation to some legitimate end.” See *Romer*, 517 U.S. at 631. See also *infra* Section III.B.3 for a more thorough discussion of whether the alleged fundamental right in question is one of the right to marry or the right of same-sex couples to marry.

¹²¹⁵ For example, legislatures need not convince courts that their judgments are based on empirically correct research. See *Minnesota v. CloverLeaf Creamery Co.*, 450 U.S. 1027 (1981).

¹²¹⁶ See, e.g., *Lawrence*, 539 U.S. 558 (2003) (striking down Texas sodomy law as unconstitutional intrusion on liberty to engage in private sexual conduct protected by the Due Process clause and reversing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986); *Romer*, 517 U.S. 620 (holding that amendment to Colorado State Constitution barring any legislative, judicial or executive action designed to protect “homosexual, lesbian or bisexual orientation, conduct, practices, or relationships” violated the Equal Protection Clause).

¹²¹⁷ See *Romer*, 517 U.S. at 635 (citing *USDA v. Moreno*, 413 U.S. 528 (1973) (unconstitutional to deny foodstamps to people living with persons unrelated to them, because the statute was motivated by a desire to harm hippies)).

lesbians, holding that the statutes in question were born of animus or dislike and thus could not withstand constitutional scrutiny.¹²¹⁸

In *Lawrence*, the Supreme Court noted the importance of recognizing the human dignity of all persons, including gay men and lesbians, when it struck down Texas' sodomy laws.¹²¹⁹ In *Romer*, the Supreme Court applied a rational basis assessment to determine whether an amendment to the Colorado Constitution satisfied a legitimate governmental interest.¹²²⁰ In that case, the Supreme Court struck down a Colorado constitutional amendment banning laws that protected homosexual citizens from discrimination.¹²²¹ The Court determined that the provision was "born of animosity toward the class of persons affected," and expressly held that, even under rational basis

¹²¹⁸ See *Romer*, 517 U.S. at 631 and *Lawrence*, 539 U.S. 558. There have been variations of the rational basis standard that are more demanding on the government. Ordinarily, to satisfy a rationality test, a court need only examine whether the act in question serves a legitimate governmental interest and whether the classification used is rationally related to the furthering of that interest. See *Heller v. Doe*, 509 U.S. 312, 320 (1993). One variation requires a "fair and substantial relation to the object of the legislation." *Zablocki*, 434 U.S. 374, 383-85 (1978) (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971), quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920)); *Craig v. Boren*, 429 U.S. 190, 210-211 (1976). This approach has been described as "rational basis with teeth." Some commentators speculated that the review applied in *Romer* was "a hybrid form of rational basis whereby the Court, under the guise of 'mere rationality,' actually applies a heightened and more demanding level of review." See Raffi S. Baroutjian, Note, *The Advent of the Multifactor, Sliding-Scale Standard of Equal Protection Review: Out with the Traditional Three-Tier Method of Analysis*, in with *Romer*, 30 LOY. L.A. L. REV. 1277, 1310 (1997); see also *Lawrence*, 539 U.S. at 579-85 (O'Connor, J., concurring) (advocating that law prohibiting same-sex sexual conduct be struck down using rational basis with teeth test).

¹²¹⁹ See *Lawrence*, 539 U.S. at 558 (acknowledging the effect that laws banning same-sex sodomy have in subordinating homosexuals by attaching an unacceptable "stigma" and "disrespect" for their private lives noting that the ability of gays to "retain their dignity as free persons" is at issue; the Court overruled *Bowers v. Hardwick* because "[i]ts continuance as precedent demeans the lives of homosexual persons" and gay people are entitled to "respect for their private lives"). Justice O'Connor noted in her concurring opinion that she would invalidate Texas' law under the Equal Protection Clause because it "raise[s] the inevitable inference that the disadvantage is born of animosity toward the class of person affected." See *id.* (quoting *Romer* at 634).

¹²²⁰ *Romer*, 517 U.S. at 631.

¹²²¹ See *Romer*, 517 U.S. 620.

review, moral disapproval of homosexuals as a class cannot be a legitimate government interest.¹²²²

The *Romer* Court declared that it did not need to answer the question of whether a higher level of review was necessary or appropriate because the Amendment in question did not pass muster even under the lowest level of review.¹²²³ The Court's opinion thus leaves open the possibility that a federal court could determine that gay men and lesbians constitute a quasi-suspect class (like women) or a suspect class (like racial minorities); most courts that have assessed the constitutional rights of gay men and lesbians have determined, however, that the rational basis test is the appropriate standard to apply.¹²²⁴

ii. Heightened Scrutiny

It is likely that a same-sex couple will allege that New York State marriage law imposes a gender-based classification because it prohibits individuals from marrying their partners on the basis of the partner's gender. Gender-based classifications brought under the Federal or state constitutions are subject to heightened scrutiny. To be upheld, they must "serve[] important governmental objectives" and "the discriminatory means employed [must be] substantially related to the achievement of those objectives."¹²²⁵

¹²²² See *id.* at 624, 635.

¹²²³ *Id.* at 632.

¹²²⁴ See *supra* note 1218; see also *Kandu*, 315 B.R. 123 (applying rational basis to assess the constitutionality of DOMA).

¹²²⁵ *Virginia*, 518 U.S. at 558 (citation omitted). The New York Court of Appeals has held that a law that treats people differently on the basis of gender "violates equal protection unless the classification is substantially related to the achievement of an important governmental objective." *People v. Liberta*, 474 N.E.2d 567, 576 (N.Y. 1984). See also *Cleburne*, 473 U.S. at 440-42.

A federal Equal Protection claim asking the courts to treat a sexual orientation classification as a gender-based classification likely would face some hurdles. First, the New York State marriage provisions single out neither men nor women as a discrete class for unequal treatment. Further, these provisions were neither drafted nor interpreted in a manner to discriminate against men or women as a class.¹²²⁶ Finally, a number of federal circuit courts have rejected claims that sexual orientation should be treated as a claim of sex-based discrimination that then would call for applying gender-based heightened scrutiny.¹²²⁷ By contrast, however, a number of state courts interpreting their own constitutions, have found merit in such claims and have, in turn, applied the higher standard.¹²²⁸

¹²²⁶ See generally *Kandu*, 315 B.R. 123, 139-40.

¹²²⁷ See, e.g., *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998); *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 296 (6th Cir. 1997); *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996); *Richenberg v. Perry*, 97 F.3d 256, 268 n.5 (8th Cir. 1996); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 571-72 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989); *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc); *Nat'l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd*, 470 U.S. 903 (1985). By contrast, at least two state courts have held that sex-based discrimination had occurred under their respective state constitutions when sexual orientation claims were brought.

¹²²⁸ A number of state courts have applied heightened scrutiny to claims of sexual orientation discrimination when interpreting their state constitutions. See *Tanner*, 971 P.2d 435 (Or. 1998) (holding that the trial court was correct in declaring that OHSU's denial of insurance benefits to domestic partners of homosexual employees violates Article I, section 20, of the Oregon Constitution); *Brause*, 1998 WL 88743, at *6. The Alaska court's ruling on whether same-sex couples were constitutionally permitted to marry was rendered moot by a public initiative amending the constitution to prohibit such marriages. AK STAT. § 25.005.013. In *Brause*, the Court stated, however, that "[w]ere this issue not moot, the court would find that the specific prohibition of same-sex marriage does implicate the Constitution's prohibition of classifications based on sex or gender, and the state would then be required to meet the intermediate level of scrutiny generally applied to such classifications. That this is a sex-based classification can readily be demonstrated: if twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious." *Id.* at *6. See also *Baehr*, 852 P.2d at 67 (treating claims of sexual orientation discrimination as claims of sex discrimination, which requires strict scrutiny to be applied; and further finding that marriage statute that did not permit same-sex marriages was presumptively unconstitutional unless on remand the distinction could be justified by a compelling state interest and as narrowly drawn to avoid intrusion on constitutional rights).

Under the New York State Constitution, it is possible that the analysis might be similar. Recent lower court cases concerning the issuance of marriage licenses in New Paltz, New York, indicate the willingness of at least some judges to conclude that a rational basis inquiry is insufficient.¹²²⁹ In addition, New York State’s enactment of SONDA sends a clear signal that lesbians and gay men are entitled to some special regard by the courts; whether this requires a more heightened review of their Equal Protection claims remains to be seen.¹²³⁰ Indeed, the outcome likely rests on whether the State’s Equal Protection clause is seen as co-terminus with or broader than its federal analogue.¹²³¹

iii. Strict Scrutiny

In 1938, the Supreme Court declared that certain forms of government discrimination warrant closer review than others.¹²³² Courts use this higher standard of review – strict scrutiny – when the state classification is based upon a suspect classification¹²³³ or violates a fundamental right.¹²³⁴ A classification will be upheld under the strict scrutiny standard only if it is necessary to promote a compelling governmental

¹²²⁹ See *infra* Section III.D.1.c.ii for a more thorough discussion of these cases.

¹²³⁰ The statement at the end of the statute noting that nothing in the statute should be considered an endorsement of any position concerning the rights of same-sex couples to marry does not answer the question of whether, for purposes of an equal protection inquiry, a higher than rational basis test ought to be applied.

¹²³¹ See *infra* Section III.B.3.b comparing federal and New York State constitutional law.

¹²³² *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that “a more searching judicial inquiry” may be warranted where government action burdens “discrete and insular minorities”).

¹²³³ *Id.*

¹²³⁴ See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy); *Zablocki*, 434 U.S. at 383-85 (right to marry); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667 (1966) (right to vote); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1965) (right to procreate). Although violations of fundamental rights can be assessed under an Equal Protection analysis, the analysis of marriage (of opposite-sex or same-sex couples) as a fundamental right is conducted in the “Due Process” section of this report. See *infra* Section III.E.

interest and if the discriminatory means employed substantially relate to the achievement of those objectives.¹²³⁵

The Supreme Court has developed indicia of what constitutes a suspect class. In *Korematsu v. United States*, the Supreme Court first addressed the question of who were the “discrete and insular” minorities referred to in *Carolene Products*.¹²³⁶ Later, in *Graham v. Richardson*, the Court held that “classifications based on alienage, like those based on nationality or race, are inherently suspect.”¹²³⁷ Thus, race, ethnicity and national origin are inherently suspect classes. In each case, as with the violation of a fundamental right provided for and protected by the United States Constitution, strict scrutiny will be applied.¹²³⁸

¹²³⁵ See *Virginia*, 518 U.S. at 533.

¹²³⁶ *Korematsu*, 323 U.S. 214, 216 (1944) (upholding under strict scrutiny the conviction of a Japanese man who refused to go to the Japanese internment camps during World War II because of the “pressing public necessity” to use racial restrictions). This case officially established race and national origin as the basis for suspect classifications, albeit in the context of a regrettable result. (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.”). *Id.* at 216.

¹²³⁷ *Graham v. Richardson*, 403 U.S. 365, 372 (1971). The Court declared that noncitizens “are a prime example of a discrete and insular minority for whom such heightened judicial solicitude is appropriate.” (citation omitted) (quoting *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

¹²³⁸ See, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (holding that the affirmative action approach used for the University of Michigan undergraduate program violated the Equal Protection Clause of the Fourteenth Amendment because it was not narrowly tailored); see generally *Zablocki*, 434 U.S. 374 (holding unconstitutional Wisconsin law restricting the rights of a parent to remarry who was subject to a court order to support a minor child); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (reaffirming “essential holding of *Roe v. Wade*” but modifying a woman’s right to choose an abortion by allowing states to restrict abortion as long as they do not place an “undue burden” on the woman’s right to choose); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a woman’s right to privacy is a fundamental right and that the legislature has a limited right to regulate abortions depending on what trimester a woman is in); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding unconstitutional law permitting contraceptives to be distributed only by registered physicians and pharmacists, and only to married persons); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding unconstitutional Connecticut law forbidding the use of contraceptives and the aiding or counseling of others in their use); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that any governmental action that is explicitly race-based must be necessary to achieve a compelling governmental interest); *Washington v. Davis*, 426 U.S. 229 (1976) (holding that racial discrimination violated the Equal Protection Clause only where it is a product of a discriminatory purpose); *Loving*, 388 U.S. 1 (1967) (holding unconstitutional a Virginia statute prohibiting marriage between a white person and

The Court has set forth a test to determine whether other claimants should be entitled to application of strict scrutiny. In *San Antonio Independent School District v. Rodriguez*, the court declared that, to be defined as suspect, “the class [must be] saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”¹²³⁹ The Court subsequently added the consideration of whether the class characteristic was “an immutable characteristic determined solely by accident of birth” to the test of suspect classification.¹²⁴⁰

Although the test has been articulated by the Court in various ways, the basic premise of suspect classification rests upon the history of discrimination, political powerlessness and immutability of the class characteristic.¹²⁴¹ Using these criteria, some courts have found sexual orientation to be a suspect classification requiring strict scrutiny analysis.

In *Tanner v. Oregon Health Sciences University*, the court found that gay men and lesbians are a suspect class of socially recognized citizens subject to adverse

a non-white person); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding the discrimination illegal because the only reason for its existence was hostility to petitioner’s race and nationality); *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (holding unconstitutional an annual poll tax imposed as a prerequisite for voting); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that denial of access to divorce was a violation of the plaintiffs’ due process rights when parties seeking divorce could not afford sixty dollar filing fee); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (holding that by requiring a one-year waiting period before a state would provide welfare benefits, the state was impairing the “fundamental right of interstate movement”).

¹²³⁹ 411 U.S. 1, 28 (1973).

¹²⁴⁰ See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Court decisions assessing suspect classifications generally require all three criteria – history of discrimination, immutability, and relative political powerlessness – to warrant suspect classification. See, e.g., *Cleburne*, 473 U.S. at 442-47 (finding that although mental retardation is immutable, classifications based on mental retardation did not satisfy all the indicia of heightened scrutiny).

¹²⁴¹ See, e.g., *id.* at 440-47.

social and political stereotyping.¹²⁴² Later, in *Castle v. State*, the court held, in a break from a prior state decision,¹²⁴³ that gay men and lesbians constitute a suspect class.¹²⁴⁴

The court reasoned that a class based on immutable characteristics, together with a long history of discrimination, and faced with policies that cannot even clear a rational basis test, constitutes a suspect class.¹²⁴⁵

b. Comparison of Equal Protection Standards: New York and Federal

The United States Supreme Court has held that “state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.”¹²⁴⁶ The late Justice William J. Brennan emphasized the importance of this aspect of our federal system:

[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law – for without it, the full realization of our liberties cannot be guaranteed.¹²⁴⁷

The New York Equal Protection clause provides:

No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any

¹²⁴² 971 P.2d at 444-48.

¹²⁴³ The court declined in *Anderson*, 2004 WL 1738447, to find that gay men and lesbians are a suspect class. The *Castle* court questioned the *Anderson* court’s reliance on *High Tech Gays v. Disco*, 895 F.2d 563 (1990), which based its denial of suspect classification on homosexuality being a behavior, rather than an immutable trait. See *Castle*, 2004 WL 1985215 at *11.

¹²⁴⁴ *Id.*

¹²⁴⁵ *Id.* at *11; see also *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999).

¹²⁴⁶ *Arizona v. Evans*, 514 U.S. 1, 8 (1995).

¹²⁴⁷ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.¹²⁴⁸

This language is strikingly similar to that found in the Equal Protection Clause of Fourteenth Amendment of the Federal Constitution, which provides that “[n]o state shall make or enforce any law which shall [. . .] deny to any person within its jurisdiction the equal protection of the laws.” Although it is quite clear that New York’s equal protection guarantee is as broad in its coverage as that of the Fourteenth Amendment,¹²⁴⁹ and that “[i]n certain areas . . . the State Constitution affords the individual greater rights than those provided by its Federal counterpart,”¹²⁵⁰ the Court of Appeals also has stated that “the wording of the State constitutional equal protection clause . . . ‘is no more broad in coverage than its Federal prototype.’”¹²⁵¹

Under the New York State Constitution, when the rational basis test applies, the statute “must be upheld if rationally related to achievement of a legitimate state purpose.”¹²⁵² In determining whether a reasonable objective is promoted by the classification, the courts are not bound by the stated purpose of the statute: “[i]nstead, a classification must be upheld against an equal protection challenge if there is any

¹²⁴⁸ N.Y. CONST. art. I, § 11.

¹²⁴⁹ *Brown v. State*, 89 N.Y.2d 172, 190 (1996) (noting that the New York provision is as broad as the federal and citing *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 530, 2 Rev. Record of N.Y. State Constitutional Convention, 1938, at 1065). See also *Golden v. Clark*, 563 N.Y.S.2d 1, 4 (1990) (holding that plaintiff appropriately relied on federal equal protection decisions in interpreting New York law).

¹²⁵⁰ *Esler v. Walters*, 56 N.Y.2d 306, 314 (1982).

¹²⁵¹ *Id.* at 313-14 (citing *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. at 530-31).

¹²⁵² See *Miriam Osborn Mem’l Home Ass’n v. Chassin*, 100 N.Y.2d 544, 547 (2003) (citing *Trump v. Chu*, 65 N.Y.2d 20, 25 (1985)).

reasonably conceivable state of facts that could provide a rational basis for the classification.”¹²⁵³

The Appellate Division, First Department, has held in one case that sexual orientation is a suspect classification under the Federal and State Equal Protection clauses.¹²⁵⁴ Although, in modifying and affirming the decision, the Court of Appeals seemed to back away from the implication that differential treatment on the basis of sexual orientation is subject to “some level of heightened scrutiny,” the court explicitly declined to decide the question on the grounds that an answer to it was not necessary to the disposition of the particular matter before the Court.¹²⁵⁵ Thus, New York courts may interpret the State Equal Protection clause as providing more protection than its federal counterpart.¹²⁵⁶ The Court of Appeals also has expressed a general willingness to expand State constitutional protections when individual liberties and fundamental rights are at stake.¹²⁵⁷

¹²⁵³ *Id.* (citing *Port Jefferson*, 94 N.Y.2d at 284, quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

¹²⁵⁴ *See Under 21 v. City of New York*, 488 N.Y.S.2d 669 (1st Dep’t), *rev’d on other grounds*, 65 N.Y.2d 344, *aff’d*, 482 N.E.2d 1 (N.Y. 1985).

¹²⁵⁵ *See Under 21*, 65 N.Y.2d at 364 (noting “[w]e need not decide now whether some level of ‘heightened scrutiny’ would be applied to governmental discrimination based on sexual orientation.”).

¹²⁵⁶ *See id.* at 359-62 (Meyer, J., dissenting); *cf. Esler v. Walters*, 56 N.Y. 2d at 313-14 (noting that “[i]n certain areas, of course, the State Constitution affords the individual greater rights than those provided by its Federal counterpart” however, “the wording of the State constitutional equal protection clause (N.Y. CONST. art. I, § 11) is no more broad in coverage than its Federal prototype.”) (citation omitted).

¹²⁵⁷ *See People v. Harris*, 77 N.Y.2d 434, 439 (1991) (describing the right-to-counsel clause of the New York Constitution as being “far more expansive than the Federal counterpart”) (citations and internal quotation marks omitted); *O’Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 529 (1988) (“[t]he protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment”); *Doe v. Coughlin*, 523 N.Y.S.2d 782, 799 (1987) (Alexander, J., dissenting) (“this court has frequently enforced the protection of individual rights under our State Constitution even where the Federal Constitution either did not or might not afford such protection” and has not “hesitated to accord to individuals protection under our State Constitution from governmental intrusion into intimate and private aspects of their lives”). This expansion is appropriate if the court finds state statutory or common law establishing the individual right, a history or tradition in the state of protecting the right, or the right is of a particular state or local concern. *See People v. Alvarez*, 521

3. Due Process Clause

a. The Standard of Assessment under the Due Process Clause

The purpose of the Due Process clause is to ensure that no group or individual is deprived of a fundamental right absent a narrowly tailored approach that satisfies a compelling governmental interest.¹²⁵⁸ The United States Supreme Court long has recognized the fundamental importance of marriage.¹²⁵⁹

As early as 1888, in *Maynard v. Hill*, the Supreme Court stated that marriage is “the most important relation in life” and is “the foundation of the family and of society, without which there would be neither civilization nor progress.”¹²⁶⁰ In 1923, the Supreme Court in *Meyer v. Nebraska* described marriage as “essential to the orderly pursuit of happiness of free men,”¹²⁶¹ and later, in *Skinner v. Oklahoma*, described marriage as “fundamental to the very existence and survival of the race.”¹²⁶²

In 1967, the Court in *Loving v. Virginia*¹²⁶³ recognized marriage as a fundamental right under the Constitution, striking down the state’s anti-miscegenation

N.Y.S.2d 212, 213 (1987). *But see Storrs v. Holcolmb*, 168 Misc. 2d 898, 899 (Sup. Ct. Tompkins County 1996) (“*ratio decidendi* forged by the Court” in *Matter of Estate of William T. Cooper*, 592 N.Y.S.2d 797 (2d Dep’t 1993) includes the holding “that marriage, in this State, is limited to opposite sex couples and that the gender classification serves a valid public purpose.”), *appeal dismissed*, 666 N.Y.S.2d 835 (3d Dep’t 1997) (dismissed for failure to join a necessary party).

¹²⁵⁸ See, e.g., *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (reaffirming that due process “forbids the government to infringe certain fundamental liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest”).

¹²⁵⁹ See, e.g., *Loving*, 388 U.S. at 12 (“The freedom to marry has long been recognized as one of the vital personal rights . . . Marriage is one of the ‘basic civil rights of man.’”); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse . . . it is an association for as noble a purpose as any involved in our prior decisions.”).

¹²⁶⁰ 125 U.S. 190, 205, 211 (1888).

¹²⁶¹ 262 U.S. 390, 399 (1923).

¹²⁶² 316 U.S. 535, 541 (1942).

¹²⁶³ For further discussion of this case, see *infra* Section III.C.1.

statute.¹²⁶⁴ The following decade, in *Zablocki v. Redhail*, the Court reaffirmed its holding in *Loving*, stating that “the right to marry is of fundamental importance for all individuals”¹²⁶⁵ and that the decision to marry deserves the same right to protection of privacy as any other right relating to family life.¹²⁶⁶

Lower courts have differed, however, on whether the denial of a right to marry to same-sex couples is a violation of the Due Process Clause. Some courts have determined that because lesbian and gay individuals can marry opposite-sex partners, they are not denied the fundamental right to marry.¹²⁶⁷ Some courts have held that, although there is a fundamental right to heterosexual marriage, there is no fundamental right to same-sex marriage.¹²⁶⁸ At least one court has found, however, that same-sex couples have a fundamental right to marry.¹²⁶⁹ There is no consensus on the appropriate interpretation of the Due Process clause and the issue is not likely to be resolved in the near future.

¹²⁶⁴ 385 U.S. 986 (1966).

¹²⁶⁵ 434 U.S. 374, 383 (1978).

¹²⁶⁶ *Id.* at 384. In *Zablocki* a Wisconsin statute had deprived petitioner of the right to obtain a marriage license due to his inability to pay outstanding child support obligations. The Court struck this statute down as unconstitutional and held, “[a]lthough *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.” *Id.* at 382-84.

¹²⁶⁷ *Standhardt*, 77 P.3d at 460 (holding that everyone has a fundamental right to enter into an opposite-sex marriage, but that a same-sex couple did not have the same fundamental right to marry).

¹²⁶⁸ *See Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (holding that the state’s prohibition on same-sex couples from marrying did not violate the fundamental right to marry under the Federal Due Process Clause).

¹²⁶⁹ *Anderson*, 2004 WL 1738447 (holding that same-sex couples do have the right to marry; statutes that prohibited same-sex marriages implicated a fundamental right for purposes of constitutional analysis).

b. A Comparison of Due Process Standards: New York and Federal

The New York Constitution provides that “no person shall be deprived of life, liberty or property without due process of law.”¹²⁷⁰ This language is nearly identical to that of the federal due process clause.¹²⁷¹ The similarity extends beyond the language of the provisions: the New York Court of Appeals has held that a statute repugnant to the due process clause of the Fourteenth Amendment also offends New York’s due process clause.¹²⁷²

The converse, however, may not always be true. The New York State Due Process clause has a broader reach than its federal counterpart. The federal provision protects individuals only from state actors who have violated their due process rights; the New York clause protects individuals from both state and non-state actors, at least with regard to procedural due process.¹²⁷³ The New York Court of Appeals has explicitly

¹²⁷⁰ N.Y. CONST. art. I, § 6.

¹²⁷¹ U.S. CONST. amend. V (“No person . . . shall be . . . deprived of life, liberty, or property, without due process of law.”); amend. XIV § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”).

¹²⁷² See *Metro. Life Ins. Co. v. New York State Labor Relations Bd.*, 280 N.Y. 194, 207 (1939) (stating that a statute that offends the federal Due Process Clause also offends the New York State clause).

¹²⁷³ *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 161 (1978) (holding that New York’s constitution protects individuals from both state and non-state procedural due process violations). In addition to its due process analysis, the *Sharrock* court provides an historical perspective about the evolution of federal and New York due process protection:

The historical differences between the Federal and State due process clauses make clear that they were adopted to combat entirely different evils. Prior to the Civil War, the Federal Constitution had as its major concern governmental structures and relationships. Indeed, prior to the enactment of the Fourteenth Amendment, the Bill of Rights delimited only the power of the National Government, imposing few restrictions on State authority and offering virtually no protections of individual liberties. The Fourteenth Amendment was a watershed – an attempt to extend and catalogue a series of national privileges and immunities, thereby furnishing minimum standards designed to guarantee the individual protection against the potential abuses of a monolithic government, whether that government be national, State or local. In contrast, *State Constitutions in general, and the New York Constitution in particular, have long safeguarded any threat to individual liberties, irrespective of from what quarter that peril arose.* Thus, as early as 1843,

held, moreover, that it “may impose higher standards [under the State constitutional provision] than those held to be necessary by the Supreme Court under the corresponding Federal constitutional provision.”¹²⁷⁴

C. PERTINENT SUPREME COURT DECISIONS

This section of the Report examines how the Supreme Court has dealt with Equal Protection and Due Process claims in cases that are likely to have a direct bearing on a determination of whether same-sex couples should be permitted to marry. This section focuses on four cases: *Loving v. Virginia*, which held that anti-miscegenation laws (*i.e.*, those barring blacks and whites from marrying each other) were unconstitutional; *Turner v. Safley*, which held that inmates are not to be denied the fundamental right to marry; *Romer v. Evans*, which held that disdain or dislike of a particular social group cannot form the basis of a legitimate governmental interest in regulating that group; and *Lawrence v. Texas*, which struck down a Texas statute

Justice Bronson, in speaking of the due process clause of our State Constitution, noted: “The meaning of the section then seems to be, that no member of the state shall be disfranchised, or deprived of any of his rights and privileges, unless the matter be adjudged against him upon trial and according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him.” *Id.* at 160-61 (citations omitted) (emphasis added).

¹²⁷⁴ *People v. Isaacson*, 44 N.Y.2d 511, 519-20 (1978) (citation omitted). As stated by the court: “Although an application of due process to outrageous conduct of law enforcement agents such as to warrant a restraint of the government from invoking judicial procedures in obtaining a conviction has evolved more recently, the doctrine is an ancient one traceable to Magna Charta and has been ‘so often judicially defined that there can be no misunderstanding as to [its] meaning.’” *Id.* at 520. (citation omitted). *See also McMinn v. Town of Oyster Bay*, 488 N.E.2d 1240, 1244 (1985) (upholding zoning restrictions under the New York State due process clause and distinguishing its holding from earlier decisions of the Supreme Court striking down such restrictions). In its recent decision in *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts took advantage of the difference permitted between state and federal due process standards. The Massachusetts constitution is “more protective of individual liberty and equality than the Federal Constitution.” *Goodridge*, 798 N.E.2d at 959. *See also supra* Section II.B.2.

criminalizing private sexual activity between consenting adults of the same sex, valuing the “human dignity” of all people, including gay men and lesbians.

1. *Loving v. Virginia*

In *Loving v. Virginia*,¹²⁷⁵ the Supreme Court outlawed a state law prohibiting marriage between Caucasian persons and non-Caucasian persons other than Native Americans.¹²⁷⁶ The question before the *Loving* court was “whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.”¹²⁷⁷ The Supreme Court found that the statute violated both clauses.¹²⁷⁸

¹²⁷⁵ 388 U.S. 1 (1967) (“*Loving*”).

¹²⁷⁶ *Id.* at 2. The *Goodridge* court in large part adopted the framework used in *Loving*. See *Goodridge*, 798 N.E.2d at 958 (“In this case, as in . . . *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance – the institution of marriage – because of a single trait: skin color in . . . *Loving*, sexual orientation here.”). When discussing *Loving*, the Massachusetts SJC also cites *Perez v. Sharp*, 32 Cal. 2d 711, 728 (1948), the first state court case to recognize that miscegenation statutes violate the Equal Protection Clause. See *id.* at 328; *Loving*, 388 U.S. at 6, fn.5. But see *Goodridge*, 798 N.E.2d at 975 (Spina, J., dissenting) (“Unlike . . . *Loving* . . ., the Massachusetts Legislature has erected no barrier to marriage that intentionally discriminates against anyone.”).

¹²⁷⁷ *Id.* at 2.

¹²⁷⁸ After presenting the question before them and answering it, the Supreme Court turned to the facts and procedural history of the case, noting that the defendants were residents of Virginia, one black and one white, who had been married in the District of Columbia. They returned to Virginia and “established their marital abode in Caroline County.” They were subsequently indicted and the trial court ruled against the defendants, stating:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

Id. at 3 (internal quotation marks omitted). The Lovings left the state after their conviction and moved to have the conviction set aside and the judgment of the trial court vacated. The motion was not decided, and the Lovings, thereafter filed a class action in federal court. Subsequently, the trial court denied their earlier motion and the Lovings appealed that decision to the Virginia Supreme Court of Appeals. The federal district court granted the Lovings a continuance in order to permit them to present their claims to the state high court. After the Supreme Court of Appeals upheld the constitutionality of the Virginia law, the Supreme Court of the United States took their appeal. *Loving*, 388 U.S. at 2-4.

Before *Loving* reached the Supreme Court, the Virginia Supreme Court of Appeals had upheld the law in question, relying upon that court’s 1955 decision in *Naim v. Naim*.¹²⁷⁹ In *Naim*, the court held that the State’s purpose in prohibiting interracial marriages was the preservation of “the racial integrity of its citizens” and the prevention of “the corruption of blood,” “a mongrel breed of citizens,” and “the obliteration of racial pride.”¹²⁸⁰ As a starting point, the *Loving* court rejected such reasoning as an obvious “endorsement of the doctrine of White Supremacy.”¹²⁸¹

The Court further rejected the argument of the State of Virginia that the Fourteenth Amendment did not apply in this case because marriage traditionally had been – and ought to be – left to the states,¹²⁸² noting Virginia’s necessary concession that the Fourteenth Amendment regulates a state’s power to craft marriage laws.¹²⁸³

The State also attempted to convince the Court that the Equal Protection Clause required only that any law with an “interracial element” apply equally to all races, and that in such circumstances, the laws need only to survive rational basis scrutiny.¹²⁸⁴ Virginia argued that its laws should survive such an inquiry because “the scientific evidence [about the soundness of interracial marriage] is substantially in doubt.”¹²⁸⁵

¹²⁷⁹ *Id.* at 7 (citing *Naim v. Naim*, 87 S.E.2d 749, 754 (Va. 1955)).

¹²⁸⁰ *Id.* (quoting *Naim v. Naim*, 87 S.E.2d at 756 (quotations omitted)).

¹²⁸¹ *Id.*

¹²⁸² *Id.*

¹²⁸³ *Id.* at 7.

¹²⁸⁴ *Id.* at 8.

¹²⁸⁵ *Id.*

Under such circumstances, according to the State, the “Court should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages.”¹²⁸⁶

The Court “reject[ed] the notion that the mere ‘equal application’ of a statute containing racial classifications”¹²⁸⁷ would “immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race.”¹²⁸⁸ Rather, the Court concluded, the Equal Protection Clause requires “that racial classifications, especially suspect in criminal statutes, be subjected to the ‘most rigid scrutiny.’”¹²⁸⁹

Applying such scrutiny, the Court concluded that “[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies [the] classification” found in the statute; rather, the only possible justification the Court could identify was to “maintain White Supremacy.”¹²⁹⁰ Ultimately, the Court found that “restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”¹²⁹¹

The Court then briefly analyzed the issue in light of the Fourteenth Amendment’s Due Process Clause, noting that “[t]he freedom to marry has long been

¹²⁸⁶ *Id.*

¹²⁸⁷ *Id.*

¹²⁸⁸ *Id.* at 9. Specifically, the Court rejected the idea “that the requirement of equal protection of the laws is satisfied by penal laws defining offenses based on racial classifications so long as white and Negro participants in the offense were similarly punished.” *Loving*, 388 U.S. at 10.

¹²⁸⁹ *Id.* at 11 (quoting *Korematsu*, 323 U.S. at 216).

¹²⁹⁰ *Id.*

¹²⁹¹ *Id.* at 12. The *Loving* court also found no basis for Virginia’s argument that the framers of the Fourteenth Amendment never intended it to make state miscegenation laws unconstitutional. *Loving*, 388 U.S. at 9 (noting “that although these historical sources ‘cast some light’ they are not sufficient to resolve the problem; ‘(a)t best, they are inconclusive’” and citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954)).

recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men” and that marriage is a ““basic civil right[] of man,’ fundamental to our very existence and survival.”¹²⁹² In light of the fundamental nature of marriage rights, the Court stated:

To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.¹²⁹³

Consequently, the Court reversed the Virginia convictions.¹²⁹⁴

2. *Turner v. Safley*

In *Turner v. Safley* (“*Turner*”),¹²⁹⁵ the Supreme Court once again reaffirmed that marriage is a “fundamental right” meriting constitutional protection.

Turner was a class-action suit brought by inmates at Missouri state correctional facilities

¹²⁹² *Id.* at 12 (quoting *Skinner*, 316 U.S. at 541). On this point, *Loving* is among a line of cases recognizing marriage as a fundamental right, starting with *Skinner*, a case in which the Court struck down as unconstitutionally discriminatory an Oklahoma statute permitting sterilization of certain criminals, but not others. In *Skinner*, the court applied strict scrutiny because sterilization implicates “[m]arriage and procreation,” which both are “fundamental to the very existence and survival of the race.” *Skinner*, 316 U.S. at 541. In *Griswold v. Connecticut*, the state’s prohibition on contraceptives was held to be unconstitutional, as it intruded upon marital privacy. 381 U.S. at 486. *Loving* followed two years later. The Supreme Court reaffirmed citizens’ fundamental right to marry in *Zablocki*, eleven years after *Loving*. See *Zablocki*, 434 U.S. at 387 (holding that a Wisconsin statute that requiring all child support payments to be made before one could receive a marriage license violated the Fourteenth Amendment).

¹²⁹³ *Loving*, 388 U.S. at 12.

¹²⁹⁴ See *id.* Following the court’s opinion, Justice Stewart added a short concurring opinion: I have previously expressed the belief that “it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor.” *McLaughlin v. State of Florida*, 379 U.S. 184, 198 (1964) (concurring opinion). Because I adhere to that belief, I concur in the judgment of the Court.

Id. at 13 (Stewart, J., concurring).

¹²⁹⁵ 482 U.S. 78 (1987).

challenging a regulation that permitted inmates to marry only with the permission of the superintendent of the prison.¹²⁹⁶ The District Court below, as well as the Eighth Circuit, had applied a “strict scrutiny” test to this restriction, finding that the regulation violated the plaintiffs’ constitutional rights to marry.¹²⁹⁷

The Supreme Court disagreed with the standard applied by the courts below, holding that in cases concerning the constitutional rights of prisoners such heightened scrutiny was not warranted. Instead, the Court held that a prison regulation that burdens fundamental rights should be upheld so long as it “is ‘reasonably related’ to legitimate penological objectives,” and should be struck down if it is “an ‘exaggerated response’ to those concerns.”¹²⁹⁸

The Court, nevertheless, held that the marriage restriction did not pass constitutional muster. Noting that *Zablocki v. Redhail*¹²⁹⁹ and *Loving v. Virginia*¹³⁰⁰ established marriage as a fundamental constitutional right, the Court concluded that

¹²⁹⁶ *Id.* at 81-82. Testimony at trial established that permission to marry under the regulation generally was given only in the case of pregnancy or the birth of an illegitimate child. *Id.* Plaintiffs also challenged a regulation prohibiting letters between inmates at different Missouri correctional institutions (with limited exceptions, such as correspondence between immediate family members). *Id.* at 79. Justice O’Connor, writing for the majority, upheld the restriction on letters between inmates, finding that it was a reasonable restriction to address legitimate concerns that letters could be used to communicate information about escape plans or gang-related activities. *Id.* at 79. Justice Stevens, writing separately in an opinion joined by Justices Brennan, Marshall, and Blackmun, dissented from this portion of the majority opinion.

¹²⁹⁷ *Id.* at 83-84.

¹²⁹⁸ *Id.* at 87-89. The Court identified four factors relevant to determining the reasonableness of the regulation at issue. The first is whether there is a “logical connection” between the regulation and a legitimate and neutral government objective. The second is whether there are alternative means of exercising the right that remain open to prison inmates. The third is the impact that accommodation of the asserted constitutional right will have on guards, other inmates, and the allocation of prison resources. The fourth is the absence of ready alternatives to the regulation. *Id.* at 89-91.

¹²⁹⁹ 434 U.S. 374 (1978).

¹³⁰⁰ 388 U.S. 1 (1967).

prisoners do not lose this right merely by the fact of their incarceration.¹³⁰¹ Although the state petitioners argued that the regulation was necessary both to help the rehabilitation of female prisoners, many of whom had histories of abuse at the hands of men, and to prevent “violent ‘love triangles’” from developing between inmates at a mixed-sex prison, the Court found that the regulation was not the best method to achieve these goals, since prohibiting marriage would not go very far in preventing the abuse of women or the development of violent “love triangles.”¹³⁰² The Court further found that the regulation was overly restrictive, since it prohibited male inmates from marrying although there was no fear that they would suffer abuse, and it prohibited inmates from marrying civilians, which carried little danger of spawning a love triangle.¹³⁰³

In finding that prisoners do not relinquish the fundamental right to marry upon being incarcerated, the Court stated that “[m]any important attributes of marriage remain, [even] after taking into account the limitations imposed by prison life.”¹³⁰⁴ These attributes are “expressions of emotional support and public commitment,” the “spiritual significance” of marriage, “the expectation that [the marriage] ultimately will be fully consummated,” and the fact that marital status often is a precondition to the receipt of governmental benefits . . . , property rights . . . , and other, less tangible benefits”¹³⁰⁵

The Court did not list procreation as one of these “important attributes” and yet found

¹³⁰¹ *Turner*, 482 U.S. at 84.

¹³⁰² *Id.*

¹³⁰³ *Id.*

¹³⁰⁴ *Id.* at 95.

¹³⁰⁵ *Id.* at 95-96.

that marriage is a fundamental right even when traditional biological-sexual procreation is impractical or impossible.

3. *Romer v. Evans*

In 1992, the State of Colorado amended its Constitution (“Amendment 2”) to repeal all non-discrimination “ordinances to the extent they prohibit discrimination on the basis of ‘homosexual, lesbian or bisexual orientation, conduct, practices or relationships.’”¹³⁰⁶ In *Romer v. Evans* (“*Romer*”), the Supreme Court struck down Amendment 2, stating that it did “more than repeal or rescind these provisions”:¹³⁰⁷ It prohibited “all legislative, executive or judicial action at any level of state or local government designed to protect” gay men and lesbians.¹³⁰⁸

The State of Colorado argued that Amendment 2 did not put homosexuals in a position any different from other citizens; instead, it merely precluded grants of special rights.¹³⁰⁹ The Court found this reading of the Amendment “implausible.”¹³¹⁰ Rather, the Court described the change in legal status created by Amendment 2 to be “[s]weeping and comprehensive”¹³¹¹ as it “nullifie[d] specific legal protections . . . in all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment.”¹³¹² The Court also found that the scope of the Amendment

¹³⁰⁶ 517 U.S. at 624 (quoting COLO. CONST., art. II, § 30b.)

¹³⁰⁷ *Id.* at 624.

¹³⁰⁸ *Id.*

¹³⁰⁹ *Id.* at 626.

¹³¹⁰ *Id.*

¹³¹¹ *Id.* at 627.

¹³¹² *Romer*, 517 U.S. at 629. The Court noted that the effect of the Amendment is “[n]ot confined to the private sphere” as it also “operates to repeal and forbid all laws or policies providing specific protection for gays and lesbians from discrimination by every level of Colorado government.” *Id.*

“may not be limited to specific laws passed for the benefit of gays and lesbians.”¹³¹³

Specifically, the Court stated that “[i]t is a fair, if not necessary, inference from the broad language of the amendment that it deprives gays and lesbians even of the protection of general laws and policies that prohibit arbitrary discrimination in governmental and private settings.”¹³¹⁴

In turning to the question of the Fourteenth Amendment and its application to this case, the Court stated:

The Fourteenth Amendment’s promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

[The Amendment] fails, indeed defies, even this conventional inquiry. First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.¹³¹⁵

The Court concluded that “[a] State cannot so deem a class of persons a stranger to its laws,” and thus found that Amendment 2 “violates the Equal Protection Clause.”¹³¹⁶

The dissent, authored by Justice Scalia and joined by Chief Justice Rehnquist and Justice Thomas, characterized Amendment 2 differently, describing it as

¹³¹³ *Id.* at 630.

¹³¹⁴ *Id.*

¹³¹⁵ *Id.* at 631-32 (citations omitted).

¹³¹⁶ *Id.* at 635.

“a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws.”¹³¹⁷ Justice Scalia asserted that the debate over whether opposition to homosexuality is evil should be left to democratic processes,¹³¹⁸ and accepted the State’s argument that the Amendment only “prohibits *special treatment* of homosexuals, and nothing more.”¹³¹⁹

Justice Scalia then critiqued the *Romer* majority’s application of the Fourteenth Amendment:

The only denial of equal treatment it contends homosexuals have suffered is this: They may not obtain *preferential* treatment without amending the State Constitution. That is to say, the principle underlying the Court’s opinion is that one who is accorded equal treatment under the laws, but cannot as readily as others obtain *preferential* treatment under the laws, has been denied equal protection of the laws. If merely stating this alleged “equal protection” violation does not suffice to refute it, our constitutional jurisprudence has achieved terminal silliness.¹³²⁰

Justice Scalia claimed novel the majority’s conclusion that forcing gay men and lesbians to “resort to a higher decision-making level” – namely, a constitutional amendment – was a violation of equal protection.¹³²¹

¹³¹⁷ *Id.* at 636 (Scalia, J., dissenting).

¹³¹⁸ *Id.* (Scalia, J., dissenting).

¹³¹⁹ *Id.* at 638 (Scalia, J., dissenting). Scalia provides an example: [The Amendment] would not affect, for example, a requirement of state law that pensions be paid to all retiring state employees with a certain length of service; homosexual employees, as well as others, would be entitled to that benefit. But it would prevent the State or any municipality from making death-benefit payments to the “life partner” of a homosexual when it does not make such payments to the long-time roommate of a nonhomosexual employee.

Id. (Scalia, J., dissenting).

¹³²⁰ *Id.* at 638-39 (Scalia, J., dissenting) (emphasis in original).

¹³²¹ *Id.* at 640 (Scalia, J., dissenting).

The dissent then turned to the question of rational basis, finding that “[i]f it is constitutionally permissible for a State to make homosexual conduct criminal [pursuant to *Bowers v. Hardwick*¹³²²], surely it is constitutionally permissible for a State to enact other laws merely *disfavoring* homosexual conduct.”¹³²³ Justice Scalia rejected any distinction between the status of being a homosexual and homosexual conduct, stating that “[i]f it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct.”¹³²⁴

Justice Scalia then turned his attention to what he called the “eminent reasonableness” of the Colorado provision. He rejected the majority’s claim that Colorado residents are guilty of an improper “animus”:

[I]t is our moral heritage that one should not hate any human being or class of human beings. But I had thought that one could consider certain conduct reprehensible – murder, for example, or polygamy, or cruelty to animals – and could exhibit “animus” toward such conduct. Surely that is the only sort of “animus” at issue here: moral disapproval of homosexual

¹³²² 478 U.S. 186 (1986), *overruled by Lawrence*.

¹³²³ 517 U.S. at 641 (Scalia, J., dissenting) (citing *Bowers*).

¹³²⁴ *Id.* (Scalia, J., dissenting). Justice Scalia goes on to say: Moreover, even if the provision regarding homosexual “orientation” were invalid, respondents’ challenge to Amendment 2 – which is a facial challenge – must fail. “A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (1987). It would not be enough for respondents to establish (if they could) that Amendment 2 is unconstitutional as applied to those of homosexual “orientation”; since, under *Bowers*, Amendment 2 is unquestionably constitutional as applied to those who engage in homosexual conduct, the facial challenge cannot succeed. Some individuals of homosexual “orientation” who do not engage in homosexual acts might successfully bring an as-applied challenge to Amendment 2, but so far as the record indicates, none of the respondents is such a person. *Id.* at 643 (Scalia, J., dissenting) (emphasis in original; footnote and citation omitted).

conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in *Bowers*.¹³²⁵

The provision, in the eyes of Scalia, could be analogized to other laws that adversely affect certain groups, such as drug addicts or smokers.¹³²⁶

The Justice found a “much closer analogy” in the constitutional provisions in many state constitutions that forbid polygamy.¹³²⁷ Many of these provisions were required by Congress for admission into the United States. In the words of Justice Scalia, therefore, the “‘singling out’ of the sexual practices of a single group for statewide,

¹³²⁵ *Id.* at 644 (Scalia, J., dissenting).

¹³²⁶ *Id.* at 647 (Scalia, J., dissenting).

¹³²⁷ *Id.* at 648 (Scalia, J., dissenting). The pertinent part of the dissent states: The constitutions of the States of Arizona, Idaho, New Mexico, Oklahoma, and Utah *to this day* contain provisions stating that polygamy is “forever prohibited.” Polygamists, and those who have a polygamous “orientation,” have been “singled out” by these provisions for much more severe treatment than merely denial of favored status; and that treatment can only be changed by achieving amendment of the state constitutions. The Court’s disposition today suggests that these provisions are unconstitutional, and that polygamy must be permitted in these States on a state-legislated, or perhaps even local option, basis – unless, of course, polygamists for some reason have fewer constitutional rights than homosexuals.

Id. (Scalia, J., dissenting) (emphasis in original; citations omitted).

On the issue of polygamy, the majority wrote:

Davis v. Beason, 133 U.S. 333, 33 L. Ed. 637, 10 S. Ct. 299 (1890), not cited by the parties but relied upon by the dissent, is not evidence that Amendment 2 is within our constitutional tradition, and any reliance upon it as authority for sustaining the amendment is misplaced. In *Davis*, the Court approved an Idaho territorial statute denying Mormons, polygamists, and advocates of polygamy the right to vote and to hold office because, as the Court construed the statute, it “simply excludes from the privilege of voting, or of holding any office of honor, trust or profit, those who have been convicted of certain offences, and those who advocate a practical resistance to the laws of the Territory and justify and approve the commission of crimes forbidden by it.” *Id.*, at 347. To the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law. *Brandenburg v. Ohio*, 395 U.S. 444, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969) (*per curiam*). To the extent it held that the groups designated in the statute may be deprived of the right to vote because of their status, its ruling could not stand without surviving strict scrutiny, a most doubtful outcome. *Dunn v. Blumstein*, 405 U.S. 330, 337, 31 L. Ed. 2d 274, 92 S. Ct. 995 (1972); cf. *United States v. Brown*, 381 U.S. 437, 14 L. Ed. 2d 484, 85 S. Ct. 1707 (1965); *United States v. Robel*, 389 U.S. 258, 19 L. Ed. 2d 508, 88 S. Ct. 419 (1967). To the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable. See *Richardson v. Ramirez*, 418 U.S. 24, 41 L. Ed. 2d 551, 94 S. Ct. 2655 (1974).

Id. at 634.

democratic vote – so utterly alien to our constitutional system, the Court would have us believe – has not only happened, but has received the explicit approval of the United States Congress.”¹³²⁸ Justice Scalia also wrote that any political power exercised by gay men and lesbians should be open to being countered by other democratic measures – such as the enactment of Amendment 2.¹³²⁹ He concluded that the majority had “take[n] sides in the culture war” and demonstrated not judgment in its opinion, but political will.¹³³⁰

4. *Lawrence v. Texas*

a. The Majority

In *Lawrence v. Texas*,¹³³¹ the Supreme Court took up the question of the “validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct,”¹³³² and concluded that the statute did not pass constitutional muster. In order to answer this question, the Court revisited its holding in *Bowers v. Hardwick*, the 1996 case in which the Court upheld a Georgia anti-sodomy law. The *Bowers* court defined the issue in that case not as a question of sodomy’s legality generally, but rather whether “the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.”¹³³³

¹³²⁸ *Id.* at 648 (Scalia, J., dissenting).

¹³²⁹ *Id.* at 646 (Scalia, J., dissenting).

¹³³⁰ *Id.* at 652-53 (Scalia, J., dissenting).

¹³³¹ 539 U.S. 558 (2003) (“*Lawrence*”). The majority decision was written by Justice Kennedy and joined by Justices Stevens, Breyer, Souter and Ginsberg; Justice O’Connor wrote a concurrence.

¹³³² *Id.*

¹³³³ 478 U.S. at 190.

The *Lawrence* court started its inquiry by citing earlier cases that touched on the “substantive reach of liberty under the Due Process Clause,” such as *Pierce v. Society of Sisters*,¹³³⁴ *Meyer v. Nebraska*,¹³³⁵ and *Griswold v. Connecticut*.¹³³⁶ The Court relied on *Griswold*, a case that invalidated a Connecticut law preventing married couples from using contraceptives, as a jumping off point for its analysis. The *Lawrence* court noted that although *Griswold* “described the protected interest as a right to privacy and placed emphasis on the marriage relation and the protected space of the marital bedroom,”¹³³⁷ the right to make such intimate decisions later was extended to those outside the institution of marriage.¹³³⁸

After reviewing these and other cases,¹³³⁹ the Court turned to *Bowers*, identifying the analytical as well as historical weaknesses it found in that opinion.¹³⁴⁰ The *Lawrence* court was troubled by *Bowers*’s reliance on the assertion that homosexual conduct long had been proscribed, noting that “there is no longstanding history in this

¹³³⁴ 539 U.S. at 564 (citing 268 U.S. 510 (1925)) (recognizing interest of parents and guardians in directing the upbringing and education of their children).

¹³³⁵ *Id.* (citing 262 U.S. 390, 400 (1923)) (acknowledging parents’ “right of control” over the education of their children).

¹³³⁶ *Id.* (citing 381 U.S. 479 (1965)). The Court in *Griswold* stated: “We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse . . . it is an association for as noble a purpose as any involved in our prior decisions.” *Griswold*, 381 U.S. at 486.

¹³³⁷ *Lawrence*, 539 U.S. at 565.

¹³³⁸ *See id.* at 565 (citing *Eisenstadt v. Baird*, 405 U.S. 438 (1972), where, pursuant to the Equal Protection Clause, the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons).

¹³³⁹ *Id.* at 565 (citing *Eisenstadt*) (invalidating law prohibiting distribution of contraceptives based on right to privacy); *Roe v. Wade*, 410 U.S. 113 (1973) (right to have an abortion, with certain limitations, found in right to privacy); *Carey v. Population Servs. Int’l*, 431 U.S. 678, 686 (1977) (regulation that burdens constitutional right of privacy violated only by a “sufficiently compelling state interest”).

¹³⁴⁰ *Lawrence*, 539 U.S. at 565-69.

country of laws directed at homosexual conduct as a distinct matter.”¹³⁴¹ To the contrary, the *Lawrence* Court found that states did not begin to criminally prohibit same-sex sexual relations until the 1970’s.¹³⁴² The Court also described the “emerging awareness that liberty gives substantial protection to adult persons deciding how to conduct their private lives in matters pertaining to sex” that predated *Bowers*,¹³⁴³ as well as the erosion of its holding in *Bowers* in two subsequent decisions,¹³⁴⁴ *Romer*¹³⁴⁵ and *Planned Parenthood v. Casey*.¹³⁴⁶ The Court then cited the “substantial and continuing” criticism of the reasoning in *Bowers* – both domestically and internationally.¹³⁴⁷

The Court overturned *Bowers*, declaring that it was “not correct when it was decided, [and is] not correct today.”¹³⁴⁸ The Court concluded with the following:

¹³⁴¹ *Id.* at 568. The particular prohibitions against sodomy were rarely enforced against consenting adults and served rather to “ensure there would be no lack of [legal] coverage if a predator committed a sexual assault that did not constitute rape.” *Id.*

¹³⁴² *Id.* at 569-71.

¹³⁴³ *Id.* at 572.

¹³⁴⁴ *Id.* at 573-74.

¹³⁴⁵ 517 U.S. 620 (1996); *see infra* Section III.C.

¹³⁴⁶ 505 U.S. 833, 851 (1992) (recognizing constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education).

¹³⁴⁷ 539 U.S. at 575-76. After citing scholars and state court opinions, the Court continued: To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v United Kingdom*. See *P. G. & J. H. v United Kingdom*, App. No. 00044787/98, P 56 (Eur. Ct. H. R., Sept. 25, 2001); *Modinos v Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris v Ireland*, 142 Eur. Ct. H. R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae* 11-12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.

Id.

¹³⁴⁸ *Id.* at 560.

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.¹³⁴⁹

Justice O'Connor joined the court in invalidating the Texas statute, but not in overturning the decision in *Bowers*, which she had joined.¹³⁵⁰ Justice O'Connor relied on equal protection jurisprudence, finding that the Texas law "would not pass scrutiny . . . regardless of the type of rational basis review that we apply."¹³⁵¹ She also noted that "we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."¹³⁵² She made it clear, however, that this did not implicate state marriage statutes:

Texas cannot assert any legitimate state interest here, such as national security or preserving the traditional institution of marriage. Unlike the moral disapproval of same-sex relations – the asserted state interest in this case – other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group.¹³⁵³

b. The Dissent

In his dissent, Justice Scalia disagreed with Justice O'Connor and the majority,¹³⁵⁴ lamenting that the *Lawrence* opinion may pave the way to same-sex

¹³⁴⁹ *Id.* at 578-79.

¹³⁵⁰ *Id.* at 579 (O'Connor, J., concurring).

¹³⁵¹ *Id.* at 580.

¹³⁵² *Id.* at 582.

¹³⁵³ *Id.* at 585.

¹³⁵⁴ Justice Scalia was joined in the dissent by Chief Justice Rehnquist and Justice Clarence Thomas, 539 U.S. at 605.

marriage.¹³⁵⁵ Before reaching that point, however, he reviewed the analytical faults he found in the majority opinion. He described the rational basis test applied by the majority as “unheard-of,¹³⁵⁶ and bemoaned the Court’s readiness to overturn a decision that had been decided just 17 years before.¹³⁵⁷ Justice Scalia characterized the majority’s approach to *stare decisis* as one permitting a decision to be overruled if: “(1) its foundations have been ‘eroded’ by subsequent decisions, (2) it has been subject to ‘substantial and continuing’ criticism, and (3) it has not induced ‘individual or societal reliance’ that counsels against overturning.”¹³⁵⁸ He proceeded to argue that *Roe v. Wade*

¹³⁵⁵

Justice Scalia writes:

[T]he Court says that the present case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Do not believe it. More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court’s opinion, which notes the constitutional protections afforded to “personal decisions relating to *marriage*, procreation, contraception, family relationships, child rearing, and education,” and then declares that “persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.” (emphasis added). Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct, and if, as the Court coos (casting aside all pretense of neutrality), “when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring,” what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising “the liberty protected by the Constitution.” Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry. This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.

Id. at 604-05.

¹³⁵⁶

Id. at 586 (Scalia, J., dissenting).

¹³⁵⁷

Id. (Scalia, J., dissenting).

¹³⁵⁸

Id. at 587 (Scalia, J., dissenting) (citations omitted). Justice Scalia writes further: That leaves, to distinguish the rock-solid, unamendable disposition of *Roe* from the readily overrutable *Bowers*, only the third factor. “There has been,” the Court says, “no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding . . .” It seems to me that the “societal reliance” on the principles confirmed in *Bowers* and discarded today has been overwhelming. Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is “immoral and unacceptable” constitutes a rational basis for regulation.

– a decision that he believes the majority has no desire to overturn – “satisfies these conditions to at least the same degree as *Bowers*.”¹³⁵⁹ Justice Scalia spent the most time on the third factor, reviewing an array of activities, including “bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity [that] are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices.”¹³⁶⁰ As a result, he argued the overruling of *Bowers* entails a “massive disruption of the current social order.”¹³⁶¹

Justice Scalia then turned his attention to the Court’s constitutional analysis of the Texas statute. He agreed that it was appropriate for the Court to apply rational basis scrutiny, as homosexual sodomy is not a “fundamental right” or a “fundamental liberty interest” (which would then require heightened scrutiny), but described the majority’s application of the standard as “an unheard-of form of rational-basis review that will have far-reaching implications beyond this case.”¹³⁶²

Id. (citing numerous cases).

¹³⁵⁹ *Id.* (Scalia, J., dissenting).

¹³⁶⁰ *Id.* at 590 (Scalia, J., dissenting) (citing the Court’s reliance on *Bowers* in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991), where the Court upheld Indiana’s public indecency statute on the grounds that it furthered “a substantial government interest in protecting order and morality.”) Justice Scalia continued:

Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding. The impossibility of distinguishing homosexuality from other traditional “morals” offenses is precisely why *Bowers* rejected the rational-basis challenge. “The law,” it said, “is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”

Id. at 589.

¹³⁶¹ *Id.* at 591 (Scalia, J., dissenting).

¹³⁶² *Id.* at 586 (Scalia, J., dissenting).

Justice Scalia disagreed with the majority's holding that the statute could not pass the rational basis test.¹³⁶³

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are “immoral and unacceptable” – the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this was a legitimate state interest. The Court today reaches the opposite conclusion. The Texas statute, it says, “furthers *no legitimate state interest* which can justify its intrusion into the personal and private life of the individual.” The Court embraces instead Justice Stevens' declaration in his *Bowers* dissent, that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review.¹³⁶⁴

Justice Scalia also rejected Justice O'Connor's conclusion that the sodomy law was unconstitutional on Equal Protection grounds.¹³⁶⁵ Finally, he chastised the Court for “sign[ing] on to the so-called homosexual agenda, . . . the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct.”¹³⁶⁶

D. CONSTITUTIONAL ANALYSIS: EQUAL PROTECTION

In a March 2004 Informal Opinion, the New York State Attorney General noted that the State's restriction of marriage to opposite-sex couples “raises important

¹³⁶³ Before delving into his criticism of this determination, Justice Scalia detailed his objections with the Court's analysis of the historical and social realities relied on in *Bowers*. *Id.* at 593-99 (Scalia, J., dissenting). He declared that the Court's “description of ‘the state of the law’ at the time of *Bowers* only confirms that *Bowers* was right.” *Id.* at 594 (Scalia, J., dissenting).

¹³⁶⁴ *Id.* at 599 (Scalia, J., dissenting) (citations omitted).

¹³⁶⁵ *Id.* at 599-600 (Scalia, J., dissenting).

¹³⁶⁶ *Id.* at 602 (Scalia, J., dissenting). He then concludes with the warning about *Lawrence* opening the door to a future ruling permitting same-sex marriage. *See supra* note 1355.

constitutional concerns.”¹³⁶⁷ The Opinion declined to resolve these issues, instead concluding that New York courts are the proper forum for resolution of whether the federal and state constitutions require the State to permit same-sex couples to marry.¹³⁶⁸

This section of the Report seeks to determine if constitutional analysis can answer the question of whether same-sex couples are constitutionally entitled to marry in New York State. This section conducts an Equal Protection analysis and the one that follows examines the Due Process Clause – in both the State and Federal Constitutions.

As discussed earlier in this Part of the Report, an Equal Protection claim can be analyzed under three different standards: rational basis, heightened inquiry, and strict scrutiny. Some courts have held that lesbians and gay men do not constitute a protected or suspect class and therefore have applied the rational basis test to examine their claims. Some courts asked to consider sexual orientation claims as discrimination based on gender have applied a heightened standard of review to such claims.¹³⁶⁹ Finally, some courts reviewing such claims have held that gay men and lesbians constitute a protected class and therefore have applied strict scrutiny to assess their claims. Accordingly, the Report will review the claim of the right to marry by same-sex couples under each of these standards of review.

¹³⁶⁷ See Att’y Gen. Op., *supra* note 1165, at 9. Cf. *In re Petri* N.Y.L.J. Apr. 4, 1994 at 29 (Sup. Ct. N.Y. County) (holding that a surviving gay partner could not inherit from the deceased’s estate when there was neither a will nor a marriage license, but noting in dictum that “Section 13 of the [DRL] has no requirement that applicants for a marriage licenses be of different sexes”) (emphasis added).

¹³⁶⁸ See Att’y Gen. Op., *supra* note 1165, at 16.

¹³⁶⁹ See *Brause*, 1998 WL 88743 at *6, and *Baehr v. Miike*, 1996 WL 694235, at *19 (citing *Baehr*, 852 P.2d at 67), discussed in greater detail *supra* Section II.B.4.C.

1. State Interests

In his March 2004 Informal Opinion on the rights of same-sex couples to marry in New York State, Attorney General Eliot Spitzer identified three key governmental interests in maintaining marriage as a heterosexual institution: procreation; the well-being of children; and maintaining the tradition of marriage as a heterosexual institution.¹³⁷⁰ Another important interest that has been raised is the preservation of public resources.¹³⁷¹ Although other interests have been raised, they generally fall within these four categories.¹³⁷²

a. Procreation

The first question is whether the State's interest in supporting procreation bears a rational relationship to maintaining marriage as a heterosexual institution. Most would agree that "encouraging the development of relationships optimal for procreation is a primary government interest."¹³⁷³ Others might assert that the purpose, or a significant purpose, of marriage is procreation, and therefore it should be limited to, or at least favored between, heterosexuals. According to this view, "[b]ecause a heterosexual

¹³⁷⁰ See Att'y Gen. Op., *supra* note 1165.

¹³⁷¹ See *Kandu*, 315 B.R. 123, a bankruptcy case arising in Washington State. In this case, the Court noted that the legislative history of the state's DOMA "identifies four governmental interests advanced by this legislation: '(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources.'" *Id.* at *15.

¹³⁷² See DOMA Legislative History, H.R. Rep. No. 104-664, at 12, *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916 (identifying the following governmental interests in the legislation: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; . . . and (4) preserving scarce government resources"; *Kandu*, at 145 (in which the U.S. Trustee argued that DOMA "furthers the legitimate government interest in encouraging the development of relationships optimal for procreating and raising children").

¹³⁷³ *Kandu*, 315 B.R. at 145.

union is the only one that can naturally produce a child, the . . . government has an interest in encouraging the stability and legitimacy of this union.”¹³⁷⁴

These assertions, though, appear to run counter to the fact that many heterosexual, married couples choose not to have children or adopt children and that gay and lesbian couples increasingly are choosing to have children, potentially with a biological connection to one or both partners, or may have children conceived through heterosexual intercourse, with the assistance of reproductive technology, or through adoption.¹³⁷⁵ Others might note that as opposite-sex couples will be able to continue to marry and to procreate even if same-sex couples are permitted to marry, it is not clear how procreation, *per se*, would be better protected by excluding same-sex couples from marriage.¹³⁷⁶

The Attorney General began his discussion of procreation as a State interest by noting that the capacity to bear children is not required for marriage under New York law. Under the Domestic Relations Law, a marriage where either party “[i]s incapable of entering into the married state from physical cause” is voidable.¹³⁷⁷ Since 1908, however, courts have ruled that this provision refers only to the physical capacity

¹³⁷⁴ *Id.* at 145-46 (noting that “applying the rational basis test as set forth by the Supreme Court, this Court cannot say that DOMA’s limitation of marriage to one man and one woman [is] wholly irrelevant to the achievement of the government’s interest“ in “encouraging the development of relationships optimal for procreation”).

¹³⁷⁵ *See, e.g., Baker v. State*, 744 A.2d at 881 (noting that “marriage laws benefit heterosexual couples who have no intention of raising children, and that a significant number of children are being raised by same-sex parents, who are conceiving through a variety of assisted-reproductive techniques”). Indeed, under New York law, sterility and the inability to bear children, as distinguished from physical inability to engage in sexual relations, are not grounds for annulment. *See supra* Section I.Q.

¹³⁷⁶ *See Lawrence*, 539 U.S. at 567 (noting that “it would demean a married couple were it told to be said that marriage is simply about the right to have sexual intercourse”).

¹³⁷⁷ N.Y. DOM. REL. LAW § 7(3).

to consummate a marriage and not the capacity to bear children.¹³⁷⁸ This holding reflects the reality that people enter into marriage for a variety of reasons, and not solely for purposes of procreation.

b. Promoting the Well-being of Children

Perhaps a more compelling question is whether maintaining marriage as an institution solely for opposite-sex couples improves the well-being of children. In *Kandu*, a federal bankruptcy court recently found DOMA's restrictions on marriage rights to be rationally related to legitimate state interests in promoting the welfare of children.¹³⁷⁹ In that case, a lesbian couple married in Canada filed a joint bankruptcy petition in their home jurisdiction, in Washington State.¹³⁸⁰ In concluding that DOMA survived rational basis review, the judge observed that "encouraging the stability and legitimacy of [a heterosexual] union for the benefit of the offspring" was a legitimate and important function of marriage.¹³⁸¹ He further observed that "[a]uthority exists that the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern."¹³⁸²

¹³⁷⁸ See *Lapides v. Lapides*, 254 N.Y. 73, 80 (1930); see also *Hatch v. Hatch*, 110 N.Y.S. 18 (Sup. Ct. Special Term Erie County 1908) (declining to annul marriage where, because of advanced age, "desire for support and companionship" motivated marriage).

¹³⁷⁹ 315 B.R. 123. See *supra* note 1371 for a more complete discussion of this case.

¹³⁸⁰ See *id.* at 130. The parties filed briefs in response to the court's own Motion to Show Cause to assess whether DOMA prohibited the couple from filing jointly. *Id.*

¹³⁸¹ See *id.* at 145.

¹³⁸² *Id.* at 146. The opinion notes that "[t]he Court's personal view that children raised by same-sex couples enjoy benefits possibly different, but equal, to those raised by opposite-sex couples, is not relevant to the Court's ultimate decision. It is within the province of Congress, not the courts, to weigh the evidence and legislate on such issues, unless it can be established that the legislation is not rationally related to a legitimate governmental end." *Id.*

The judge added that he personally believed there was insufficient empirical evidence to support the assertion that denying marriage to gay men and lesbians benefits children and that his “personal view [was] that children raised by same-sex couples enjoy benefits possibly different, but equal, to those raised by opposite-sex couples”; however, he deemed his personal views “not relevant to the Court’s ultimate decision.”¹³⁸³

At least three states – Florida, Mississippi and Utah – expressly prohibit same-sex couples from adopting children by statute. Florida’s law provides that “[n]o person eligible to adopt under this statute may adopt if that person is a homosexual.”¹³⁸⁴ Mississippi’s statute also specifically details that “[a]doption by couples of the same gender is prohibited.”¹³⁸⁵ Utah more generally prohibits adoption by all unmarried couples.¹³⁸⁶

The Florida statute prohibiting gay men and lesbians from adopting has survived numerous court challenges,¹³⁸⁷ most recently in *Lofton v. Secretary of the Department of Children and Family Services*.¹³⁸⁸ Plaintiffs, lesbian and gay foster parents and guardians seeking to adopt their wards, brought claims asserting that the

¹³⁸³ See *id.*

¹³⁸⁴ FL STAT. ch. 63.042(3) (2002).

¹³⁸⁵ 2004 Miss. Laws ch. 527, § 93-17-3(2).

¹³⁸⁶ UT CODE ANN. § 78-30-1(3)(b). “A child may not be adopted by a person who is cohabitating in a relationship that is not a legally valid and binding marriage under the laws of this State.” The statute goes on to define “cohabitating” as “residing with another person and being involved in a sexual relationship with that person.” *Id.*

¹³⁸⁷ See, e.g., *Seebol v. Farie*, 16 Fla. L. Weekly Supp. C52 (Fla. Cir. Ct. 1991); *Cox v. Fla. Dep’t of Health & Rehabilitative Servs.*, 656 So. 2d 902 (Fla. 1995).

¹³⁸⁸ See *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804 at *18 (11th Cir. 2004) (“*Lofton*”) (affirming summary judgment for the defendants that Florida’s statute prohibiting homosexuals from adopting is constitutional).

statute violated “their rights to privacy of intimate association, family integrity, as well as their Fourteenth Amendment rights of Due Process and Equal Protection.”¹³⁸⁹ The 11th Circuit rejected each of these claims, concluding that one’s status as a foster parent does not guarantee a right to be an adoptive parent¹³⁹⁰ and accepting the State’s assertion that “the presence of both male and female authority figures [is] critical to optimal childhood development and socialization.”¹³⁹¹

Some states have relied on judicial precedent to restrict parenting to heterosexual couples and individuals. In *Bottoms v. Bottoms* (“*Bottoms*”),¹³⁹² a Virginia trial court held that the biological mother of a child was an unfit parent as a matter of law after the mother admitted being involved in a lesbian relationship.¹³⁹³ The appellate court reversed, concluding that “the evidence fails to prove [that the mother] abused or neglected her son, that her lesbian relationship . . . has or will have a deleterious effect on her son, [or] that she is an unfit parent.”¹³⁹⁴ The grandmother, to whom the trial court had originally awarded custody, appealed to the Virginia Supreme Court, which overturned the appellate court ruling and reinstated the trial court’s order.¹³⁹⁵ The Virginia Supreme Court, in granting custody to the grandmother, expressed concern

¹³⁸⁹ *Lofton v. Kearney*, 157 F. Supp. 2d at 1372, 1378 (S.D. Fla. 2001).

¹³⁹⁰ *Lofton*, 358 F.3d at 813 (citing *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 847 (1977)).

¹³⁹¹ *Id.* at 818.

¹³⁹² 457 S.E.2d 102 (Va. 1995). The *Bottoms* case followed the ruling in *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985), where the Virginia Supreme Court held that if a parent was involved in a same-sex relationship, the court was required to deny custody and grant extremely limited visitation. *Shapiro, supra* note 1234, at 631.

¹³⁹³ *Bottoms*, 444 S.E.2d 276, 279-80 (Va. Ct. App. 1994).

¹³⁹⁴ *Id.* at 278. The court continued: “To the contrary, the evidence showed that [the mother] is and has been a fit and nurturing parent who has adequately provided and cared for her son.” *Id.*

¹³⁹⁵ *Bottoms*, 457 S.E.2d at 108-09.

about the long-term consequences of being raised by lesbians, including the social condemnation that the child might face.¹³⁹⁶

In 1999, the Arkansas Child Welfare Agency Review Board enacted a policy that excludes gay men and lesbians from becoming foster parents in Arkansas.¹³⁹⁷ Arkansas courts also have been reluctant to grant custody to gay or lesbian parents. In *Larson v. Larson*,¹³⁹⁸ the Arkansas Court of Appeals affirmed a lower court's decision to grant primary custody to the biological father of the children in question after learning of the biological mother's lesbian relationship.¹³⁹⁹ The Court of Appeals agreed with the lower court's reasoning of the negative impact the mother's sexual orientation would have on the children and affirmed the decision.¹⁴⁰⁰

Other courts have declared same-sex couples and gay and lesbian individuals suitable parents, with the same interests and abilities as heterosexual parents. Notably, without deciding the question of whether same-sex couples should be permitted to marry,¹⁴⁰¹ the Supreme Court in *Lawrence* observed that “[p]ersons in a homosexual relationship may seek autonomy” for the purposes of marriage, procreation,

¹³⁹⁶ *Id.* at 108.

¹³⁹⁷ See *Arkansas Gay Adoption Ban Remains in Place*, MEMPHIS TRIANGLE J., Dec. 2002, at 1. A bill prohibiting gay men and lesbians from adopting or becoming foster parents was not recommended by the House Committee to be passed onto the Arkansas House of Representatives for consideration for enactment in 2001. See H.B. 1026, 83rd Gen. Assem. Reg. Sess. (Ark. 2001); Michael Rowlett, *Gay, Lesbian Adoption Ban Rejected by House Committee*, ARK. DEMOCRAT-GAZETTE, Jan. 27, 2001, at A10.

¹³⁹⁸ *Larson v. Larson*, 902 S.W.2d 254 (Ark. 1995).

¹³⁹⁹ *Id.* at 255.

¹⁴⁰⁰ *Id.* at 256.

¹⁴⁰¹ See *Lawrence*, 539 U.S. at 578 (noting that the case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter”). Justice Scalia had a decidedly different perspective, observing that, although “[m]any will hope” it is not so, “[t]oday’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.” *Id.* at 604.

contraception, family relationships, child rearing, and education, “just as heterosexual persons do.”¹⁴⁰²

Some courts specifically have found that a state’s interests in promoting the well-being of children would not be harmed by permitting same-sex couples to marry. For example, when considering that question, the Hawai’i Circuit Court concluded that it could find no causal link between allowing same-sex couples to marry and adverse effects upon the optimal development of children.¹⁴⁰³ The Hawai’i court also noted that if same-sex couples are permitted to marry, “the children being raised by gay or lesbian parents and same-sex couples may be assisted, because they may obtain certain protections and benefits that come with or become available as a result of marriage.”¹⁴⁰⁴

Two Washington State courts have also recognized the positive impact marriage has on families with children and have concluded that same-sex couples should be permitted to marry. In *Castle v. State*, the court noted that children born or adopted

¹⁴⁰² *Id.* at 574 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

¹⁴⁰³ *Baehr*, 1996 WL 694235, at *17 -18. Specifically, the court found:

- The sexual orientation of parents is not in and of itself an indicator of parental fitness; does not automatically disqualify them from being good, fit, loving or successful parents and is not in and of itself an indicator of the overall adjustment and development of children.
- Gay and lesbian parents and same-sex couples have the potential to raise children that are happy, healthy and well-adjusted and can be as fit and loving parents as non-gay men and women and different-sex couples.
- Although children of gay and lesbian parents and same-sex couples may experience symptoms of stress and other issues related to their non-traditional family structure, the available scientific data, studies and clinical experience suggests that children of gay and lesbian parents and same-sex couples tend to adjust and develop in a normal fashion.
- Although there is a benefit to children which comes from being raised by their mother and father in an intact and relatively stress-free home, same-sex marriage is not likely to result in significant differences in the development or outcomes of children raised by gay or lesbian parents and same-sex couples.
- Neither the public interest in the well-being of children and families nor the optimal development of children will be adversely affected by same-sex marriage.

These findings have been edited, but largely follow the language used by the court.

¹⁴⁰⁴ *Baehr*, 1996 WL 694325, at *18 (citing *Baehr v. Lewin*, listing marital rights and benefits).

during the duration of the state-approved contract of marriage “gain significant rights in relationship to all parties to the contract and even the state will not allow the contract to be dissolved without taking into account how the dissolution might affect the children and see, to the extent possible, that the children are protected.”¹⁴⁰⁵ The court stated that because Washington permits same-sex couples to adopt children, it is questionable that the State would not require, let alone allow, “the permanency of a binding contract between same-sex couples the way it requires such a contract with opposite sex couples.”¹⁴⁰⁶

In *Anderson v. King County*, the court observed that with the availability of adoption, foster parenting and assisted reproduction technologies, “sexual orientation is no bar to good parenting.”¹⁴⁰⁷ If the interest of society is to protect children, the court observed, it is irrational to harm certain children by devaluing their immediate families.¹⁴⁰⁸ According to the court, civil marriage enhances family stability and social adjustment and that “when a civil marriage is dissolved, there is a right to court oversight to provide an orderly and equitable distribution of cases and obligations and to protect the best interests of any children involved.”¹⁴⁰⁹ The court therefore concluded that “the goal of nurturing and providing for the emotional wellbeing of children would be rationally

¹⁴⁰⁵ *Castle*, 2004 WL 1985215, at *3.

¹⁴⁰⁶ *Id.* at *5. By way of example, the court cited *State ex. rel. D.R.M.*, where a long-term same-sex couple had a child through alternative insemination. When their relationship broke down, the non-biological parent was found to have no obligations to the child, including an obligation of child support. 109 Wash. App. 182 (2001).

¹⁴⁰⁷ *Id.* at *9.

¹⁴⁰⁸ *Id.*

¹⁴⁰⁹ 2004 WL 1738447 at *3.

served by allowing same-sex couples to marry and that the same goal is impaired by prohibiting such marriages.¹⁴¹⁰

Courts in Massachusetts and Vermont also have demonstrated that the protection of children would be furthered by allowing same-sex couples the right to marry. The court in *Goodridge v. Department of Public Health* reasoned that “[e]xcluding same-sex couples from civil marriage will not make children of opposite-sex marriage more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of ‘a stable family structure in which children will be reared, educated, and socialized.’”¹⁴¹¹ Likewise, in *Baker v. State*, the Vermont Supreme Court concluded that “the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against.”¹⁴¹²

New York also has addressed the issues that arise when children are raised by same-sex parents. Attorney General Spitzer points out in his Informal Opinion that New York State’s treatment of second-parent adoptions shows that the State is not concerned that the welfare of children who are raised in same-sex couple households will be compromised by that circumstance. This is evidenced by the Court of Appeals’ holding permitting the same-sex partner of a child’s biological or adoptive parent to become the child’s second legal parent by means of adoption¹⁴¹³ and by regulations

¹⁴¹⁰ *Id.* at *10.

¹⁴¹¹ 798 N.E.2d 941, 964 (quoting 798 N.E.2d at 995 (Cordy, J., dissenting)).

¹⁴¹² 744 A.2d 864, 882.

¹⁴¹³ *See In re Jacob*, 86 N.Y.2d 651 (1995).

preventing adoption agencies from rejecting applicants solely based on their sexuality.¹⁴¹⁴

As noted by the Attorney General, these and other holdings, statutes, and regulations run counter to the proposition that excluding same-sex couples from the opportunity to marry would advance the State's interest in protecting the well-being of children.

c. Maintaining the Traditional Understanding of a Marriage as a Union between a Man and a Woman

Attorney General Spitzer suggests that, of the three interests described in his Informal Opinion, maintaining the traditional understanding of marriage as a union between a man and a woman presents a much closer question under New York law.¹⁴¹⁵ The question is whether traditional marriage – that reserved only for opposite-sex couples and not same-sex couples – can survive constitutional assessment on the grounds that many people feel deeply about this traditional definition? Is it constitutionally sufficient to say that this is how we have always done it and we should not lightly alter the ways in which we have always done it? Moreover, can this tradition be upheld even if it was not born of animus, but if it causes harm (as described in Part I of this report) to a particular group in the present?

Many religious institutions would insist that maintaining marriage as a heterosexual institution is essential for the functioning of modern society. Others would assert that religious tradition requires, or at least permits the marriage of same-sex couples; still others would remind us, however, that although our lives might be informed

¹⁴¹⁴ See 18 N.Y.C.R.R. § 421.16(h)(2) (McKinney 2003) (prohibiting qualified adoption agencies from rejecting applicants “solely on the basis of homosexuality”).

¹⁴¹⁵ See Att’y Gen. Op., *supra* note 1165.

by our religious values and experiences, the courts are not permitted to rely on religious tenets to determine the outcome of civil law.¹⁴¹⁶

There also are those who believe that marriage is a historically defined term whose definition includes the limitation that it is solely a union between a man and a woman. Individuals holding this view may be strongly committed to ensuring that same-sex couples have the opportunity to enter into legally recognized relationships with many, if not all, the same legal protections and responsibilities as are now extended to married couples. They argue, however, that this should be done without redefining the word “marriage,” but rather by the creation of some other legally recognized concept such as a comprehensive domestic partnership or a civil union.

Finally, there are those who believe that even the creation of comprehensive domestic partnership schemes or the advent of civil unions is just a way of maintaining an irrational divide between opposite-sex unions and same-sex unions. For them, this “separate but unequal” approach is a tradition that ought not to withstand any level of constitutional scrutiny.

¹⁴¹⁶ See, e.g., Memorandum from Dr. Gerald B. Kieschnick, President, The Lutheran Church, Missouri Synod, to The Lutheran Church (October 24, 2003) (on file with authors) (stating that the issuance of marriage licenses to same-sex couple is unacceptable); Press Release, New York State Catholic Conference, *Response To Attorney General’s Opinion Concerning Marriage Of Same-Sex Couples* (March 3, 2004), available at http://www.nycatholicconference.org/pages/news/show_newsDetails.asp?id=121&cat=News%20Releases (disagreeing with the conclusion Mr. Spitzer reaches regarding the recognition of same-sex unions from other jurisdictions and calling for the passage of a NY mini-DOMA); Press Release, Rabbinical Council of America, *Rabbinical Council of American and Union of Orthodox Congregations of America Oppose Same-Sex Marriage* (March 4, 2002) (citing religious tradition, both groups reaffirmed the prohibition of homosexuality and the definition of marriage as between a man and a woman). But see Jan Nunley, *Episcopal Church Leaders Urge Restraint on Marriage Amendment*, EPISCOPAL NEWS SERVICE (March 2, 2004) (declaring President Bush’s endorsement of a Federal Marriage Amendment “clear and unabashed discrimination”); Press Release, Union of American Hebrew Congregations, *Civil Marriage for Gay and Lesbian Jewish Couples* (November 2, 1997) (on file with authors) (reaffirming that full equality under the law for gay men and lesbians requires legal recognition of monogamous domestic gay and lesbian relationships); Press Release, Reconstructionist Rabbinical College, *In Support of Marriage for Same-Sex Couples* (April 2004) (stating that equality demands recognition of the relationships of gay men and lesbians through marriage).

To better understand the constitutional ramifications and general legal concerns raised by these issues, the Committee looked to the review of cases and statutes that follows.

i. Supreme Court Precedent

The Supreme Court has stated clearly that neither the bare desire to harm a politically unpopular group,¹⁴¹⁷ nor a desire to disadvantage homosexuals, in particular, can constitute a legitimate government interest.¹⁴¹⁸ In *Romer v. Evans*,¹⁴¹⁹ the Supreme Court declared that a proposed Colorado constitutional amendment failed Equal Protection rational basis review because the ultimate force behind the amendment, as seen by the Court, was constitutionally impermissible animus.¹⁴²⁰ The implication is that solely targeting politically unpopular groups will “raise the inevitable inference” that the action is “born of animosity.”¹⁴²¹ Thus, in response to an Equal Protection challenge, a state or governmental entity may not claim that it has a legitimate interest in the moral disapproval of homosexuality.¹⁴²²

The Court also has made clear that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law

¹⁴¹⁷ See *USDA v. Moreno*, 413 U.S. 528 (1973).

¹⁴¹⁸ See *Romer*, 517 U.S. at 634-35.

¹⁴¹⁹ *Id.* at 634-35.

¹⁴²⁰ Consider also that one stated rationale of Congress in enacting DOMA was “defending traditional notions of morality.” *Kandu*, 315 B.R. at 145 (citation omitted).

¹⁴²¹ *Romer*, 517 U.S. at 635; see also Courtney G. Joslin, *Equal Protection And Anti-Gay Legislation: Dismantling The Legacy of Bowers v. Hardwick*, 32 HARV. C.R.-C.L. L. REV. 225, 244 (1997).

¹⁴²² *Lawrence*, 539 U.S. at 577-78 (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986 (Stevens, J., dissenting) (footnotes and citations omitted))).

prohibiting miscegenation from constitutional attack.”¹⁴²³ Justice O’Connor emphasized this in her concurring opinion in *Lawrence* when she stated that “moral disapproval” of homosexuals cannot be a “legitimate state interest.”¹⁴²⁴

The Court has not yet answered the question, however, whether the preservation of tradition can serve as something *more* than moral disapproval of same-sex relationships.

ii. New York State Statutes and Cases

Determining whether New York State has an interest in maintaining the historical understanding of marriage as a union between opposite-sex partners is informed by examining the State’s treatment of same-sex relationships. Although neither the Legislature nor high-level courts have acted to sanction marriage for same-sex couples,¹⁴²⁵ both the State courts and the Legislature have already decided that gay men and lesbians are entitled to many of the benefits that come with forming families: the right to not be discriminated against; the right to bear children; the right to adopt children; the right to enter into contracts which seek to mimic many of the safeguards that

¹⁴²³ *Id.* See also Barbara J. Flagg, “Animus” and Moral Disapproval: A Comment on *Romer v. Evans*, 82 MINN. L. REV. 833, 847 (1998).

¹⁴²⁴ In her concurring opinion, Justice O’Connor noted that Texas could not assert the preservation of the traditional institution of marriage as a legitimate state interest for the moral disapproval of same-sex relations. See *Lawrence*, 539 U.S. at 585 (O’Connor, J., concurring). Although the majority stated that it did not answer the question of whether current restrictions on marriage violate the Constitution, Justice Scalia argues in his dissent that the Court’s decision does answer the question:

This reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples. Justice O’Connor seeks to preserve them by the conclusory statement that “preserving the traditional institution of marriage” is a legitimate state interest. But “preserving the traditional institution of marriage” is just a kinder way of describing the State’s moral disapproval of same-sex couples.

See *Lawrence*, 539 U.S. 601.

¹⁴²⁵ *cf. infra* notes 1429-41 and accompanying text discussing decisions by two New York Town Justices concluding in dicta that it is unconstitutional to bar same-sex couples from marriage.

attach to marriage (*e.g.*, establishing guardians for children; determining who will inherit one's estate; determining who can make decisions should one become incapacitated).

The New York State Court of Appeals has upheld the practice of permitting second-parent adoptions and has held that an unmarried same-sex survivor of a partnership is protected against eviction from a rent-regulated apartment as a qualified "family" member.¹⁴²⁶ The court has stated that it is appropriate to recognize that non-traditional family structures exist and has adopted view of "family" that includes "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."¹⁴²⁷

In the context of evaluating charges of solemnizing marriages without licenses, two town courts in Ulster County have found that the State interests in prohibiting same-sex couples from marrying were insufficient for Equal Protection purposes. Jason West, the Mayor of New Paltz, New York began presiding over same-sex marriages in early 2003. Under prosecution for illegally solemnizing weddings, West halted the practice.¹⁴²⁸ On June 10, 2004, New Paltz Town Justice Jonathan Katz dismissed misdemeanor charges against West on the grounds that the law upon which the charges were filed is unconstitutional (*i.e.*, it is unconstitutional to bar same-sex couples from civil marriage).¹⁴²⁹ The court referenced arguments in cases from other states

¹⁴²⁶ See *Braschi*, 74 N.Y.2d 201 (1989); 9 N.Y.C.R.R. 2204.6(d) (McKinney 2003). For a more complete discussion of this case, see *supra* Section I.M.1.

¹⁴²⁷ See *Braschi*, 74 N.Y.2d at 211.

¹⁴²⁸ See, *e.g.*, Gabriel J. Wasserman, *Spitzer: West Risks Job if Gay Marriages Go On*, POUGHKEEPSIE JOURNAL, Mar. 10, 2004 at B1, available at 2004 WL 6265284.

¹⁴²⁹ *People v. West*, 780 N.Y.S.2d 723, 724 (Just. Ct. 2004). ("The defendant's dismissal motion is authorized by CPL 170.30(1)(a); CPL 170.35(1)(c) as a way of challenging the constitutionality of DRI.17.").

addressing the issue, finding, however, “that none of the reasons stated in opposition to same-sex marriage is paramount to the equal protection guarantees enshrined in the state and federal constitutions.”¹⁴³⁰ Justice Katz recounted numerous recent court decisions and statutory enactments eliminating discrimination on the basis of sexual orientation from New York law¹⁴³¹ and called for the courts to heed the advice of Justice Brandeis that “[w]e must be ever on our guard lest we erect our prejudices into legal principles.”¹⁴³²

In a second case from Ulster County, two Unitarian ministers were charged with violating New York Domestic Relations Law § 17 by marrying 13 same-sex couples without marriage licenses.¹⁴³³ The court found the constitutionality of the State’s

¹⁴³⁰ See *West*, 780 N.Y.S.2d at 725 (dismissing the charge that Mayor Jason West violated DRL Sections 13 and 17 by performing same-sex marriages in New York State, and finding “that none of the reasons stated in opposition to same-sex marriage is paramount to the equal protection guarantees enshrined in the state and federal constitutions”).

¹⁴³¹ Judge Katz set forth the following history:
For example, the New York Court of Appeals has said that a “realistic and valid” view of family “includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence.” *Braschi v. Stahl Assoc. Co.*, 74 N.Y.2d 201, 211, 544 N.Y.S.2d 784, 543 N.E.2d 49, (same-sex partner is a family member for purposes of rent controlled apartment. The Court of Appeals interprets our adoption laws to allow for the possibility of the biological parent’s same-sex partner to adopt her child. *Matter of Jacob*, 86 N.Y.2d 651, 668, 636 N.Y.S.2d 716, 660 N.E.2d 397. The Appellate Division, 4th Department, has held that a lesbian couple has standing to adopt, notwithstanding the fact that DRL 110 lists only unmarried adults, or a husband and wife, as people that may adopt. *Matter of Adoption of Carolyn B.*, 6 A.D.3d 67, 774 N.Y.S.2d 227 (4th Dept. 2004). The majority opinion held that the sexual orientation of the proposed parents to be irrelevant. A surviving spouse from a same-sex Vermont Civil Union is a “spouse” entitled to bring a wrongful death action under New York law. *Langan v. St. Vincent’s Hospital of New York*, 196 Misc.2d 440, 765 N.Y.S.2d 411. Same sex partners are entitled to compensation resulting from the loss of their partners on September 11. The New York State legislature has adopted sweeping legislation directed to discrimination against homosexuals. Civil rights Law 313; Insurance Law 2701; Penal Law 240.30(3), 485.05(1). While, perhaps not exhaustive, the foregoing establishes that the policy of New York is to outlaw discrimination based upon sexual preference.

Id. at 724-25.

¹⁴³² *Id.* (quoting *New State Ice Co. v. Liegmann*, 285 U.S. 262 (1932)).

¹⁴³³ *People v. Greenleaf*, 780 N.Y.S.2d 899 (Just. Ct. 2004).

policy of prohibiting marriage between same-sex couples and the defendants' violation of that policy were intertwined, and dismissed the criminal charges against the ministers as unconstitutional.¹⁴³⁴ In this case, the interests advanced by the prosecution were: "a long tradition of political, cultural, religious, and legal consensus that marriage is understood as the union of male and female" and the "interest of encouraging procreation and child-rearing within a marital relationship."¹⁴³⁵ The Town Justice considered the constitutionality of the prohibition on marrying same-sex couples and determined under the rational basis test that "'tradition' is not a legitimate state interest and that prohibiting same-sex marriage is not rationally related to furthering the state's legitimate interest in providing a favorable environment for procreation and child-rearing."¹⁴³⁶

In rejecting the prosecution's assertion that "tradition" justified a ban on issuing marriage licenses to same-sex couples, the court analogized the case to slavery, interracial marriage and marital rape, all of which have at one time been legal "tradition."¹⁴³⁷ The court ruled that tradition does not justify unconstitutional treatment.¹⁴³⁸ Noting that marriage extends economic and legal protection to married couples,¹⁴³⁹ and recognizing that New York State has regularly amended statutes to

¹⁴³⁴ *Id.* at 900.

¹⁴³⁵ *Id.* at 901.

¹⁴³⁶ *See id.*

¹⁴³⁷ *Id.* at 901-02.

¹⁴³⁸ *Id.* at 901.

¹⁴³⁹ *Id.* at 904.

prohibit discrimination on the basis of sexual orientation,¹⁴⁴⁰ the court found no legitimate State interest in denying marriage licenses to same-sex couples.¹⁴⁴¹

The New York Legislature also has expressed support for gay men and lesbians by enacting numerous provisions that bar discrimination based on sexual orientation and enhance penalties for crimes that involve animus based on sexual orientation.¹⁴⁴² The recent amendment to New York Civil Rights Law by the Sexual Orientation Non-Discrimination Act (“SONDA”), which became effective January 17, 2003, evidences New York State’s interest in protecting the rights of its gay and lesbian citizens. SONDA provides that no State or private institutional actor may discriminate against a person on the basis of sexual orientation in housing, employment, credit or public accommodations.¹⁴⁴³ Without taking a position on whether same-sex couples should be permitted to marry,¹⁴⁴⁴ the statute reflects a strong protective policy and suggests that tradition, for whatever constitutional significance it has, is changing.

In sum, although many disparities remain,¹⁴⁴⁵ the State Legislature and State courts have started to recognize that the needs of same-sex couples and their families do not differ significantly from those of their heterosexual counterparts.

¹⁴⁴⁰ *Id.* at 904-05.

¹⁴⁴¹ *Id.* at 901.

¹⁴⁴² *See, e.g.*, N.Y. CIV. RIGHTS LAW § 40-c(2); N.Y. EXEC. LAW § 296; N.Y. EDUC. LAW § 313; N.Y. INS. LAW § 2701(a); N.Y. PENAL LAW §§ 240.30(3), 485.05(1).

¹⁴⁴³ *See* N.Y. CIV. RIGHTS LAW § 40-c.

¹⁴⁴⁴ *See* N.Y. EXEC. LAW § 291, Legislative Findings and Intent (McKinney 2004) (“Nothing in this legislation should be construed to create, add, alter or abolish any right to marry that may exist under the constitution of the United States, or this state and/or the laws of this state.”).

¹⁴⁴⁵ Such disparities include: (1) the need for homemade (or, lawyer made) work-arounds by same-sex couples; (2) advantageous defaults not available to same-sex couples in the absence of a work-around; (3) flaws with work-arounds such as their expense and that one must know to create them; and (4) in some circumstances, the absence of any possible work-around. *See generally* Part I.

d. Preserving Scarce Government Resources

Members of Congress in enacting DOMA asserted that the statute was necessary to preserve limited state resources and federal, citing to extension of marriage benefits, insufficient tax payments and increased regulation.¹⁴⁴⁶ The Massachusetts Department of Health in *Goodridge I* also argued that the State had an interest in “preserving scarce State and private financial resources” and that the court could “logically [] assume that same-sex couples are more financially independent than married couples and thus less needy of public marital benefits, such as tax advantages, or private marital benefits like employer-financed health plans that include spouses in their coverage.”¹⁴⁴⁷ The court rejected this claim on two grounds. First, the claim failed to recognize that many same-sex couples care for children and elderly parents. And, second, the marriage laws as they exist do not require a showing of financial dependence on one’s spouse.¹⁴⁴⁸

Public officials and scholars also have weighed in on the economic impact of marriage. In June 2004 the Congressional Budget Office (“CBO”) released a report on the budgetary impact of permitting same-sex couples to marry,¹⁴⁴⁹ estimating that, on net, recognizing this as a right would improve the Nation’s budget by just under \$1 billion in

¹⁴⁴⁶ See H.R. Rep. No. 104-664 at 18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2922; *Kandu*, 315 B.R. 123 (noting that the legislative history of DOMA “identifies four governmental interests advanced by this legislation: ‘(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources’”). *Id.* at 145.

¹⁴⁴⁷ See *Goodridge*, 798 N.E.2d at 964.

¹⁴⁴⁸ See *id.*

¹⁴⁴⁹ Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, June 21, 2004, *available at* <http://www.cbo.gov/showdoc.cfm?index=5559> (last visited Aug. 12, 2004).

each of the next ten years.¹⁴⁵⁰ The report, submitted to the House Judiciary Committee, used the 2000 Census to estimate that, if legal, 600,000 same-sex couples would wed nationwide. The CBO estimates federal tax revenues would increase by \$400 million per year from 2005 through 2010 and increase \$500 to \$700 million per year from 2011 to 2014.¹⁴⁵¹ In addition, legalization of same-sex marriage would: save the Supplemental Security Income program roughly \$100 million per year by 2014; save Medicaid approximately \$400 million per year by 2014; save Medicare around \$50 million per year through 2014; and cost the Federal Employees Health Benefits Program less than \$50 million per year through 2014.¹⁴⁵²

There are no data available measuring the specific economic impact of permitting same-sex couples to marry in New York, should it occur.¹⁴⁵³ Based on studies of other areas, however, State Comptroller Alan G. Hevesi has testified that he believes that permitting same-sex couples to marry will provide economic benefits to the State.¹⁴⁵⁴

¹⁴⁵⁰ Areas affected by the legalization of same-sex marriage include Income Tax, Estate Tax, Social Security, Medicare, Medicaid, Supplemental Security Income and Food Stamp programs. *See generally supra* Part I.

¹⁴⁵¹ Congressional Budget Office, *The Potential Budgetary Impact of Recognizing Same-Sex Marriages*, June 21, 2004, *available at* <http://www.cbo.gov/showdoc.cfm?index=5559> (last visited Aug. 12, 2004).

¹⁴⁵² *Id.*

¹⁴⁵³ In addition to the Report published by the Congressional Budget Office, the Human Rights Campaign has published two reports on the specific financial burdens placed on lesbian and gay couples, Lisa Bennett and Gary J. Gates, *The Cost of Marriage Inequality to Children and Their Same-Sex Parents*, A Human Rights Campaign Foundation Report, April 13, 2004, and on seniors by inequitable marriage laws, and Lisa Bennett & Gary J. Gates, *The Cost of Marriage Inequality to Gay, Lesbian, and Bisexual Seniors*, A Human Rights Campaign Foundation Report, Jan. 29, 2004. *See also infra* notes 1458-1464 and accompanying text.

¹⁴⁵⁴ On March 3, 2004, State Comptroller Alan G. Hevesi testified before a New York State legislative forum on marriage equality. It will be cited hereinafter as *Testimony in Support of the Right to Civil Marriage for Same-Sex Couples in New York State*, N.Y. St. Compt. Alan G. Hevesi (Mar. 3, 2004); *see also The Cost of Non-Recognition of Same Gender Marriages*, 1 Angles, Institute for Gay & Lesbian Strategic Studies (May 1996), at <http://www.buddybuddy.com/toc.html> (noting that additional potential benefits to the state from allowing same-sex couples to marry could include increased state tax revenues, a

He concluded that expanding marriage benefits will actually reduce the burden on government:

Marriage provides access to a spouse's health, social security, disability and death benefits, and the right to alimony and child support, all of which reduce both the number of people reliant on public assistance, and the number forced to seek medical care from state and city funded emergency rooms and community health centers. Additionally, married couples assume joint responsibility for basic living expenses, debts, and liabilities, allowing the state to use a partner's assets and income to determine eligibility for state-funded public assistance programs.¹⁴⁵⁵

Comptroller Hevesi specifically relied on two studies: one study estimated a \$11.5 million per year reduction in spending on “means-tested public assistance benefits” in California “even if only a small percentage of individuals living with partners were to marry”;¹⁴⁵⁶ a second study conducted in Vermont, basing its figures on the assumption that only one percent of same-sex unions would involve a partner who would be able to come off of public assistance, still estimated a savings of \$2 million over five years.¹⁴⁵⁷

decrease in the cost of anti-poverty programs, and a significant increase in tourism); M.V. Lee Badgett, *The Fiscal Impact on the State of Vermont of Allowing Same-Sex Couples to Marry*, Institute for Gay & Lesbian Strategic Studies Technical Report 98-1 (Oct. 1998).

¹⁴⁵⁵ *Testimony in Support of the Right to Civil Marriage for Same-Sex Couples in New York State*, N.Y. St. Compt. Alan G. Hevesi, at 2 (Mar. 3, 2004) (citing Lee Badgett, Bradley Sears & Suzanne Goldberg, *Supporting Families, Saving Funds: A Fiscal Analysis of New Jersey's Domestic Partnership Act*, Dec. 2003; Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995); R. Bradley Sears, *Senate Appropriations Committee Testimony on AB 205*, Aug. 18, 2003 (“Sears”); Müller, *supra* note 939).

¹⁴⁵⁶ *Id.* at 2 (citing Sears, *supra* note 1455).

¹⁴⁵⁷ *Id.* at 2-3 (March 3, 2004) (citing M.V. Lee Badgett, *The Fiscal Impact on the State of Vermont of Allowing Same-sex Couples to Marry*, Oct. 1998). The Hawai'i State Auditor has reported such findings in a study conducted on the fiscal impact of their reciprocal beneficiaries law. Because the “reciprocal beneficiaries make up a very small portion of the state's population,” the law “has had little fiscal impact in the areas of workers' compensation, public employee health and retirement benefits, and prepaid health insurance.” The report does state that if the numbers of beneficiaries were to increase “the fiscal impact could change.” REPORT, OFFICE OF THE AUDITOR, STATE OF HAWAI'I, STUDY OF THE FISCAL IMPACT OF PROVIDING CERTAIN BENEFITS TO RECIPROCAL BENEFICIARIES, Report No. 99-17 (1999) available at <http://www.state.hi.us/auditor/Overviews/1999/99-17.htm>.

In addition, Comptroller Hevesi stressed that marriage provides children with financial security and has the potential to increase overall family wealth through specialization and more efficient divisions of labor.¹⁴⁵⁸ He further observed that this specialization will help New York “compete more effectively in the global market [because there] is no greater asset in today’s technology-driven economy than a highly-skilled workforce.”¹⁴⁵⁹ The final economic benefit to the State foreseen by Comptroller Hevesi would be an increase in tourism revenues, something already experienced in jurisdictions, such as Ontario, that have recognized same-sex marriage.¹⁴⁶⁰

The Comptroller ended his comments by noting that there are other, intangible health and happiness benefits enjoyed by those who marry that also are likely to be reproduced in the State.¹⁴⁶¹

Such intangible benefits have been described by others as follows:

If the recognition helps to overcome prejudices and the stigmatisation of homosexuality, these gains are accompanied with the positive externality of reduced discrimination, accompanied with increasing self-esteem, diminishing psychological and economic costs, higher productivity and economic growth. The promotion of monogamy and sexual fidelity could reduce the risk of spreading venereal diseases, which would reduce health-expenditures.¹⁴⁶²

¹⁴⁵⁸ *Testimony in Support of the Right to Civil Marriage for Same-Sex Couples in New York State*, N.Y. St. Compt. Alan G. Hevesi, at 3 (Mar. 3, 2004).

¹⁴⁵⁹ *Id.* at 4.

¹⁴⁶⁰ *Id.* at 4-6. Comptroller Hevesi referenced a UCLA study “based on extremely conservative estimates” that predicted a gain in tourism revenues for California that could potentially top \$4 billion in the first five years should same-sex couples be allowed to marry. *Id.*

¹⁴⁶¹ *Id.* at 6-7.

¹⁴⁶² Müller, *supra* note 939, at 23 (“If same-sex marriage helps to reform marriage law, traditional gender norms could be abandoned and women might be able to make up their weaker position in matrimony. Hence, there are strong economic arguments for the recognition of same-sex marriage.”).

These societal gains might be joined by private economic gain as well, because couples with the choice to marry would do so only “if their perceived benefits . . . outweigh the costs.”¹⁴⁶³ The option provides “incentives for efficient relationship-specific investments.”¹⁴⁶⁴

There also are economic costs that are likely to accompany expanded access to marriage.¹⁴⁶⁵ The most explicit economic costs are those imposed on employers and the government,¹⁴⁶⁶ as they would be “forced to reassess employment-, health- and other benefits to homosexual partners.”¹⁴⁶⁷ In addition, recognizing same-sex marriage might impose additional costs on the government related to “the granting of tax breaks and legal benefits,” particularly if there is no concomitant “benefit[] for society.”¹⁴⁶⁸

¹⁴⁶³ Müller, *supra* note 939, at 22.

¹⁴⁶⁴ *Id.* at 23. One student author, reviewing a book on the rights of lesbians and gay men to marry, turns to economics, as well:

Marriage, as a contractual relationship, falls within law and economics analysis. Like the marketplace, marriage allows for parties to contract for maximum utility. Hence, proponents of law and economics regularly view marriage through the economic lens. Unfortunately, with same-sex marriage, law and economics theorists have been unjustifiably reluctant to make the application. Yet, if same-sex marriage creates benefits that outweigh its externalities, then law and economics must advocate its recognition. Although such an analysis is not the only one that can or should be made in defense of same-sex marriage, there is ample room for an argument that defends same-sex marriage as a policy that promotes economic efficiency. By focusing on the pragmatics of same-sex marriage, law and economics avoids the emotionally-laden morality defenses that have dominated the debate.

Ryan Nishimoto, Book Note, *Marriage Makes Cents: How Law & Economics Justifies Same-Sex Marriage: The Gay Rights Question in Contemporary American Law*. By Andrew Koppelman, 23 B.C. Third World L.J. 379, 384 (2003).

¹⁴⁶⁵ Müller, *supra* note 939. An “economic cost” argument may prove too much, as it could be used to sustain almost any classification and differential treatment.

¹⁴⁶⁶ *Id.* at 21-22.

¹⁴⁶⁷ *Id.* at 21.

¹⁴⁶⁸ *Id.* The author also notes the social and cultural costs of permitting same-sex couples to marry. Some of the possible costs offered are: (1) Informational – “The more broadly marriage is defined, the less information is revealed”; (2) “Tradition” – changing the definition of marriage will be a drastic change in a longstanding social tradition; (3) “Over-signalling” – creating a separation between “good” and “bad” homosexuals; (4) “Publicity” – due to public nature of marriage, gays and lesbians might have their sexual orientation publicized in ways they do not wish; (5) “Stamp of approval” – the government “propagating

2. Analysis of Equal Protection Claims

Although it is impossible for the Committee to predict how the United States Supreme Court or New York's Court of Appeals will rule on these issues, the Committee believes that some conclusions can be drawn.

a. Strict Scrutiny

Should an appellate court find that same-sex couples seeking to be married constitute a protected class, the court would be bound to apply some heightened level of scrutiny. Under strict scrutiny, the Committee believes it unlikely that a court would conclude that maintaining marriage exclusively for opposite-sex couples serves a compelling governmental interest.

First, as important as a state's interests in procreation may be, it is difficult to see how this interest is substantially related to excluding same-sex couples from marrying. Second, a state would appear to have a compelling interest in ensuring and supporting a social structure designed to protect children and promote their well-being. The issue, then, is whether limiting marriage to opposite-sex couples is a legitimate way or, under strict scrutiny, is a substantially related way, to further that state purpose.

Some have argued that a state could conclude that a family with married opposite-sex parents remains the optimal environment in which to raise children.

Consistent with that argument, at least three states have enacted legislation limiting the right of gay men and lesbians to adopt or become foster parents and one federal court has

and privileging homosexuality"; (6) "Negative Externalities" – unwanted exposure to public affection by gays and lesbians; (7) Procreation – the concern that allowing same-sex couples to marry would be overinclusive because the entire point of marriage is to encourage procreation; (8) "Effect on Children" – concern that children will not have two opposite-sex role models and the possibility that children of same-sex couples will be "more likely to develop a homosexual orientation"; (9) "The effect on population" – due to increased rates of homosexuality. *Id.* at 17-21.

upheld the constitutional validity of one of these statutes. These states have determined that the state has at least a legitimate interest in excluding gay men and lesbians, and same-sex couples, from parenthood.

Several courts examining these issues have concluded, however, that children of same-sex parents fare largely the same as their peers raised by opposite-sex parents. Indeed, by permitting same-sex couples legally to become parents, New York State falls into this category. Also, a state's interests may be bolstered by permitting more committed couples – and their families – to enjoy the rights and to attend to the responsibilities that come with marriage. If that is so, then it would follow that exclusion of same-sex couples from the right to marry would not be necessary to promote a state's interests and may, in fact, undermine those interests. It could be argued in at least some states, moreover, that the proper question is not whether prohibiting marriage of same-sex couples substantially relates to the achievement of a state's interest in promoting optimal environments for child-rearing, but rather whether it substantially advances an equally undoubted interest in avoiding deleterious environments. Taking all of these concerns into consideration, the Committee has concluded that prohibiting same-couples from marrying is not substantially related to the state's valid interest in promoting the well-being of children and thus, would not survive strict scrutiny.

Finally, the State's interest in maintaining the traditional model of marriage may be difficult to evaluate. In weighing its significance, however, one must take into account the Supreme Court's rejection of the elements of distaste or moral disapproval in *Lawrence* and *Romer*. One also might consider the thoughts of Judge Greaney in his concurrence in *Goodridge I*. He noted that:

To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory. . . . [T]he case requires that we confront ingrained assumptions with respect to historically accepted roles of men and women within the institution of marriage. . . .

. . . To justify the restriction in our marriage laws by accusing the plaintiffs of attempting to change the institution of marriage itself terminates the debate at the outset without any accompanying reasoned analysis.¹⁴⁶⁹

Ultimately, the Committee believes the State’s interest in maintaining marriage for opposite-sex couples for reasons of tradition is not likely to survive a strict scrutiny analysis.

b. Heightened Scrutiny

The standard of inquiry is somewhat lower if lesbians and gay men seeking to be married are found to be a quasi-suspect class under a gender claim. Under this approach, courts would have to find that the exclusion of same-sex couples from marriage serves important governmental objectives and is substantially related to its objectives. The Committee believes, nevertheless, that it is unlikely that a Court would find that maintaining marriage for opposite-sex couples only would serve important governmental objectives. Moreover, although there is some room for under- and over-

¹⁴⁶⁹ *Goodridge*, 798 N.E.2d 941, 972 (Greaney, J., concurring) (citing *Lawrence v. Texas*, 539 U.S. 558, ___, 123 S.Ct. 2472, 2486 (2003) (O’Connor, J., concurring) (moral disapproval, with no other valid State interest, cannot justify law that discriminates against groups of persons); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (“Our obligation is to define the liberty of all, not to mandate our own moral code.”)). Justice Greaney also noted:

I do not doubt the sincerity of deeply held moral or religious beliefs that make inconceivable to some the notion that any change in the common-law definition of what constitutes a legal civil marriage is now, or ever would be, warranted. But, as matter of constitutional law, neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families.

Goodridge, 798 N.E.2d at 973.

inclusiveness in governmental categorizations, the degree to which it is present here is likely to lead a court to conclude that the exclusion of same-sex couples from marriage is not substantially related to the achievement of important governmental objectives.

c. Rational Basis Review

The most difficult inquiry is whether a ban on marriage for same-sex couples bears some rational relationship to a state interest and whether that interest is legitimate. The plurality believes that the exclusion of same-sex couples from marriage will fail even the lower rational basis test. Although recognizing that the *Romer* and *Lawrence* decisions explicitly reject animus or discomfort with a particular group as a rational basis for exclusion, the remainder of the majority nevertheless believes that the courts may find that maintaining the well-being of children or maintaining the traditional understanding of marriage arguments are sufficient bases upon which to sustain a rational basis analysis and that it is not possible to predict with certainty just what the courts will determine. These conclusions are explored in further detail *infra*, Sections IV.C.3.a & b.

E. CONSTITUTIONAL ANALYSIS: DUE PROCESS

Consistent with its holdings that many other personal decisions involving marital and familial relationships are constitutionally protected from governmental interference,¹⁴⁷⁰ the U.S. Supreme Court has recognized a fundamental right to marry.¹⁴⁷¹

¹⁴⁷⁰ See *Doe v. Coughlin*, 71 N.Y.2d 48, 63 (1987) (citing *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (contraception); *Loving v. Virginia*, 388 U.S. 1, (interracial marriage); *Griswold v. Connecticut*, 381 U.S. 479 (contraception); *Prince v. Massachusetts*, 321 U.S. 158 (family relationships); *Skinner v. Oklahoma*, 316 U.S. 535 (procreation); *Pierce v. Society of Sisters*, 268 U.S. 510 (child rearing)).

¹⁴⁷¹ See *Turner*, 482 U.S. 78 (1987) (prisoners do not relinquish the fundamental right to marry upon being incarcerated); *Zablocki*, 434 U.S. 374 (1978) (holding that a Wisconsin statute requiring all child support payments to be made before one could receive a marriage license violated the 14th Amendment); *Loving*, 388 U.S. 1 (1967) (holding that Virginia's statutory scheme to prevent marriages between persons

The Court locates this right in the fundamental “right of privacy” implicit in the Due Process Clause of the Fourteenth Amendment.¹⁴⁷² The Court has noted that the right of privacy is:

older than the Bill of Rights – older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to a degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.¹⁴⁷³

In *Loving v. Virginia* the Court noted that “[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.”¹⁴⁷⁴ In reversing convictions under Virginia’s anti-miscegenation statutes, the Court determined: “To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly

solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

¹⁴⁷² The Due Process Clause of the Fourteenth Amendment protects citizens from undue and unjustified interference with fundamental rights and liberty interests by state and local governments; the Due Process Clause of the Fifth Amendment provides heightened protection against interference by the federal government with those same rights and interests. While marriage is generally a matter regulated by states, and therefore protected by the Fourteenth Amendment, federal legislation such as DOMA could implicate the Fifth Amendment. The Fifth Amendment provides that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. The analysis under both provisions would be the same. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment”).

¹⁴⁷³ *Griswold*, 381 U.S. at 486. See also *Zablocki*, 434 U.S. 374, 384 (1978) (quoting *Griswold*); *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. 833, 851 (1992)) (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”)

¹⁴⁷⁴ 388 U.S. at 11. In *Skinner*, the Court recognized that “[m]arriage and procreation are fundamental to the very existence and survival of the race,” but it struck down the statute in question – permitting the sterilization of recidivist convicts – on equal protection grounds. 316 U.S. at 541. The Court held as such because the statute permitted sterilization for certain crimes but not others – most notably, as the Court discussed, permitting sterilization for burglary, but not for embezzlement of an equal amount of money. 316 U.S. at 538-39.

subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law"; moreover, under the Fourteenth Amendment "the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State."¹⁴⁷⁵ The Court consistently has re-affirmed its finding that the freedom to marry is a fundamental right, and restrictions on that right that "significantly interfere with decisions to enter into the marital relationship" are subject to "rigorous scrutiny."¹⁴⁷⁶ Any action or legislation by the federal government that denies a group a fundamental right is subject to strict scrutiny. Under this standard, the state must demonstrate "a compelling state interest" for the classification and show that the legislation is "narrowly tailored" to that interest.¹⁴⁷⁷ If a reviewing court finds that a right properly claimed by a litigant is not a "fundamental" right, the court will use a "rational basis" analysis, which requires upholding the suspect action or legislation if it is rationally related to a legitimate government interest.¹⁴⁷⁸

By definition, the Due Process analysis is somewhat circular. The Court's determination that marriage is a fundamental right would, to some, end the inquiry. If it is a fundamental right for all adults, strict scrutiny would apply, and it would seem that

¹⁴⁷⁵ See *Loving*, 388 U.S. at 11.

¹⁴⁷⁶ *Zablocki*, 434 U.S. at 386-87. See also *Turner*, 482 U.S. at 99 (concluding that Missouri prison regulation allowing a prisoner to marry only when there is a compelling reason for marriage "is not reasonably related to legitimate penological objectives").

¹⁴⁷⁷ See *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993)); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (holding that an infringement of a fundamental right is subject to review under the "strict scrutiny" standard).

¹⁴⁷⁸ See *Washington*, 521 U.S. at 728.

same-sex couples would be entitled to marry.¹⁴⁷⁹ Whether this right is fundamental for all adults is, however, an open question – and one on which courts have split. The question of how restrictions on the right to marry a person of the same sex will be reviewed by a court under the Due Process Clause may turn on how the “right” at issue is classified – either as “the right to marry” or “the right to marry a same-sex partner.”¹⁴⁸⁰

Although the Supreme Court repeatedly has declared that marriage is a fundamental right, the courts that have reviewed the issue are split on whether this fundamental right encompasses the right of same-sex couples to marry.¹⁴⁸¹ For example, in 2003, an Arizona Court of Appeals held that although the men petitioning to marry do “possess a fundamental right to enter opposite-sex marriages, they do not have an

¹⁴⁷⁹ The case that comes closest is *Baker v. Nelson*, 409 U.S. 810 (1972). In *Baker*, a same-sex couple challenged their refusal of a marriage license. See *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). The Minnesota Supreme Court held that the state’s prohibition of same-sex marriage did not violate the fundamental right to marry under the Federal Due Process Clause. See *Baker*, 191 N.W.2d at 186. The U.S. Supreme Court dismissed the appeal from the case for want of a substantial federal question. See *Baker v. Nelson*. Although such a ruling is considered a ruling on the merits, such dismissals lack the same precedential value as Supreme Court decisions reached after briefings and oral arguments on the merits. See *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979). Such dismissals represent “no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision.” See *id.* Summary dismissals do not reflect the Court’s agreement with the lower court’s opinion. See *id.*

In *Lawrence*, the Supreme Court expressly declined to answer the question: “The present case . . . does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” See *Lawrence* 539 U.S. 578 (2003). In the recent bankruptcy court decision, *Kandu*, the court concluded that *Baker v. Nelson* was not binding on the issues presented by the debtors. See *Kandu*, 315 B.R. 123, 138 (“Given the enumerated statutory differences between Baker and DOMA, subsequent Congressional history related to DOMA, the limited scope of precedential value of summary affirmations and dismissals, and the possible impact of recent Supreme Court decisions, particularly as articulated in *Lawrence*, this Court concludes that Baker is not binding precedent on the issues presented by the Debtors.”).

¹⁴⁸⁰ Compare *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986) (finding that “[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy”), with *Lawrence*, 539 U.S. at 567 (finding that the *Bowers* Court’s framing of the fundamental right at issue “demeans the claim the individual put forward The laws involved in *Bowers* and here . . . have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes . . . seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals”).

¹⁴⁸¹ See, e.g., *Baker*, 191 N.W.2d 185; *Baehr*, 74 Haw. 530; *Lewis*, 2003 WL 23191114; *Standhardt v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003).

equivalent right to enter same-sex marriages.”¹⁴⁸² The court based this conclusion on the lack of Federal or Arizona jurisprudence declaring the right of same-sex couples to marry a fundamental right.¹⁴⁸³ The court also relied upon *Glucksberg* to support its holding that same-sex marriages are neither deeply rooted in the legal and social history of our Nation or state nor are they implicit in the concept of ordered liberty.¹⁴⁸⁴ The Federal Bankruptcy court in *Kandu*¹⁴⁸⁵ also recognized marriage as a fundamental right, but cited to a lack of federal precedent to support its determination that there is no fundamental right to marry someone of the same sex.

The majority in *Goodridge* also found that the right of same-sex couples to marry is not a fundamental right, but found that such a right did exist under an Equal Protection claim (applying a rational basis standard of review).¹⁴⁸⁶ The court reasoned that, because marriage between same-sex couples is not deeply rooted in our Nation’s history,¹⁴⁸⁷ and because same-sex couples “cannot procreate on their own,”¹⁴⁸⁸ that no fundamental right exists.¹⁴⁸⁹ Likewise, in *Lewis v. Harris*, the court found that, while

¹⁴⁸² *Stanhardt*, 77 P.3d at 454. The men had challenged the constitutionality of Arizona’s mini-DOMA under both the state and federal constitutions. They contended that the statute violated their fundamental right to marry and their right to equal protection of the laws, substantive due process and their state constitutional rights to privacy. The mini-DOMA was reviewed using rational basis analysis rather than applying the strict scrutiny standard, and was found to rationally further a legitimate state interest in preserving the tradition of marriage. *Id.* at 465.

¹⁴⁸³ *Id.* at 281.

¹⁴⁸⁴ *Id.* at 284 (citing *Glucksberg*, 521 U.S. at 520-21).

¹⁴⁸⁵ 315 B.R. 123.

¹⁴⁸⁶ 798 N.E.2d 941.

¹⁴⁸⁷ *Id.* at 354.

¹⁴⁸⁸ *Id.* at 367.

¹⁴⁸⁹ Justice Greaney, in his concurrence, reached a different conclusion:

. . . constitutional protections extend to individuals and not to categories of people. Thus, when an individual desires to marry, but cannot marry his or her chosen partner because of the traditional opposite-sex restriction, a violation of [the Massachusetts Constitution]

marriage is a fundamental right, the right of same-sex couples to marry is not deeply rooted in our Nation’s history and as such is not a fundamental right.¹⁴⁹⁰ The court went on to state that the right of same-sex couples to marry is not implicit in the concept of ordered liberty.¹⁴⁹¹

Two Washington courts have reached the opposite conclusion. In *Anderson v. King County*, the Superior Court concluded that precedent “firmly establishes the broad right to marry as a fundamental right.”¹⁴⁹² The court rejected the presumption that a fundamental right is only one that is “deeply rooted in the Nation’s history and tradition” and “implicit in the concept of orderly liberty.”¹⁴⁹³ Relying on the reasoning employed in *Loving v. Virginia*,¹⁴⁹⁴ the *Anderson* court noted that there was no deeply rooted tradition of interracial marriage at the time the U.S. Supreme Court considered *Loving*, yet “the Court analyzed the issue of [the anti-miscegenation statutes’] constitutionality in terms of the broad right to marry and found the right to be infringed.”¹⁴⁹⁵ Observing the Supreme Court’s willingness to analyze the constitutionality of non-traditional marriages under the broad fundamental right to

has occurred. . . . I find it disingenuous, at best, to suggest that such an individual’s right to marry has not been burdened at all, because he or she remains free to chose another partner, who is of the opposite sex.

Id. at 346 (citation omitted).

¹⁴⁹⁰ 2003 WL 23191114 (N.J. Super. Nov. 5, 2003).

¹⁴⁹¹ *Id.* at *11.

¹⁴⁹² 2004 WL 1738447, at *5.

¹⁴⁹³ *Id.* at *5 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)).

¹⁴⁹⁴ 388 U.S. 1 (1967).

¹⁴⁹⁵ *Id.* at 5.

marry,¹⁴⁹⁶ the court concluded that same-sex couples possess the right to the legal rights associated with marriage.¹⁴⁹⁷

The second Washington court to find that same-sex couples have a fundamental right to marriage is *Castle v. State*.¹⁴⁹⁸ There, the court turned to the analysis of the fundamental right to marry in *Turner v. Safely*.¹⁴⁹⁹ Before *Turner*, it had not been established that inmates had a fundamental right to marry; yet the *Turner* court reaffirmed the importance of marriage as a fundamental right, and in finding that the State could articulate no peneological interests to justify imposing upon that right, struck down the ban on inmate marriages.¹⁵⁰⁰ Ultimately, the *Castle* court held that “homosexuals are a suspect class, that marriage is a fundamental right and that [the Washington] state constitution guarantees more protections to citizen’s rights than what is protected under the Equal Protection clause.”¹⁵⁰¹

Thus, the more significant question is whether the fundamental right in question applies solely to heterosexual marriage. Were the Court to reach this conclusion, it would then apply a rational basis analysis, which takes us back to the analysis conducted earlier. Under this approach, one cannot predict a result; were the Court to decide that same-sex couples do not have the same fundamental right to marry

¹⁴⁹⁶ The court reviewed *Zablocki*, 434 U.S. 374 (no tradition of marriage while delinquent in child support payments, yet Court analyzed constitutionality in terms of the broad right to marry) and *Turner*, 482 U.S. 78 (no tradition of inmate marriage, but court analyzed constitutionality in terms of broad right to marry). *Anderson*, 2004 WL 1738447, at *5.

¹⁴⁹⁷ *Id.* at *11-12.

¹⁴⁹⁸ 2004 WL 1985215 (Wash. Super. Ct. Sept. &, 2004).

¹⁴⁹⁹ 482 U.S. 78 (1987).

¹⁵⁰⁰ *Id.* at 85, 91.

¹⁵⁰¹ *Castle v. State*, 2005 WL 1985215, at *13.

as do opposite-sex couples, however, one might expect that determination to foreshadow the Court's ultimate conclusion.¹⁵⁰²

Although some members of the Committee believe that the courts should find that the right of same-sex couples to marry is a fundamental right and that there is no compelling state interest in maintaining the marriage ban, the Committee as a whole believes it is not possible to predict with certainty how the courts will come out on this issue.¹⁵⁰³

F. RECOGNITION OF MARRIAGES OF SAME-SEX COUPLES ENTERED INTO IN OTHER JURISDICTIONS

1. The “Celebration Rule”

Traditionally, a marriage that was valid where celebrated would be valid everywhere unless it violated a strong public policy of the forum.¹⁵⁰⁴ As a general rule, every state recognizes the validity of a marriage that was valid where the marriage contract was made.¹⁵⁰⁵ This “celebration rule” has led to the recognition of marriages performed in one state even though the marriage could not have been entered into in the recognizing state.¹⁵⁰⁶ Since 1881, New York has held out-of-state marriages valid if they

¹⁵⁰² See *Anderson*, 2004 WL 1738447; *Castle*, 2004 WL 1985215; cf. *Kandu*, 315 B.R. 123.

¹⁵⁰³ See *supra* Section III.E.

¹⁵⁰⁴ See, e.g., *Lanham v. Lanham*, 117 N.W. 787, 788 (Wis. 1908) “The general rule of law unquestionably is that a marriage valid where it is celebrated is valid everywhere . . . [except for m]arriages which are deemed contrary to the law of nature . . . and . . . marriages which the lawmaking power of the forum has declared shall not be allowed validity on grounds of public policy.” See also L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex “Marriage”*: *How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 31 (1998).

¹⁵⁰⁵ See 2 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

¹⁵⁰⁶ See, e.g., *Parish v. Minvielle*, 217 So.2d 684, 688 (La. Ct. App. 1969) (recognizing valid out-of-state common law marriage); *In re Miller’s Estate*, 214 N.W. 428 (Mich. 1927) (recognizing valid marriage between first cousins).

were legally performed where consummated.¹⁵⁰⁷ For example, although the legal age of consent to marry in New York is eighteen,¹⁵⁰⁸ courts have recognized out-of-state marriages involving persons under the age of eighteen.¹⁵⁰⁹ And though New York does not permit common-law marriages, it recognizes those entered into in a sister state.¹⁵¹⁰

Exceptions to the “celebration rule” generally occur where there is a public policy rationale for refusing to recognize the otherwise valid marriage. A foreign law is not “contrary to public policy” merely because it differs from the forum law or because the forum has not legislated on the matter. As Judge Cardozo stated in *Loucks v. Standard Oil Co.*, “[t]he courts . . . do not close their doors unless [recognition of the policy] would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”¹⁵¹¹

Although there are many marriages validly performed in other states that New York would not sanction if they were performed here, in practice, the only type of marriage New York has invalidated consistently as against public policy are polygamous

¹⁵⁰⁷ See *Van Voorhis v. Brintnall*, 86 N.Y. 18 (1881); see also *Mott v. Duncan Petroleum Trans.*, 414 N.E.2d 657, 659 (N.Y. 1988) (finding that the law to be applied in determining the validity of a marriage is the law of the State in which the marriage occurred).

¹⁵⁰⁸ N.Y. DOM. REL. LAW § 7.

¹⁵⁰⁹ See, e.g., *Carr v. Carr*, 104 N.Y.S.2d 269, 271 (Sup. Ct. 1951). However, in *Wilkins v. Zelichowski*, 140 A.2d 65 (N.J. 1958), a New Jersey teenage couple, barred for nonage in the forum, drove to Indiana to marry there. A few years later, when the teenage husband was in jail, the young wife launched an “internal attack” on the marriage, and the court invalidated it on public policy grounds. The court refused to bind her to an ill-advised elopement with a juvenile delinquent that she had conducted at age sixteen. *Id.*

¹⁵¹⁰ See, e.g., *Carpenter v. Carpenter*, 617 N.Y.S.2d 903, 904 (2d Dep’t 1994) (recognizing Pennsylvania common-law marriage under principles of comity); *In re Estate of Gates*, 596 N.Y.S.2d 194, 198 (3d Dep’t 1993); *Ram v. Ramharack*, 571 N.Y.S.2d 190, 191 (Sup. Ct. 1991).

¹⁵¹¹ *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 110 (1918) (“Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right.”).

marriages.¹⁵¹² The New York Court of Appeals has upheld a marriage between an uncle and his niece, even though such a marriage would be invalid as incestuous if performed within the state.¹⁵¹³ Given New York courts' trend toward legal recognition of same-sex relationships in a variety of circumstances,¹⁵¹⁴ and the New York State Attorney General's Informal Opinion indicating that New York will recognize same-sex unions entered into in other jurisdictions,¹⁵¹⁵ it appears unlikely that the courts in New York would find a public policy against same-sex marriages strong enough to deviate from the celebration rule.

2. The Full Faith and Credit Clause of the U.S. Constitution

One important question is whether same-sex couples who are legally married in Massachusetts, Canada or elsewhere will have their marriages recognized in other states pursuant to the Full Faith and Credit Clause of the United States Constitution, which governs interstate recognition of legal proceedings and determinations at all levels of state and federal government, United States territories and Indian tribunals.¹⁵¹⁶ This clause requires that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be

¹⁵¹² See, e.g., *People v. Ezeonu*, 588 N.Y.S.2d 116 (Sup. Ct. 1992) (refusing to recognize polygamous marriage entered into in Nigeria); *In re Application of Sood*, 142 N.Y.S.2d 591 (Sup. Ct. 1955) (upholding clerk's refusal to issue marriage license where man remained legally married in India), *aff'd*, 1510 N.Y.S.2d 578 (4th Dep't 1956).

¹⁵¹³ *In re May's Estate*, 305 N.Y. 486 (1953) (upholding marriage between Jewish uncle and his niece entered into in Rhode Island, where Jews were exempt from laws prohibiting incest). The court was careful to note that the spouses were of the same age and lived in an apparently happy 32-year marriage that produced six children. *Id.* at 5.

¹⁵¹⁴ See *supra* Section III.D.1.c.ii.

¹⁵¹⁵ See *infra* Section III.F.2.

¹⁵¹⁶ 28 U.S.C. § 1738 (1994).

proved, and the Effect thereof.”¹⁵¹⁷ This Clause requires the courts of each state to enforce “the judgments of courts of sister states, no matter how offensive the results to the forum court, and no matter how contrary to the forum’s chosen policies.”¹⁵¹⁸

The Supreme Court has held that the purpose of the Full Faith and Credit Clause is to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.¹⁵¹⁹ This holding requires states to forgo their local policies for the sake of the federal union and in so doing, to give full effect to the contrary policies of other states.

There are some limited exceptions, however, to the Full Faith and Credit Clause. The public policy exception¹⁵²⁰ has been recognized by the Supreme Court as the most significant of these exceptions. In practice, there are some limitations upon the extent to which a state will be required by that clause to enforce the judgments or acts of another state in contravention of the forum state’s own statutes or policy.¹⁵²⁰ When considering whether to apply another state’s laws, the forum state will apply its own laws where application of the other state’s law would be contrary to the public policy of the forum state.¹⁵²¹ Under the public policy exception to the Full Faith and Credit Clause, a

¹⁵¹⁷ U.S. CONST. art. IV, § 1.

¹⁵¹⁸ Michael H. Gottesman, *Adrift on the Sea of Indeterminacy*, 75 IND. L.J. 527, 531 (2000).

¹⁵¹⁹ *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 276-77 (1935).

¹⁵²⁰ See, e.g., *Milwaukee County, mandate conformed to*, 81 F.2d 753 (C.C.A. 7th Cir. 1936) (recognizing rule, but holding that a judgment for taxes is entitled to full faith and credit); *Alaska Packers Ass’n v. Industrial Accident. Comm’n*, 294 U.S. 532 (1935).

¹⁵²¹ *Mullins v. M.G.D. Graphics Sys. Group*, 867 F. Supp. 1578 (N.D. Ga. 1994).

foreign law will not be enforced when it would violate a fundamental principle of justice, a relevant conception for good morals, or a deep-rooted tradition of the common weal.¹⁵²²

Now that Massachusetts, and two trial courts in Washington State,¹⁵²³ have held that gay and lesbian couples must be permitted to marry, courts are quite likely to be faced with the question of whether same-sex marriages fall within the “contrary to public policy” exception of the Full Faith and Credit clause.¹⁵²⁴

In New York, the State’s Attorney General has issued an Informal Opinion indicating that the civil unions and marriages entered into by gay men and lesbians in other states should be recognized in New York. Further, a state trial court has held that the survivor of a New York couple who entered into a civil union in Vermont was entitled to bringing a wrongful death claim following the death of his partner. This matter currently is on appeal and, therefore, the final resolution of this issue is not known.¹⁵²⁵

¹⁵²² *Blits v. Renaissance Cruise Lines, Inc.*, 633 N.Y.S.2d 933 (Sup. Ct. 1995). Among other instances, the U.S. Supreme Court has held that the full faith and credit clause does not require one state to enforce the penal laws of another, *Converse v. Hamilton*, 224 U.S. 243, (1912), but it has not determined whether a judgment for an obligation created by a penal law is entitled to full faith and credit, *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935).

¹⁵²³ See *Anderson*, 2004 WL 1738447; *Castle*, 2004 WL 1985215.

¹⁵²⁴ U.S. CONST. art. IV. This clause was implicated in a recent lawsuit where eight couples challenged the Massachusetts ban on marrying out-of-state couples. *Cote-Whitacre v. Department of Public Health*, No. 04-2656-G, slip op. at 15 (Suffolk Super. Ct. Aug. 18, 2004). By relying on a statute enacted in 1913 (Mass. Gen. Laws ch. 207 § 11 (1913)), barring from marriage any non-state-residents who could not get married in their home state, Massachusetts greatly has reduced the likelihood that other states will be faced with questions of full faith and credit or the constitutionality of the Defense of Marriage Act based on same-sex marriages performed there. See also *supra* Section II.B.2.a-b for a more complete discussion of this decision and the current situation in Massachusetts.

¹⁵²⁵ *Langan*, 765 N.Y.S.2d 411, 422 (Sup. Ct. Nassau Co. 2003). See *supra* Section I.H.1 for a discussion of *Langan*.

3. The Defense of Marriage Act

Regardless of whether the Full Faith and Credit Clause would require a state to recognize a same-sex marriage, Congress adopted the Defense of Marriage Act (“DOMA”), seeking to give states the ability not to recognize such marriages without having to rely on the Full Faith and Credit Clause’s limited exceptions. DOMA, enacted by Congress in 1996,¹⁵²⁶ provides:

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.¹⁵²⁷

Congress passed DOMA to assure that no state would “be obligated or required by operation of the Full Faith and Credit Clause of the United States Constitution to recognize [a same-sex] marriage or any right or claim arising from it.”¹⁵²⁸ In enacting the statute, Congress was acting under the asserted principle that the Full Faith and Credit Clause is applicable only as Congress determines,¹⁵²⁹ a contention that has sparked intense debate.¹⁵³⁰ If DOMA is constitutional, then states may deny

¹⁵²⁶ 1 U.S.C. § 7 (1994); 28 U.S.C. § 1738C.

¹⁵²⁷ 28 U.S.C. § 1738C. The statute also defines marriage for federal purposes “as being valid only between one man and one woman” (e.g., regarding the impact of immigration, social security, or tax laws, *inter alia*, on married couples; *see supra* Part I). Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (2000) and 1 U.S.C. § 7 (2000)); *see also* Jennifer Gerarda Brown, *Extraterritorial Recognition of Same-Sex Marriage: When Theory Confronts Praxis*, 16 QUINNIPIAC L. REV. 1 (1996).

¹⁵²⁸ H.R. Rep. No. 104-664, at 25, (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2929.

¹⁵²⁹ *Id.* at 26, *reprinted in* 1996 U.S.C.C.A.N. at 2930. Specifically, Congress cited the second sentence of Article IV Section 1, which states: “Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” *Id.*

¹⁵³⁰ *See, e.g.*, Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307, 309 (1998) (arguing that DOMA is an unconstitutional use of Congress’ power under the FFCC); Ralph U. Whitten, *The Original Understanding*

recognition of same-sex marriages solemnized in other states; if DOMA is unconstitutional, then courts may be called upon to determine whether the Full Faith and Credit Clause would require one state to give full faith and credit to same-sex marriages performed in other states.

Thus far, only one court has attempted to determine whether DOMA is constitutional. In *In re Kandou*, the federal Bankruptcy Court in Washington State upheld the constitutionality of DOMA when faced with a joint bankruptcy filing by a same-sex couple who had been married in British Columbia, Canada.¹⁵³¹ Finding that there is no fundamental right to same-sex marriage, and further that DOMA does not create sex-based categories, the court employed the rational basis test to conclude that the statute passed constitutional muster.¹⁵³²

4. The “Mini-DOMAs”

After the passage of the Federal DOMA, states began passing their own “mini-DOMAs,” which are state laws, enacted through either the legislature or a voter referendum, that explicitly state only marriages between a man and a woman will be

of the Full Faith and Credit Clause and the Defense of Marriage Act, 32 CREIGHTON L. REV. 255 (1998) (arguing that Congress properly employed its power to proscribe the effect of judgments under the Full Faith and Credit Clause). See *infra* Section III.F.3 discussing the constitutionality of DOMA.

¹⁵³¹ 315 B.R. 123 (Wash. 2004). In December 2003, the Court filed an Order to Show Cause for Improper Joint Filing on its own. In response, the surviving debtor (Ms. Ann C. Kandou passed away in March 2004) challenged the constitutionality of DOMA raising claims under the Tenth Amendment, the principles of comity, and the Fourth and Fifth (due process and equal protection) Amendments. She did not raise claims under the Full Faith and Credit Clause. *Id.* at 131.

¹⁵³² *Id.* at 144-48. The court acknowledged that in holding that there is no fundamental right to same-sex marriage, *id.* at 140, it “disagrees with the contrary conclusion recently reached by the Superior Court for King County, Washington.” *Id.* (citing *Anderson*). The court also noted more than once its personal disagreement with many of the arguments raised by the Trustee in support of DOMA, but concluded that it “cannot say that DOMA’s limitation of marriage to one man and one woman is not wholly irrelevant to the achievement of the government’s interest.” *Id.* at 144. *Cf. id.* at 146 (“This Court’s personal view that children raised by same-sex couples enjoy benefits possibly different, but equal, to those raised by opposite-sex couples, is not relevant to the Court’s ultimate decision.”).

recognized in a state. As of October 2004, forty states had enacted mini-DOMAs.¹⁵³³ In addition, some states seek to add bans on same-sex marriage to their constitutions.¹⁵³⁴ (New York State has taken neither of these actions.) These mini-DOMAs outlaw same-sex marriage outright, as opposed to the federal DOMA's choice component, which permits states to recognize or to refuse to recognize gay and lesbian marriages.¹⁵³⁵ It is difficult to discern the impact of the varying prohibitions against same-sex marriage, and whether, if challenged, they will withstand constitutional review. Presuming that these mini-DOMAs are constitutionally sound, however, they are persuasive evidence that their enacting states have a public policy against same-sex marriages for the purposes of the "Celebration Rule," the Full Faith and Credit Clause, and the federal DOMA.

Another question relating to DOMA and the mini-DOMAs is whether or how they will affect the rights of couples joined under alternatives to marriage (*e.g.*, civil union, domestic partnership). For example, although Vermont treats civil unions as

¹⁵³³ Marriage Watch, State Defense of Marriage Acts, *available at* <http://www.marriagewatch.org/states/doma.htm> (last visited August 30, 2004). *See supra* note 1135 for a list of the relevant state statutes. The eleven states which have not adopted mini-DOMAs are: Connecticut, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Wisconsin, and Wyoming. *Id.* In addition to mini-DOMAs, some states have opted to pursue state constitutional amendments. A state constitutional amendment does not preclude the passage of a mini-DOMA and vice-versa. States, however, may opt for both due to the legal certainty surrounding mini-DOMAs. *See supra* Sections II.B.7.a & b for a discussion of proposed state constitutional amendments and referenda.

¹⁵³⁴ *See supra* Sections II.B.2.b.ii and II.B.7.b. for a discussion of state constitutional amendments and referenda.

¹⁵³⁵ *Compare* ALA. CODE § 30-1-19(e) (1975) ("The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued."), *with* ALASKA STAT. § 25.05.013(a) (Michie Supp. 2000) ("A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state."); ARK. CODE ANN. § 9-11- 208(c) (Michie 1998) ("Any marriage entered into by persons of the same sex, where a marriage license is issued by another state or by a foreign jurisdiction, shall be void in Arkansas and any contractual or other rights granted by virtue of that license, including its termination, shall be unenforceable in the Arkansas courts.").

equivalent to marriage, other states do not necessarily extend their own laws, including those relating to custody and dissolution, to a Vermont civil union. A Connecticut court ruled that “a civil union is not a family relations matter” in that state, determining that it did not have jurisdiction to dissolve a Vermont civil union.¹⁵³⁶ In Texas, a court dissolved a civil union but set aside its order after intervention by the state Attorney General.¹⁵³⁷

The Georgia Court of Appeals enforced a visitation decree between a divorced heterosexual couple that forbade visitation with a parent living or staying with someone to whom they were not married;¹⁵³⁸ the mother, who had entered a valid Vermont civil union with her new same-sex partner, was denied visitation with her children because the civil union, in the eyes of the court, was not a marriage.¹⁵³⁹ In Virginia, a judge applied local law to decide a child custody case involving a same-sex couple who had entered into a civil union in Vermont.¹⁵⁴⁰ Under the civil union law, both women were recognized as the child’s legal parents. When one parent moved to Virginia and petitioned the Frederick County, Virginia court for full custody, the court determined that the civil union held no bearing on the award of custody, and awarded sole custody to the Virginia parent. When word reached Vermont, the Family Court judge in Vermont

¹⁵³⁶ *Rosengarten v. Downes*, 802 A.2d 170, 184 (Conn. App. Ct. 2002).

¹⁵³⁷ *See* Human Rights Campaign, *Dissolving a Vermont Civil Union*, *supra* note 970.

¹⁵³⁸ *Burns v. Burns*, 560 S.E.2d 47 (Ga. App. 2002).

¹⁵³⁹ *See id.* at 48-49 (“Moreover, even if Vermont had purported to legalize same-sex marriages, such would not be recognized in Georgia, the place where the consent decree was ordered and agreed to by both parties (both of whom are Georgia residents), and more importantly the place where the present action is brought.”).

¹⁵⁴⁰ *See, e.g.*, Justin Bergman, *Custody Fight May Test Va. Law; Mother Of Child Seeks Sole Custody After Civil Union To Woman Ends*, RICHMOND TIMES-DISPATCH, Aug. 24, 2004, at B2, available at 2004 WL 61912579.

who had granted joint-custody held the woman who went to Virginia in contempt. The Virginia judge, however, has asserted jurisdiction. The non-custodial parent has indicated that she will appeal the decision in Virginia.¹⁵⁴¹

¹⁵⁴¹ *Id.*

PART IV

CONCLUSIONS AND RECOMMENDATIONS

The House of Delegates in its January 24, 2003 resolution directed this Committee “to explore legislative or private legal solutions to the problems raised by the Association of the Bar of the City of New York report [entitled ‘Marriage Rights of Same-Sex Couples in New York’], and report back to the House of Delegates with concrete recommendations . . . and that the New York State Legislature thereafter enact legislation that clearly defines the legal rights and responsibilities of same-sex couples.”¹⁵⁴²

As noted in the introduction to this Report, the Committee recognizes that this debate is fraught on all sides with strong, sincere, and reasoned beliefs that make these issues difficult to resolve. The Committee recognizes further that it was not created to formulate or to opine on social policy, or to express any individual member’s personal values or opinions with regard to religious considerations or matters of “social justice.” Throughout the process of formulating this Report, therefore, the members of the Committee, individually and collectively, worked to prevent such concerns from affecting their legal analysis of the issues.

The Committee has undertaken its assignment with an understanding that the issue of whether same-sex couples should be permitted by the State to marry is often cast in terms of social policy, morality, or religion. Civil marriage, however, is inherently a legal construct. We, as a committee of lawyers, claim no special insights with respect to social policy, morality or religion. As a committee of lawyers, however,

¹⁵⁴² See *supra* Part I.

we are qualified to address and to make concrete recommendations with respect to the legal aspects of marriage of same-sex couples and related issues.

The Committee concluded, moreover, with a dissent of three members, that the mandate in the resolution of the House directed this Committee to make specific recommendations and so we do. In making our recommendations, however, we recognize that we speak only for ourselves as a special committee of the Association, not for the Association itself. Contrary to the position taken by our colleagues in the dissent, the majority of this Committee believes that, if there is a question of whether the Association should exercise some restraint in stating its position with regard to this issue, that is a question for the Executive Committee and the House of Delegates to address and answer.

The majority also takes issue with the dissent's statement that "whether, or to what extent, New York law should be changed to recognize same sex relationships, and whether to recognize them as partnerships, unions, or marriages, is a social policy matter, not a legal issue." Marriage is legislatively created and judicially interpreted. Indeed, as discussed throughout this Report, marriage and its attendant rights and responsibilities are essential legal creations and constructs. We therefore see no basis for casting the issues before the Committee as "social issues" that ought not to be addressed.

What follows is a discussion of the Committee's findings and recommendations, which are based upon the research and inquiries represented in the previous sections of the Report.

A. AN EVALUATION OF THE CURRENT LEGAL SITUATION

1. Disparities Exist in How the Law Treats Same-Sex and Opposite-Sex Couples

Over the course of the past two years, the Committee has looked broadly and deeply at the issue of the State’s legal treatment of marital relationships and of same-sex relationships. The Committee has performed extensive research and met with numerous knowledgeable practitioners and experts in the field.¹⁵⁴³ Based upon what the Committee learned in the course of those efforts, it has determined that significant and substantial differences exist in the ways in which the law treats married and unmarried couples. Because same-sex couples in New York currently do not have the ability to enter into marriages, those differences have an impact on same-sex couples directly and more severely than on opposite-sex couples, who generally have the ability to marry.¹⁵⁴⁴

For example, as shown in Part I of this Report, although the laws of intestacy protect the spouse of one who dies intestate, the same protection would not be available to that person’s same-sex partner, no matter how long the same-sex couple had been together, how intertwined their personal finances had become, or how much the surviving partner relied on the decedent for her or his financial support.¹⁵⁴⁵ Nor do gay men and lesbians enjoy the right to financial support from their same-sex partners, as do

¹⁵⁴³ The Committee heard from Erica Bell, Esq. and Carol Buell, Esq. (Weiss, Buell and Bell); Professor Arthur S. Leonard, New York Law School; Professor Teresa Stanton Collett (University of St. Thomas School of Law, Minneapolis, MN); Marc Scherzer, Esq. (Law Offices of Marc P. Scherzer); Judith Turkel, Esq. (Turkel and Forman, P.C.); and Evan Wolfson, Esq. (Freedom to Marry, Founder and Executive Director).

¹⁵⁴⁴ The Committee recognizes that there are certain other loving and long-term relationships (such as those between siblings and between grandparent and grandchild) for which there currently is no ability to have the same legal protections and obligations of a marriage, but addressing those relationships is beyond the scope of the Committee’s assignment and this Report.

¹⁵⁴⁵ See *supra* Section I.L.1.

married heterosexual people.¹⁵⁴⁶ Similarly, if a same-sex couple becomes estranged, the partners do not have the same rights to each other's and to commonly owned property, as do separating or divorcing opposite-sex couples; nor do same-sex couples have access to the processes and institutions through which such rights are protected.¹⁵⁴⁷ Because the real property ownership status of "tenancy by the entirety" is reserved exclusively for couples married at the time the property is purchased, certain important rights with regard to real property ownership are categorically denied even to long-term, financially interdependent same-sex couples.¹⁵⁴⁸ Same-sex couples also suffer from adverse financial consequences in connection with state taxation and health care coverage.¹⁵⁴⁹

Children of parents in same-sex relationships are not covered by the statutory duty of support that extends from stepparents to stepchildren.¹⁵⁵⁰ A lesbian or gay man does not have standing to sue for wrongful death if her or his partner is killed;¹⁵⁵¹ and the children of the decedent's partner, presuming no adoption by the decedent, would also be barred from maintaining such a suit, even if the decedent had been the sole financial provider for the family.¹⁵⁵²

In the case of a medical emergency, the wishes of a patient's long-term, same-sex partner may not be respected, and he or she may not be consulted about the

¹⁵⁴⁶ See *supra* Section I.A.1.

¹⁵⁴⁷ See *supra* Section I.R.1.

¹⁵⁴⁸ See *supra* Section I.F.1.

¹⁵⁴⁹ See *supra* Sections I.D and I.I.

¹⁵⁵⁰ See *supra* Section I.E.1.

¹⁵⁵¹ See *supra* Section I.H.1. In a case currently on appeal in New York, the trial court found that a gay man had standing to sue for his partner's wrongful death based on their Vermont civil union. See *Langan* 765 N.Y.S.2d 411.

¹⁵⁵² See *id.*

patient's condition or possible courses of treatment. Opposite-sex couples may avoid all of these adverse consequences by choosing to enter into a marriage.

2. Same-Sex Couples Cannot Themselves Adequately Remedy the Disparities

Certain of the rights and responsibilities attendant to marriage can be created privately between same-sex partners through contractual arrangements. An assessment of practical concerns, discussions with practitioners, and the observations and knowledge of the members of the Committee as practicing attorneys, have made it clear, however, that “lawyering” around the disparities noted in Part I of this Report is an inadequate remedy. First and foremost, many same-sex couples may not be aware that such disparities, or options for remedying them, exist, or be willing to address them, until they have become a real and present problem, if then. Second, many of the most important rights denied to same-sex couples cannot be preserved in this manner. Third, even with regard to those rights that a same-sex couple can preserve through private contracts, such contracts – if they are to be legally sufficient – often require the extensive assistance of private attorneys, making them prohibitively expensive for and effectively unavailable to large numbers of citizens. Fourth, even those same-sex couples affluent enough to afford private attorneys to handle these matters will find the process difficult and time-consuming and will have to remain vigilant to revise their contract-based efforts as laws may change and case law may develop. Fifth, even if such contractual arrangements are entered into, they remain subject to legal challenge by other interested parties.

The Committee observes further that even the existence of such a “piecemeal” method of preserving certain rights for same-sex couples highlights yet

another disparity in the law. Although many opposite-sex couples may lack the knowledge, sophistication or financial resources to pursue contractual arrangements to preserve their rights and responsibilities as a couple, they have protection provided to them by State law – *i.e.*, marriage. Same-sex couples do not have this, or an equivalent, state-based protection.

For all of these reasons, the Committee concludes that “work-arounds” in general are impractical and unsatisfactory means of obviating the kinds of disparities noted in this Report. If same-sex couples are to have access to many, if not all, of the rights and protections currently reserved for married couples, something more than reliance on the status quo or on *ad hoc*, contract-based scenarios is required.

B. SAME-SEX COUPLES SHOULD, AS A MATTER OF LAW, BE AFFORDED THE SAME RIGHTS AND RESPONSIBILITIES THAT OPPOSITE-SEX COUPLES CAN OBTAIN THROUGH CIVIL MARRIAGE

Setting aside for the moment the issue of how the court should rule on the constitutional issues presented, the Committee concludes that an analysis of recent changes to New York law shows that the State now has a responsibility to establish a comprehensive system whereby same-sex couples can gain access to the plethora of social and economic rights that are currently denied to them. At the present time, there is a dissonance between the disparate treatment of same-sex couples under many older statutes¹⁵⁵³ and the steps taken by the State over the last decade or so to reduce the disparities experienced by same-sex couples.

For example, in 2002, the State legislature passed the Sexual Orientation Non-Discrimination Act (“SONDA”) prohibiting discrimination on the basis of sexual

¹⁵⁵³ See *supra* Part I.

orientation in a variety of situations, including public accommodations, housing, and education. Although the law states explicitly that it is not to be construed to require or prohibit marriage rights for same-sex couples, it clearly evidences a public policy choice by the legislative and executive branches in favor of eliminating discrimination based on sexual orientation. Before SONDA was passed, the Executive Branch (both Governors Cuomo and Pataki) had issued executive orders prohibiting discrimination in state employment against gay men and lesbians; Governor Pataki later recognized the rights of surviving same-sex partners of those killed in the attacks on 9/11 and, later, of those killed as a result of any homicide.

Recent decisions of the New York Court of Appeals and other New York courts also evidence an evolving public policy favoring the recognition of rights for committed same-sex couples that were hitherto enjoyed solely or primarily by opposite-sex married couples. For example, the Court of Appeals has upheld second-parent adoptions as a means of creating a legal relationship between the non-biological or non-first-adoptive parent and his or her partner's children¹⁵⁵⁴ and previously had acknowledged that gay partnerships "comport[] . . . with our society's traditional concept of 'family.'"¹⁵⁵⁵

¹⁵⁵⁴ See *In re Jacob*, 86 N.Y.2d 651 (1995) (allowing second-parent adoption by biological parent's same-sex partner) (discussed *supra* at Section I.E.2). Although the Court of Appeals previously had not permitted a lesbian to seek visitation with the child she had been raising with her former partner for lack of a biological or legal relationship with the child, see *Alison D. v. Virginia M.*, 552 N.Y.S.2d 321 (1990), the Court's more recent decision permitting second-parent adoption, see *In re Jacob*, 86 N.Y.2d 651, makes clear that its concern is not with a child having two parents of the same sex, but rather the importance of establishing legal relationships between *de facto* parents and the children they are raising.

¹⁵⁵⁵ *Braschi*, 74 N.Y.2d at 211 (granting gay man the right to occupy his deceased same-sex partner's rent-controlled apartment, finding their relationship "comports . . . with our society's traditional concept of 'family'") (discussed *supra* at Section I.M.1). More recently, two town courts have doubted that the exclusion of same-sex couples from marriage could pass constitutional muster. See *People v. West*, 780 N.Y.S.2d 723 (Just. Ct. 2004); *People v. Greenleaf*, 780 N.Y.S.2d 899 (Just. Ct. 2004).

The Committee anticipates, moreover, that the State and other entities will be subjected to an increasing number of challenges by same-sex couples, not only seeking to be married, but also seeking to obtain the benefits and responsibilities readily available to their heterosexual, married counterparts as described in Part I of the Report. For the reasons stated in Part III of this Report, the Committee anticipates further that an increasing number of these challenges with respect to particular benefits and responsibilities, if not a challenge to the exclusion from marriage itself, will be sustained.

Even assuming, therefore, that the United States and New York Constitutions do not require a particular result with regard to extending marriage to same-sex couples, the Committee finds that New York has clearly determined – as evidenced by legislative, executive, and judicial acts – that the rights of gay men and lesbians, and of same-sex couples, should be protected. The Committee also finds that, as shown in Part I, the disparities created by civil marriage, as currently limited to opposite-sex couples, conflict with this determination.

In view of the strength of the arguments in favor of the constitutional entitlement of same-sex couples to marry and the recent New York policy changes extending to all persons, regardless of sexual orientation, fundamental rights with respect to such matters as employment, housing, education, and adoption, the Committee concludes that same-sex couples should, as a matter of law, be afforded the same set of comprehensive rights and responsibilities that opposite-sex couples can obtain through civil marriage. The Committee thus recommends that the New York State Legislature promptly enact legislation that will eliminate the existing statutory dissonance described

above by enacting legislation enabling same-sex couples to obtain readily the comprehensive set of rights and responsibilities attendant to civil marriage.

C. HOW TO AFFORD SAME-SEX COUPLES THOSE RIGHTS AND RESPONSIBILITIES

The question remains as to how the Legislature should allow same-sex couples to obtain readily the same set of comprehensive rights and responsibilities attendant to civil marriage. As set out in Part II, the Committee has reviewed various ways to address the differences and disparities in the legal treatment of same-sex and opposite-sex couples.

1. The Four Options

One method is an “*ad hoc*” or “piecemeal” approach, in which the Legislature and/or the judiciary would amend or interpret individual statutes one-by-one to rectify these differences in treatment. This method has the advantage of being the alternative least likely to arouse divisive political, religious and moral debate. At the same time, however, eliminating most or all of the disparities outlined in this Report by that means would likely entail repeated and divisive debates over the basic issues; further, it would be time consuming and a difficult, if not impossible, task to complete and would be an inefficient and costly use of judicial and legislative resources. Therefore, the Committee finds that an *ad hoc* or piecemeal approach would not be a sensible way to address the matter.

Another option would be to create “bundles” of rights conveyed in a package, such as the creation of a statewide domestic partnership registry that carried with it certain rights, such as that created by the State of California. Domestic partnership would provide a means to recognize same-sex couples as committed partners, *i.e.*, a family. The Legislature would be required to determine which rights and

responsibilities should accompany domestic partnership. The risk exists that the Legislature would not act expansively enough, or may rescind rights once given, thereby creating confusion and uncertainty and potentially harming individuals and families; and it is not clear how universally this partnership would be recognized by other states.

The remaining options are civil union and marriage. The creation of a civil union status would be efficient. It likely would require the Legislature to pass only a single bill creating the status and mandating that it carry the same rights and responsibilities as marriage. It could also help to avoid the debate over whether “marriage,” as such, is or should remain an exclusively heterosexual institution. There are, however, problems with this approach, too. First, as has been seen with Vermont civil unions, there is no guarantee that any civil-union-type arrangement would be recognized outside of New York; this uncertainty would run afoul of New York’s well-developed interest in seeing that the status and rights it grants its citizens are recognized and honored elsewhere. Second, the creation of a “separate but equal” alternative to which only same-sex couples are relegated will create additional constitutional concerns as discussed in *Goodridge II*.

Marriage is undoubtedly the most straight-forward and most comprehensive legislative option. The Legislature would need only to amend the Domestic Relations Law to explicitly open marriage to same-sex couples. This solution, it must be recognized, will conflict with the sensibilities and religious values of many. It has long been established, however, that marriage in the United States is a civil institution. Extending it to same-sex couples would be consistent, moreover, with existing State law recognizing the dignity and rights of its gay and lesbian citizens.

Although there is no guarantee that marriages between same-sex couples will be recognized by other jurisdictions, at a minimum, courts, lawyers and lay people all understand what “marriage” means, facilitating its use and acceptance within the State and elsewhere. As for the obverse, New York State shares a border with Massachusetts and with Ontario (one of the six Canadian provinces that permit same-sex couples to wed). It will not be long before couples residing in one of these locales – or any of the other Canadian provinces or European countries that grant marriage licenses to same-sex couples – travel or move to New York. Indeed, same-sex couples from New York can be wed in virtually all of these locations except Massachusetts.

Predictably, same-sex couples legally married elsewhere will begin to assert their rights in New York State. Already we have seen the surviving partner of a civil union assert a wrongful death claim on behalf of his partner who died following an automobile accident. Consistent with the opinion of the State’s Attorney General that “New York law presumptively requires that parties to such unions must be treated as spouses for purposes of New York law,” the trial court recognized that claim and the matter is on appeal.

As described in Part III of the Report, New York State traditionally interprets and applies the “Celebration Rule” and the Full Faith and Credit Clause of the Constitution quite liberally, so long as the marriage in question was entered into legally in another state. The only exceptions occur if recognition of the marriage were “expressly prohibited by statute, or the union is abhorrent to New York’s public policy.” Yet, even the “abhorrence exception” is remarkably narrow in New York. It would be

anomalous, at best, if New York were to recognize out of state unions, as it almost certainly will, without according similar right to its own citizens.

2. Constitutional Analysis

The Committee undertook a legal analysis of which option the New York State Legislature should enact to define the rights and responsibilities of same-sex couples, starting with an assessment of what rights are mandated by the United States or the New York Constitutions. In conducting its analysis, which is set out largely in Part III above, the Committee focused its attention on the Equal Protection clause and the Due Process clause of both documents.

The Equal Protection clause of both Constitutions is triggered whenever the government treats two groups differently.¹⁵⁵⁶ The differential treatment must relate to a legitimate state interest. Certain kinds of differential treatment (*e.g.*, treatment based on race or those implicating fundamental rights) are viewed with great suspicion by the courts; this examination is known as “strict scrutiny.” Differential treatment based on gender receives “heightened scrutiny.” Most other forms of differential treatment receive “rational basis” review. Although courts differ on the appropriate standard that should be applied when assessing the rights of gay men and lesbians, most courts have applied a “rational basis” review.¹⁵⁵⁷

Under Due Process analysis, if the fundamental right to marry applies to same-sex couples, strict scrutiny would be applied to assess the constitutionality of their

¹⁵⁵⁶ Equal Protection analysis also can be triggered when a fundamental right is at issue. The Committee opted, however, to conduct the fundamental rights analysis through the lens of the Due Process clause. *See infra* this Section and *supra* Sections III.B.3 and III.E.

¹⁵⁵⁷ *See supra* Section III.B.2.a.

current exclusion. If it does not apply to same-sex couples, then the rational basis standard would be applied.

In “rational basis” review, the differential treatment must be “rationally related to a legitimate state interest.”¹⁵⁵⁸ Statutes are presumed constitutional, and as a result, few laws fail the rational basis test.¹⁵⁵⁹ It is the burden of the claimant to show that a statute has no rational basis by negating each offered justification.¹⁵⁶⁰ The government must be able to offer some rational basis, some relevant and legitimate interest, however, in order to justify differential treatment.

The rational basis standard is the easiest of the three standards to satisfy; it is not so low, however, that the bare desire to harm a politically unpopular group, or a desire to show distaste towards or moral disapproval of that group, constitutes a legitimate government interest.¹⁵⁶¹ Indeed, although the Court nominally has continued to use the rational basis test where such harm is alleged, such as in *Romer v. Evans* and *Lawrence v. Texas*, it acknowledges using “a more searching” rational basis review in such contexts.¹⁵⁶²

¹⁵⁵⁸ See, e.g., *New Orleans v. Dukes*, 427 U.S. 297 (1976).

¹⁵⁵⁹ *Minnesota v. Cloverleaf Creamery*, 450 U.S. 1027 (1981). Legislatures need not convince courts that their judgments are based on empirically correct research. *Id.*

¹⁵⁶⁰ *Heller v. Doe*, 509 U.S. 312 (1993).

¹⁵⁶¹ *USDA v. Moreno*, 413 U.S. 528 (1973) (unconstitutional to deny food stamps to people living with persons unrelated to them, because the statute was motivated by a desire to harm hippies).

¹⁵⁶² See, e.g., *Lawrence*, 539 U.S. at 580 (noting that, when a law exhibits a desire to harm a politically unpopular group, the Court has applied a “more searching form of rational basis review to strike down such laws under the Equal Protection Clause”); *Romer v. Evans*, 517 U.S. 620 (1996) (holding that a bare desire to harm a politically popular group cannot constitute a legitimate governmental interest).

3. The Result of the Constitutional Analysis

The Committee finds that the legal disparities in the treatment of opposite-sex and same-sex couples raise serious Equal Protection issues under both the Federal and New York Constitutions.¹⁵⁶³ For the reasons set forth in Part III of the Report, the Committee concludes that the exclusion of same-sex couples from marriage is not likely to be upheld should strict scrutiny or, perhaps, even heightened scrutiny, be applied under either an Equal Protection or a Due Process analysis. The Committee concludes, however, that it cannot predict how the courts will rule if the rational basis standard is used to review a challenge to the exclusion of same-sex couples from marriage. Indeed, it is almost axiomatic to conclude that it is impossible to predict how the courts will rule on a complicated constitutional issue. Although unanimous in all that precedes in this Report, the members of the majority differ on whether they can conclude how the courts should rule on the constitutional question under a rational-basis test, with their two positions set forth below.

a. The Comprehensive Remedy Must Be Civil Marriage (Plurality of Five Members)

Like our fellow Committee members, the five of us in this plurality¹⁵⁶⁴ do not know and cannot predict with certainty how the courts of this State and Nation will resolve the constitutional issues related to whether same-sex couples have the right to civil marriage or, put another way, whether the right to marry may be withheld from same-sex couples. We do not believe, however, that the responsibility of the Committee

¹⁵⁶³ See *supra* Part III for a discussion of the standards applied under these different constitutions.

¹⁵⁶⁴ This part of the Majority is endorsed by Michael Whiteman, co-chair of the Committee, Melvyn Mitzner, Peter J.W. Sherwin, Harriette Steinberg and Lorraine Tharp.

as charged – to make “concrete recommendations” upon which the Legislature should take action – is constrained by what we can or cannot say of the likelihood of any particular judicial outcome or outcomes. The recommendations the Committee is charged to make were contemplated to be the basis for legislative and not judicial action. In taking action upon any subject, and especially one as laden with constitutional significance as the one this Committee was charged to examine, the Legislature shares with the judiciary and the executive a responsibility to make constitutional judgments. Accordingly, we believe that this Committee should offer its view of the proper resolution of the constitutional issues. Based upon the information and analyses in the first three parts of this Report, we believe that we are able to draw conclusions with respect to the constitutional issues of Equal Protection and Due Process, and we do so here.

Among the various reasons advanced to justify the exclusion of same-sex couples from civil marriage, stability of the family, support of children, facilitation of procreation and preservation of public resources are legitimate State interests. Try as we might, however, we are unable to discern how the exclusion of same-sex couples from marriage is rationally related to the fulfillment of those interests. To the contrary, inviting gay and lesbian citizens of our State to solidify their familial bonds through marriage actually furthers those interests without in any way diminishing them or the strength of the institution of civil marriage with regard to heterosexuals. Nor are we able to discern any other legitimate State interest advanced by the exclusion of same-sex couples from the opportunity to marry, or any constitutionally cognizable basis to exclude same-sex couples from the fundamental right to marry.

For these and other reasons set forth in the Committee’s Report, we conclude that excluding same-sex couples from the right to marry and from the benefits of civil marriage cannot pass even a rational-basis assessment under either the Equal Protection or the Due Process clauses of the Federal and State constitutions. Based upon that conclusion, we recommend that the Legislature enact legislation that expressly authorizes same-sex couples to marry under this State’s civil marriage statute.

b. The Comprehensive Remedy Can Be Domestic Partnership, Civil Union, or Civil Marriage (Four Members)

The four members of this Committee who join in this section,¹⁵⁶⁵ contrary to the other members of the majority, have concluded that it is also impossible to say with any degree of certainty how the State or federal courts should rule on this issue. As a constitutional matter, there may be sufficient merit to the assertions of a legitimate state interest in the well-being of children, or in the maintenance of the traditional understanding of marriage, or in other arguments, that preclude us from saying that the State or federal courts would reject a challenge.

We note that no federal court has found the limitation of marriage to one man and one woman to be unconstitutional. There is broad language in *Lawrence v. Texas* that would appear to support such a conclusion. Indeed, Justice Scalia, in his dissent, argued that the *Lawrence* decision undercut any gender limitation on marriage. The *Lawrence* majority, however, explicitly rejected Justice Scalia’s argument, stating that its holding did not reach the question of marriage. The Eleventh Circuit, in a post-*Lawrence* decision, upheld Florida’s prohibition on adoption by homosexuals, rejecting

¹⁵⁶⁵ This part of the Majority is endorsed by James B. Ayers, Hermes Fernandez, Lucille Fontana and Lucia Whisenand.

an Equal Protection challenge. The New York Court of Appeals, however, has upheld adoption by gay and lesbian couples and individuals.¹⁵⁶⁶

The Massachusetts Supreme Judicial Court overturned gender limitation on marriage on the basis of that State Constitution's Equal Protection Clause. In doing so, the Massachusetts Supreme Judicial Court held that the State equal protection clause was broader than its federal counterpart. We believe the New York Court of Appeals, by contrast, has not extended the reach of the New York equal protection clause beyond the federal clause.

The Vermont Supreme Court, in reaching its decision that led to the Vermont civil union statute, did not rely on that State's Equal Protection Clause, but on the Vermont Constitution's "Common Benefits" Clause. The New York and federal constitutions have no such equivalent.

As noted in Part III, a number of other state courts have rejected constitutional challenges to gender restrictions in state marriage laws.

We need not restate the arguments for and against the constitutionality of gender restrictions on marriage. They are well-stated in the majority and dissenting opinions in the Massachusetts Supreme Judicial Court's decision in *Goodrich*. Given the varying conclusions that courts have reached, however, we cannot confidently state how the New York or federal courts should rule on this question. Therefore, we cannot advise the House of Delegates that the current law either accords or conflicts with the State or federal constitution. We readily conclude, however, that the inability to come to a constitutional conclusion is not the proper end of the Committee's analysis. The law is in

¹⁵⁶⁶ See *supra* Section I.E.2 for a discussion of adoption by same-sex couples.

need of reform, whether or not that reform is constitutionally mandated. Domestic partnership, civil union, and civil marriage each would achieve our objective of reform, and the Legislature should enact one of these options.

D. END WORD

As stated above, five members of the majority believe that marriage is the constitutionally mandated means for extending to same-sex couples the rights, benefits, and obligations now afforded married opposite-sex couples. Four members of the majority believe that marriage as presently constituted may be able to pass a rational-basis test. In view of the strength of the arguments in favor of the constitutional entitlement of same-sex couples to marry and the recent New York policy changes extending to all persons, regardless of sexual orientation, fundamental rights with respect to such matters as employment, housing, education, and adoption, however, all nine members of the majority strongly believe that the Legislature should enact comprehensive legislation extending to same-sex couples the rights now extended to opposite-sex couples. It is important and appropriate, therefore, that the Legislature provide for the legal protection and recognition of same-sex relationships under State law and afford same-sex couples the ability to obtain the comprehensive set of rights and responsibilities attendant to civil marriage.

DISSENT

We are constrained, reluctantly, to dissent from each of the Part IV recommendations joined in by the other members of the Committee.¹⁵⁶⁷

We do so notwithstanding that (a) we agree, for the most part, with the Report's analysis of the current state of the law, (b) we agree with the concept enunciated by all of the other members of the Committee that it would be good policy for the State to enact a comprehensive legislative solution for the myriad legal issues encountered by same sex couples but which are not encountered by their heterosexual counterparts, and (c) we agree that there are no valid reasons for distinguishing between same sex and heterosexual couples with respect to status. However, we dissent because the recommendations made in Part IV of the Report by the other members would thrust the Association headlong into areas where it should not tread.

Parts I and II of the Report contain an extraordinary exposition of the historical and legal context of the marriage relationship in New York and elsewhere, and a comprehensive identification of various legal issues which are presented for same sex couples, but not to heterosexual couples who choose to marry. Part III seeks to analyze the legal issues applicable to recognition of marriages by same-sex couples. It analyzes legal arguments which have and may be made as to constitutional and other legal issues which are relevant to this subject. While we do not agree with every part of those discussions, we refrain from commenting on those various differences as they are not relevant to the ground upon which we disagree with the recommendations in Part IV.

¹⁵⁶⁷ The dissent is submitted by A. Thomas Levin, co-chair of the Committee, Steven C. Krane and Emily Franchina.

The New York State Bar Association is an outstanding organization of lawyers, who hold many and diverse views on social issues and philosophy. We are bound together by our commitment to the legal system, and the rule of law. As an organization of lawyers, we are duty bound to speak out (as we have frequently in the past) with respect to legal issues which affect us as attorneys, which affect the way in which we represent and advocate for our clients, and where lawyers have some particular expertise or knowledge greater than that of non-lawyers.

This self-imposed limitation on our areas of focus has been very effective for us as an organization. It has permitted us to be strong advocates for proposals to improve the judicial system, to enhance and improve the administration of justice, and to thwart proposals which would do harm to the public interest or to our profession.

Identification of legal issues which particularly affect same sex couples is an appropriate activity for a Bar Association, as is an analysis of, and recommendation of, ways to address those issues within the current legal framework of marriage laws. However, whether, or to what extent, New York law should be changed to recognize same sex relationships, and whether to recognize them as partnerships, unions, or marriages, is a social policy matter, not a legal issue with respect to which lawyers have special expertise.

It is very likely that we each have individual views on this subject, and we ought individually to express them, and advocate for them, wherever it would be effective to do so. But to take a position as an organization of lawyers in such matters is a dangerous leap into matters of social policy, an area where our Association should not tread.

Our Association has established itself as an inclusive organization. We welcome participation by all lawyers, regardless of background or interest, and every lawyer has full opportunity to participate in our professional activities without regard to race, creed, national origin, gender, sexual orientation, marital status, disability, age, or any other criteria irrelevant to an individual's professional activity or abilities. We recognize that there is simply no room in our pluralistic society for artificial restrictions which prevent anyone from enjoying the same rights and privileges as anyone else similarly situated, without sufficient reason.

However, in respecting and protecting the rights of all, professional associations (and particularly NYSBA) necessarily walk a fine line with respect to predominantly social issues. NYSBA historically has walked this line by limiting itself to matters where we attorneys have a particular expertise or knowledge, so that we are qualified to advocate for improvements in the law and the legal system. We properly have declined to take positions on issues which are, at their heart, more social than legal.

Clearly, there are some issues (of which this is one) which are inextricably intertwined with the religious beliefs or cultural attitudes of our members, and the general public, and which tend to arouse strong reaction from advocates on all sides. For NYSBA to take positions on such issues, when the positions are not centered in some particular expertise possessed by lawyers, is ill-advised, and potentially detrimental to the health and vitality of the organization.

In our own Association, we have seen this principle at play in the past. The House adopted a policy resolution with respect to capital punishment, which expressly disavowed any position on the public policy issue whether New York should

have capital punishment, but urged that if the Legislature were to decide that capital punishment should be authorized, the legislation should include necessary safeguards for due process and fair administration. By so doing, NYSBA recognized its status as an organization of lawyers. It did not take a position on the underlying public policy issue, as to which lawyers have no greater expertise than others, but focused its comments on the legal issues which needed to be addressed if the public policy debate were resolved in favor of capital punishment.

Once we step over the line into public policy issues, there are no limits to where we will be invited to go. There are many such issues at the heart of current public discourse. To name only a few: gun control; stem cell research; abortion rights; constitutional amendments to restrict free speech, due process rights, or desecration of the flag; public funding of faith-based initiatives or displays; the extent to which race should be a factor in college and law school admissions. All these issues involve laws, and involve strongly held views. What they all have in common is that they are discussions to which none of us bring any particular expertise by virtue of our legal education, training and experience. Rather, each is, at its heart, a social issue before it is a legal issue.

There is doubtless a temptation to ignore this boundary when the proposed position is in accord with our personal view. In such cases, we are likely to reach for reasons why the issue is one of law, not social policy. We suggest that the proper test in such instances is to imagine the Association taking the opposition's position, and examining whether we would still agree that it is properly one of law rather than social policy. We should not be swayed by whether we are in personal agreement with the

recommendations in Part IV. Rather, we need to consider our position as an organization of lawyers. Where the proposed action goes beyond remediation of a recognized legal problem, and reaches into recommendations for legislation which would recognize as a matter of public policy the status of relationships not presently recognized in the law, we go too far as an organization.

The other members of the Committee implicitly recognize this limitation on Association activity, but seem to indicate that the social policy already has been established by the Legislature in various legislative enactments already implemented. Thus, the contention that not to go further would create a “dissonance” with existing State policy. This position stretches the scope of existing law too far, and even beyond what the existing legislation specifically states.

That the Legislature has enacted various laws, such as the Sexual Orientation Non-Discrimination Act (SONDA), to prevent discrimination on the basis of individual sexual orientation is evident. The Legislature also has enacted other measures which would afford same sex couples, and other unmarried couples, various rights or privileges, without bestowing any formal status upon their relationships. Indeed, in so doing, the Legislature has expressly disclaimed any intention in those laws to recognize the status of same sex relationships. The reasonable conclusion to be drawn is that there is State policy to prohibit certain types of discriminatory conduct, and bestow certain benefits or privileges, all without regard to sexual orientation, but there is no State policy at this time with respect to recognition of the underlying relationships.

The evidence for existing policy relied upon in the other recommendations is simply too ephemeral to justify the conclusion that a comprehensive solution to all

legal issues faced by same sex couples is the proper legislative direction. Rather, whether any particular legal status should be afforded to same sex relationships remains an undecided social policy issue in this State, and the question is not a proper subject for our Association.

The Committee's research indicates that the only state bar association which has taken a position for or against same sex marriage is the Massachusetts Bar Association. The fact that neither any other state bar association nor the ABA has taken such a position is indicative of the wisdom of the traditional approach to refrain from involvement in disputed social policy issues. The disengagement of the ABA from this issue speaks volumes, as it is an organization not historically as restrained as NYSBA in its involvement in social policy issues. Yet, the ABA has limited its involvement to opposing a constitutional amendment to ban same sex marriage, a position predicated upon legal grounds relating to preemption of state authority, a matter as to which lawyers do have knowledge greater than the general public.

The public debate which has raged across the nation over this issue makes self-evident that recognition of same sex relationships, regardless of the extent of recognition, implicates religious, political, social, and other values. Because lawyers lack special expertise on whether such relationships should have legal recognition, the Committee should refrain from making recommendations which thrust the Association into this debate.

We are cognizant of the charge given to the Committee by the House. One of us, in fact, is the draftsman of that charge. We believe that the Committee can, and should, make a report within the framework of that charge, but also consistent with

its obligations to the Association as an entity. That entity obligation transcends our individual views, and even our collective view(s), as to what the proper policy should be with respect to the legal status of same sex relationships.

The Committee would fulfill its charge, and act within its proper bounds, by issuing Parts I, II and III of the Report. These include materials which identify and quantify legal issues which affect same sex couples and which do not similarly affect couples married under current law. Part IV should recommend that the Legislature determine whether, and to what extent, those disparities should be addressed, and summarize the advantages and disadvantages of each proposal which the Committee believes merits consideration. As in the case of capital punishment, the Association can address the details of any such future legislation once the Legislature sets out to determine the appropriate State policy. The Committee can review, and analyze, and comment on the positive and negative aspects of such legislation, without embroiling the Association in the public policy debate over the legal status to be accorded same sex relationships. The Committee, and the Association, should go that far, and no further.

To the extent that Part IV notes that the House is the ultimate arbiter of Association policy, and can choose whether or not to endorse the Report and its conclusions, the Report is self-evident. However, that does not justify the Committee going into areas where the Association should not act. The Committee is part of the Association, and the Committee is ill-advised to make a social policy recommendation to the House, especially when at the same time it recognizes that the House has the right to reject that approach. The Committee is inherently charged with acting in the best

interests of the Association, and by recommending involvement in a social policy issue, it does not fulfill that charge.

There can be no doubt, and Part III of the Report makes clear, that there are a myriad of legal issues encountered by same sex couples which are not encountered by married heterosexual couples. This may be an injustice, and may be unfair, to the point where legislative action to provide a remedy is appropriate. Or, judicial action may resolve the constitutional issues in a way which will require legislative action. That action could be in any of a variety of forms, by addressing particular problems or by a more comprehensive approach. Because any legislation to grant or clarify rights of same sex couples involves a policy determination by the Legislature whether and to what extent to give legal recognition to those relationships, the Association should not at this time put forward any particular recommendations for legislation until that policy determination has been made.

Where legal problems exist, lawyers should propose legal solutions. But the public policy aspects overwhelm the legal considerations when we reach the core issues at the heart of the public debate: whether and to what extent should same sex relationships be recognized as marriage relationships or relationships which equate to marriage. The Association should properly be heard with respect to the legal issues and the legal solutions for those issues, individually or collectively. But the Association should refrain from entering the heart of the debate over the proper status for same sex relationships.

Each view expressed in Part IV is based upon a conclusion that a “comprehensive solution” is required. Despite the disclaimer by the proponents, this

conclusion involves a social policy determination which has not yet been made by the State. A recommendation for a “comprehensive solution” necessarily requires the conclusion that the status quo must change, thus going beyond the proper Association role. This is made clear in the recommendations that legal recognition be given to same sex relationships either as marriage or as equivalents to marriage, which clearly require a social policy determination which is beyond the legal expertise of this Association. While we may personally agree that such legislation would be good public policy, we can and do express that view as individuals. The Association should not endorse it as a body.

The plurality recommendation takes this ill-advised position even further, and recommends that the Association endorse only one outcome: recognition of same sex marriage. This recommendation is based on the prediction, or preference, for a judicial conclusion that the Constitution requires equal treatment of same sex and opposite sex couples. Here again, we have no personal objection to a decision by the Legislature to endorse same sex marriages. And, if it were up to us, we would conclude that this is constitutionally required, although we suspect that the courts will rule differently. Nonetheless, the Association should neither recommend such social policy to the Legislature, nor should it make any recommendations which are based upon predicted or preferred results in constitutional matters presently under review by the courts.

The recommendations of this Committee, and the Association’s action on those recommendations, should be based on the current state of the law, and limited to proposals for legal reform based on our expertise and knowledge as lawyers. This does not require, or justify, the proposed venture into the question of the proper legal status, if any, to be afforded same sex relationships.

The Association should not put forward recommendations for laws addressing the legal problems faced by same sex couples in committed relationships, who are unable to resolve those issues because they cannot enter into marriage under current law, until such time as the Legislature has resolved the policy issue whether, and to what extent to recognize those relationships, or until the courts have concluded that such relationships are entitled to constitutional protection. The Association should not go into areas where lawyers have no special expertise. We should not address the social policy issue whether those relationships should be granted formal legal status as marriage by the same or another name. It is not the proper function or duty of this Association to make that choice, and advocate for it, for us or any other member.

Therefore, we reject so much of the recommendations in the Report as expresses any policy judgment, or any preference or recommendation, whether the Legislature should grant a formal legal status to same sex relationships by marriage, domestic partnerships, civil unions, or any other name. Rather, we recommend that the Association call upon the Legislature to determine the appropriate public policy with respect to whether, and to what extent, such relationships should have legal recognition. At that time, this Association would be prepared, and would be acting within its proper purpose, to evaluate the advantages and disadvantages of the various possible measures, and make appropriate recommendations.

This approach is in keeping with our status as lawyers, and as an association of lawyers. It uses our legal skills of analysis, our knowledge, and our experience, to propose solutions to real problems with respect to which we, as lawyers, do have particular expertise more extensive or relevant than the public at large. To do so,

we need not involve ourselves in the larger social policy issues, where we have no such particular expertise.

The Report should go no further than this. It should not have the Association enter the realm of social or public policy by recommending that the legal status of same sex relationships be recognized in the same manner as marriage, or an equivalent to marriage, or otherwise. Whether or not to support that position is a personal decision for each of us, a choice to be made by our elected representatives, and an issue to be determined on constitutional standards by our courts. Because the other recommendations each go beyond that proper boundary, we dissent.

APPENDIX A

NEW YORK MARRIAGE LICENSE¹⁵⁶⁸

N.Y. Dom. Rel. Law § 14.

Town and city clerks to issue marriage licenses; form

The town or city clerk of each and every town or city in this state is hereby empowered to issue marriage licenses to any parties applying for the same who may be entitled under the laws of this state to apply therefor and to contract matrimony, authorizing the marriage of such parties, which license shall be substantially in the following form:

State of New York
County of _____
City or town of _____

Know all men by this certificate that any person authorized by law to perform marriage ceremonies within the state of New York to whom this may come, he not knowing any lawful impediment thereto, is hereby authorized and empowered to solemnize the rites of matrimony between _____ of _____ in the county of _____ and state of New York and _____ of _____ in the county of _____ and state of New York and to certify the same to the said parties or either of them under his hand and seal in his ministerial or official capacity and thereupon he is required to return his certificate in the form hereto annexed. The statements endorsed hereon or annexed hereto, by me subscribed, contain a full and true abstract of all of the facts concerning such parties disclosed by their affidavits or verified statements presented to me upon the application for this license. This certificate is to be returned addressed to the undersigned at _____, (Street), _____, _____ (City, Town, Village) (State).

In testimony whereof, I have hereunto set my hand and affixed the seal of said town or city at _____ this _____ day of _____ nineteen ____, at ____ .m.

Seal.

¹⁵⁶⁸ N.Y. Dom. Rel. Law § 14 (McKinney 2003).

The form of the certificate annexed to said license and therein referred to shall be as follows:

I, _____ a _____, residing at _____ in the county of _____ and state of New York do hereby certify that I did on this _____ day of _____ in the year, nineteen ____ at ____ .m, at _____ in the county of _____ and the state of New York, solemnize the rites of matrimony between _____ of _____ in the county of _____ and state of New York, and _____ of _____ in the county of _____ and state of New York in the presence of _____ and _____ as witness, and the license therefor is hereto annexed.

Witness my hand _____ in the county of _____ this _____ day of _____, nineteen ____.

In the presence of _____

There shall be endorsed upon the license or annexed thereto at the end thereof, subscribed by the clerk, an abstract of the facts concerning the parties as disclosed in their affidavits or verified statements at the time of the application for the license made in conformity to the provisions of section fifteen of this chapter.

There shall also be stated upon the license the exact period during which the marriage may be solemnized.

The license issued, including the abstract of facts, and the certificate duly signed by the person who shall have solemnized the marriage therein authorized, shall be returned by him, and where the marriage is solemnized by a written contract, the judge before whom acknowledgment is made shall forward such contract and marriage license to the office of the town or city clerk who issued the license within five days succeeding the date of the solemnizing of the marriage therein authorized and any person or persons who shall wilfully neglect to make such return within the time above required shall be

deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars or more than fifty dollars for each and every offense.

When a marriage is solemnized by a city, town or village justice outside of the territorial jurisdiction in which such justice was elected or appointed, as provided in subdivision six of section eleven of this chapter, there shall be affixed to such license prior to filing, the official or common seal of the court or of the municipality in which such justice was elected or appointed.