FOREWORD: THE NEXT NORMAL—DEVELOPMENTS SINCE MARRIAGE RIGHTS FOR SAME-SEX COUPLES IN NEW YORK

*JAY WEISER**

I. INTRODUCTION

The Association of the Bar of the City of New York issued its Report on Marriage Rights for Same-Sex Couples in New York (2001),[1] calling for the recognition of same-sex marriages, not long after Vermont enacted legislation giving same-sex couples the right to enter into civil unions. The Report comprehensively treated state and federal constitutional and statutory issues surrounding the recognition of same-sex marriage in New York, and served as a template for similar efforts elsewhere. In connection with the Columbia Journal of Gender and Law's publication of the Report, an update seemed appropriate because the ground has shifted in New York and in American society. The 2000 United States Census revealed 594,000 same-sex couples nationwide, with 46,490 in New York alone[2]—figures that may undercount the true number of couples by as much as 62 percent.[3] Reflecting a gay baby boom accelerating over the past

---

* Jay Weiser is Associate Professor of Law at Baruch College's Zicklin School of Business in New York, and was Project Coordinator, Co-Editor, and Contributor for the Association of the Bar of the City of New York's Report on Marriage Rights for Same-Sex Couples in New York. The opinions expressed in this Foreword are his own, and not those of the Association. Thanks to Peg Brinig and Adam Aronson for directing me to unreported civil union comity cases.

[1] Report on Marriage Rights for Same-Sex Couples in New York, 13 Colum. J. Gender & L. 70 (2004) [hereinafter Report].

[2] Tavia Simmons & Martin O'Connell, Census 2000 Special Reports: Married-Couple and Unmarried-Partner Households: 2000 4 (2003), *available at* http://www.census.gov/prod/2003pubs/censr-5.pdf. This marks an astonishing 314 percent increase from the number of unmarried same-sex couples reported in 1990. David M. Smith & Gary J. Gates, Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households; A Preliminary Analysis of 2000 United States Census Data; A Human Rights Campaign Report 2 (2001). The Census Bureau warns that the 1990 figures are not comparable to the 2000 figures because of editing changes. Simmons & O'Connell, *supra*, at 1 n.2. Some of the increase is also likely due to more same-sex couples being willing to self-identify. Smith & Gates, *supra*, at 2.

[3] Smith & Gates, *supra* note 2, at 2-3. *See also* Human Rights Campaign Foundation, Parenting, *at* http://www.hrc.org/index.html (last visited Dec. 5, 2003) (undercount likely based on comparisons to other studies estimating number of lesbians and

decade, 34.3 percent of female same-sex households and 22.3 percent of male households have children nationwide (the figures for New York are 34.3 percent and 21.7 percent, respectively). These rates are not that much below the national rate for married opposite-sex couples of 45.6 percent and of unmarried opposite-sex couples of 43.1 percent.[4] Using reasonable estimates, this would suggest around 400,000 children being raised by same-sex couples nationwide, and 31,000 in New York.[5] It is increasingly clear that same-sex couples are here to stay as a significant factor in American life—1 percent of all coupled households in the United States, and 1.3 percent in New York.[6]

There are facts on the ground elsewhere. Canada,[7] Belgium,[8] and Zurich[9] have now joined the Netherlands[10] in legalizing same-sex marriage,

---

gays, and number of same-sex couples; confusing form and fear of discrimination may explain gap).

[4] Simmons & O'Connell, *supra* note 2, at 9.

[5] To arrive at these figures, we would start with the Census figures for (1) the number of unmarried same-sex couples of each sex and (2) the percentage of unmarried same-sex couples of each sex with children. The 2000 Census also says that the average family with its own children under eighteen has 1.87 children. U.S. Census Bureau, Statistical Abstract of the United States: 2002 at 52 *available at* http://www.census.gov/prod/2003pubs/02statab/pop.pdf (table 57, entitled Families by Type, Race, and Hispanic Origin: 2000). If we next assume that the average same-sex family with children under eighteen has 1.5 children—not unreasonable, since the lesbian and gay baby boom is of recent vintage, and same-sex couples cannot have children by accident—this would give us 251,433 children of unmarried same-sex couples nationally and 19,290 in New York. If, following the Smith and Gates analysis, *supra* note 2, we further assume a 62 percent undercount of unmarried same-sex couples by the Census, that would mean 405,537 children of unmarried same-sex couples nationally and 31,112 in New York.

There is a huge gap between these figures and the estimates for the number of children with at least one gay parent. The latter vary wildly. *See* Sean Cahill et al., Family Policy: Issues Affecting Gay, Lesbian, Bisexual and Transgender Families 69 (2003), *available at* http://www.ngltf.org/downloads/familypolicy/familypolicy-chap04.pdf (one to fourteen million); Joan Biskupic, Same-Sex Couples Are Redefining Family Law in USA, USA Today, Feb. 18, 2003, at 1A (six to twelve million cited in various judicial proceedings). The 2000 Census figures on same-sex couples with children figures exclude (1) single-parent same-sex families with children and (2) opposite-sex marriages where one partner is gay or lesbian and there are children. This accounts for some of the gap. The Census figures, however, cast serious doubt on the upper-range estimates of children with at least one gay parent.

[6] Simmons & O'Connell, *supra* note 2, at 4. The increased attention to same-sex couples extends to the animal kingdom. Dinitia Smith, Love That Dare Not Squeak Its Name: Homosexuality Among Animals Is Common, N.Y. Times, Feb. 7, 2004, at B7 (gay chinstrap penguins in long-term relationship hatch egg together and raise chick in New York City's Central Park Zoo).

[7] Halpern v. Toronto (City), [2003] O.A.C. 276; EGALE Canada Inc. v. Canada, [2003] B.C.L.R. (4th) 1; Hendricks c. Québec (Procureur Général), [2002] R.J.Q. 2506.

[8] Gay.com/PlanetOut.com Network, Belgium Approves Same-Sex Marriage, Jan. 30, 2003, *at* http://gay.com/news/article.html?2003/01/30/1.

and in Goodridge v. Department of Public Health, the Massachusetts Supreme Judicial Court required the enactment of same-sex marriage legislation.[11] The European Union's Parliament has required member states to grant same-sex marriage and domestic partnership rights, and Germany has adopted domestic partnership legislation.[12] The governments of Taiwan and the United Kingdom are also introducing legislation to recognize same-sex couples.[13] In California, even before the recent expansion of domestic partnership into a near-equivalent to marriage, there were approximately 21,000 same-sex and opposite-sex registered domestic partnerships,[14] and New Jersey, too, has instituted domestic partnership.[15] In the first six months after legalization of marriage, nearly 2,000 same-sex couples were wed in the Netherlands, and 1,500 same-sex couples in Canada.[16] Nearly 5,700 same-sex couples had entered into Vermont civil unions as of June

---

[9] Gay.com U.K., Zurich Voters Approve Gay Marriage Rights, Sept. 23, 2002 (on file with author).

[10] On same-sex marriage in the Netherlands, see Nancy G. Maxwell, Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison, 18 Ariz. J. Int'l & Comp. L. 141 (2001); Marilyn Sanchez-Osorio, The Road to Recognition and Application of the Fundamental Constitutional Right to Marry of Sexual Minorities in the United States, the Netherlands, and Hungary: A Comparative Legal Study, 8 ILSA J. Int'l & Comp. L. 131 (2001); Scott C. Seufert, Going Dutch?: A Comparison of the Vermont Civil Union Law to the Same-Sex Marriage Law of the Netherlands, 19 Dick. J. Int'l L. 449 (2001).

[11] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948-49 (Mass. 2003); Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

[12] Jon ben Asher, E.U. Members to Recognize Gay Couples, 365Gay.com, Feb. 12, 2003 (on file with author); Reuters, Same-Sex Partners Win Legal Status in Germany, N.Y. Times, Aug. 2, 2001, at A3.

[13] Lilian Wu, Presidential Team Unveils Major Bills on Human Rights, Central News Agency–Taiwan, Nov. 8, 2003 (marriage); Marie Woolf, The Queen's Speech: Gay Rights, The Indep., Nov. 27, 2003, at 11 (Labour government proposes civil union; Conservative party will not oppose).

[14] Gregg Jones & Nancy Vogel, Domestic Partners Law Expands Gay Rights, L.A. Times, Sept. 20, 2003, at 1.

[15] New Jersey Domestic Partnership Act, 2003 N.J. Sess. Law Serv. ch.246.

[16] Associated Press, Dutch Release Historic Gay Marriage Stats, Dec. 12, 2001; Clifford Krauss, Canada's View on Social Issues is Opening Rifts with the U.S., N.Y. Times, Dec. 2, 2003, at A1. An estimated 8 percent of new Dutch marriages are same-sex. Keith B. Richburg, Gay Marriage Becomes Routine for Dutch: Two Years After Enacting Law, Up to 8 Percent of Weddings Are Same-Sex Unions, Wash. Post, Sept. 23, 2003, at A20. In addition, following a new San Francisco city directive, more than fifty lesbian and gay couples were wed there on February 12, 2004, notwithstanding that California bans same-sex marriage. Carolyn Marshall, More than 50 Gay Couples Are Married in San Francisco, N.Y. Times, February 13, 2004, at A24.

29, 2003.[17] Canada and Vermont are becoming magnets for same-sex couples from other jurisdictions seeking recognition of their partnerships: 15 percent of the 362 same-sex marriage licenses issued in the five weeks after Canada legalized same-sex marriage were issued to United States couples, and a whopping 85 percent of those who had obtained a Vermont civil union license in the first three years were out-of-staters.[18]

The United States Supreme Court's recent decision in Lawrence v. Texas, holding Texas's gay sodomy law unconstitutional,[19] led to instant speculation on the potential constitutional implications for marriage. Lawrence and Goodridge energized conservative organizations to press for a United States constitutional amendment to ban same-sex marriage,[20] and one poll showed that 50 percent of Americans supported such an amendment in August 2003.[21] An October 2003 Pew Research Center poll found that only 32 percent of Americans favored gay marriage, while 59 percent opposed it.[22] Still, in much of American society, gay relationships are being normalized. A September 2003 USA Today/CNN/Gallup poll showed that 50 percent of Americans said that allowing gay marriage would either improve society or have no effect, with the percentage rising to 67 percent for those from eighteen to twenty-nine years old.[23] Even some

---

[17] Patricia Wen, A Civil Tradition: Data Show Same-Sex Unions in Vt. Draw a Privileged Group, Boston Globe, June 29, 2003, at B1.

[18] *See* Lornet Turnbull, Gay Marriage: Couples Head North for Validation, Columbus Dispatch (Ohio), Aug. 5, 2003, at 1A; Wen, *supra* note 17; *see also* Weddings/Celebrations: Richard Mohr, Robert Switzer, N.Y. Times, Nov. 30, 2003, at 19 (announcement of Toronto wedding by Illinois gay couple); www.civilmarriagetrail.org (last visited Dec. 6, 2003) (organizing New York gay couples to travel to Canada for weddings).

[19] 123 S.Ct. 2472 (2003).

[20] David D. Kirkpatrick, Conservatives Using Issue of Gay Unions As a Rallying Tool, N.Y. Times, Feb. 8, 2004, § 1, at 1. Ohio responded with one of the nation's strictest bans on the recognition of same-sex relationships. James Dao, Ohio Legislature Votes to Ban Same-Sex Unions, N.Y. Times, Feb. 4, 2004, at A12.

[21] Alan Cooperman, Sodomy Ruling Fuels Battle over Gay Marriage, Wash. Post, July 31, 2003, at A1; Shawn Hubler, It Was a Surprisingly Quick Engagement: Acceptance of Gays is Now Widespread—But Same-Sex Marriage Could be the Biggest Battle, L.A. Times, Aug. 31, 2003, at 1.

[22] Christopher Curtis, U.S. Public is 50-50 on Gay Marriage, Gay.com/PlanetOut.com Network, Oct. 7, 2003, *at* http://gay.com/news/article.html?2003/10/07/2; Eric Johnston, U.S. Poll: Gay Marriage Opposition Rises, Gay.com/PlanetOut.com Network, Nov. 19, 2003, *at* http://gay.com/news/article.html?2003/11/19/2. There was a dramatic drop in support for gay marriage and civil union after the Supreme Court decision in Lawrence and the Massachusetts Supreme Judicial Court decision in Goodridge. Johnston, *supra*.

[23] *See* National Gay and Lesbian Task Force, Recent National Polls on Same-Sex Marriage, Civil Unions, *available at* http://www.ngltf.org/marriagecenter/PublicOpinion.pdf (last visited Jan. 22, 2004).

conservatives now support marriage or civil union,[24] and some opponents of Lawrence and Goodridge leave room for recognition of same-sex relationships.[25] Although the contest remains intense and the result uncertain, the laggard United States appears to be following the gradient of other Western nations, identified by William Eskridge, that begins with repeal of sodomy laws, progresses through the passage of nondiscrimination legislation, and culminates in legal recognition of same-sex relationships.[26] Analyzing the changing legal and social environment since the date of the Report, this Foreword looks at developments worldwide and in New York.

II. NEW YORK'S PUBLIC POLICY AFTER SEPTEMBER 11

The Report was issued a few months before the September 11, 2001, attacks. Those attacks led to widespread news coverage of gays and lesbians whose long-time partners had been murdered by the terrorists, and to sympathy for the survivors.[27] In response, Governor George Pataki extended crime victim compensation benefits to surviving same-sex partners of World Trade Center victims, acknowledging that the grief and loss suffered by gays and lesbians who lose a life partner is equal to that suffered by surviving opposite-sex spouses.[28] Legislation followed making the partners of World Trade Center victims eligible for benefits from the federal September 11 Victims Compensation Fund and for workers'

---

[24] David Brooks, The Power of Marriage, N.Y. Times, Nov. 22, 2003, at A15 (supporting gay marriage); William Safire, On Same-Sex Marriage, N.Y. Times, Dec. 1, 2003, at A23 (supporting civil unions but expressing uncertainty about marriage).

[25] Katharine Q. Seelye & Janet Elder, Strong Support Is Found for Ban on Gay Marriage, N.Y. Times, Dec. 21, 2003, §1, at 1 (congresswoman who introduced United States constitutional amendment banning same-sex marriage would permit states to create civil unions); Review & Outlook, Roe, the Sequel, Wall St. J., Nov. 20 2003, at A20 (criticizing Goodridge for taking choice on Massachusetts marriage away from voters and legislators, but noting increased acceptance of same-sex relationships, including marriage, and noting that parent company Dow Jones itself has a domestic partner benefit policy).

[26] William Eskridge, Equality Practice: Civil Unions and the Future of Gay Rights (2002). *See also* Yuval Merin, Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States (2002).

[27] *See, e.g.*, Indrani Sen, Couples Committed in Life, Death: For Gay Partners, Reparation Woes, Newsday, Oct. 20, 2001, at A8; Jessica DuLong, Pair Recognition: Sept. 11 Survivors of Same-sex Partners Face Extra Challenges, Newsday, Jan. 22, 2002, at B3; Denny Lee, Partners of Gay Victims Find The Law Calls Them Strangers, N.Y. Times, Oct. 14, 2001, at 14:4; Robert F. Worth, Gay Man to Seek Benefits for Loss of Companion on Sept. 11, N.Y. Times, Apr. 23, 2002, at B7.

[28] *See* N.Y. Exec. Order No. 113.30 (2001) (Pataki, Gov.).; Joel Stashenko, Pataki's Executive Order Extends Equal Benefits to Gay Partners of WTC Victims, Assoc. Press, Oct. 13, 2001 (quoting Pataki spokesperson Joseph Conway).

compensation claims arising from the attacks.[29] In the wake of the Iraq war, the state of New York made the domestic partners of active-duty military service members eligible for library Internet access, burial insurance, videoconferencing, discounted telephone rates, and property tax relief[30]—notwithstanding the federal "don't ask, don't tell" policy requiring the expulsion of openly gay military service members. Also responding to September 11, even the federal government—generally less supportive of lesbian and gay families—passed the Mychal Judge Act, which directed federal benefits to a limited class of same-sex surviving partners.[31]

New York also recently agreed to pay unemployment benefits to long-term same-sex domestic partners who quit their jobs to follow their partners obtaining work out of state.[32] It enacted the Sexual Orientation Non-Discrimination Act ("SONDA")[33] which bars discrimination based on sexual orientation in employment, housing, education, commercial occupancy, trade, credit, and public accommodations. SONDA's legislative history, however, specifically disclaimed any intent to affect the right to marry under New York law.[34] And although it does not specifically reflect New York's public policy, the American Law Institute's model Principles of the Law of Family Dissolution advocated full recognition of cohabiting same-sex partners for purposes of child custody, visitation, and spousal

---

[29] 2002 N.Y. Laws ch. 73, § 1(7) (legislative history stating that domestic partners are intended to be eligible for federal Victims Compensation Fund); N.Y. Workers' Comp. Law § 4 (McKinney 2003).

[30] N.Y. Educ. Law § 272(1)(l) (McKinney 2003) (library internet access); N.Y. Exec. Law § 354-b(2)(b)(i) (McKinney 2003) (burial insurance); N.Y. Mil. Law § 254(2) (McKinney 2003) (video teleconferencing); N.Y. Pub. Serv. Law § 92 (McKinney 2003) (discounted phone rates); N.Y. Real Prop. Tax Law § 925-d (McKinney 2003) (property tax extension).

[31] Mychal Judge Police and Fire Chaplains Public Safety Officers' Benefit Act of 2002, Pub. L. No. 107-196, 116 Stat. 719 (2002). *See* Susan J. Becker, Tumbling Towers as Turning Points: Will 9/11 Usher in a New Civil Rights Era for Gay Men and Lesbians in the United States?, 9 Wm. & Mary J. Women & L. 207 (2003) (discussing statute). The partners had to be the survivors of public safety officers and named in their wills.

[32] Steven Greenhouse, Labor Department Now Backs Jobless Pay for Gay Partners, N.Y. Times, Feb. 11, 2004, at B5. Governors Mario Cuomo and George Pataki first agreed to provide health insurance benefits for the same-sex domestic partners of New York State executive branch employees in the 1990s. *See* Ian Fisher, Cuomo Decides to Extend Domestic-Partner Benefits, N.Y. Times, June 29, 1994, at B4; Kevin Sack, Pataki Drops Threat to Close Down Government, N.Y. Times, Mar. 29, 1995, at A1. The Report incorrectly attributed the provision of these benefits to Executive Orders issued by the Governors, Report, *supra*, note 1, at 80 n.42, but the Executive Orders merely stated a nondiscrimination policy. The benefits were separately granted under union contracts.

[33] N.Y. Exec. Law § 291 (McKinney 2003) (enacted 2002).

[34] N.Y. Exec. Law § 291 cmt. (McKinney 2003).

support.[35] Similarly, recent academic legal literature has overwhelmingly favored the recognition of same-sex relationships, reflecting an increasingly functionalist American family law that takes into account actual, rather than purely legal, relationships.[36]

Not all New York developments since the Report have supported the recognition of same-sex relationships. In J.C. v. C.T., discussed in the Report, a lesbian couple split up after having a child together in the relationship, and the biological parent refused visitation to the nonbiological

---

[35] Principles of the Law of Family Dissolution: Analysis and Recommendations as Adopted and Promulgated by The American Law Institute at Washington, D.C., May 16, 2000, § 6.03, ch. 1 (2002).

[36] On functionalism, see Developments in the Law: II. Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe, 116 Harv. L. Rev. 2004 (2003) [hereinafter Developments: Inching]; Developments in the Law: IV. Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies, 116 Harv. L. Rev. 2052 (2003).

The ALI Principles of the Law of Family Dissolution, *supra* note 35, offer an extreme functionalist perspective. *See* discussion *infra* text accompanying note 80.

For other books and articles supporting legal recognition of same-sex relationships, see, for example, Becker, *supra* note 31; Mary Becker, Family Law in The Secular State and Restrictions on Same-Sex Marriage: Two Are Better Than One, 2001 U. Ill. L. Rev. 1; Eskridge, *supra* note 26; Christopher S. Hargis, Queer Reasoning: Immigration Policy, Baker v. State of Vermont, and the (Non)Recognition of Same-Gender Relationships, 10 Law & Sexuality 211 (2001); Greg Johnson, In Praise of Civil Unions, 30 Cap. U. L. Rev. 315 (2002); 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); Merin, *supra* note 26; Michael S. Wald, Same-Sex Couple Marriage: A Family Policy Perspective, 9 Va. J. Soc. Pol'y & L. 291 (2001) (reviewing social science literature); and other articles cited in this Foreword.

For academic commentaries from a conservative perspective suggesting that recognition of same-sex relationships should be against public policy, see Lynn D. Wardle, Counting the Costs of Civil Unions: Some Potential Detrimental Effects on Family Law, 11 Widener J. Pub. L. 401 (2002) (listing thirty-four potential issues and warning of destabilization of family law); Lynn D. Wardle, "Multiply and Replenish": Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 Harv. J.L. & Pub. Pol'y 771 (2001) (same-sex relationships do not support state goal of supporting procreation) [hereinafter Wardle, Multiply]; David Orgon Coolidge & William C. Duncan, Reaffirming Marriage: A Presidential Priority, 24 Harv. J.L. & Pub. Pol'y 623 (2001) (political discussion); Lynne Marie Kohm & Mark A. Yarhouse, Fairness, Accuracy and Honesty in Discussing Homosexuality and Marriage, 14 Regent U. L. Rev. 249 (2001/2002) (marshalling religious and procreative arguments, as well as citing to social science literature purporting to link homosexuality with pathology and child molestation); Michael A. Scaperlanda, Kulturkampf in the Backwaters: Homosexuality and Immigration Law, 11 Widener J. Pub. L. 475 (2002); Dale M. Schowengerdt, Note, Defending Marriage: A Litigation Strategy to Oppose Same-Sex "Marriage", 14 Regent U. L. Rev. 487 (2001/2002) (thin rehearsal of arguments with little research); *see also* Ruthann Robson, Assimilation, Marriage, and Lesbian Liberation, 75 Temp. L. Rev. 709 (2002) (questioning marriage from radical feminist perspective).

partner.[37] The Westchester Family Court found standing for the nonbiological partner to seek visitation on an equitable estoppel theory.[38] New York's Appellate Division, Second Department, reversed in a decision retitled Janis C. v. Christine T., however, citing the 1991 Court of Appeals decision in Alison D. v. Virginia M., which refused a nonbiological partner visitation.[39] The Second Department did not reason that permitting visitation (and therefore recognizing the same-sex relationship to that extent) would be against public policy; instead, it applied stare decisis.[40]

III. FEDERAL, STATE, AND CANADIAN CONSTITUTIONAL DEVELOPMENTS

A. Equal Protection: Level of Scrutiny under Rational Basis Test

In North America, recognition of same-sex partners' rights has typically expanded through litigation rather than legislation.[41] Interpretations of the United States Constitution's Equal Protection Clause, and comparable constitutional clauses in other jurisdictions, distinguish between suspect classes subject to strict scrutiny, classes such as sex discrimination subject to intermediate scrutiny,[42] and other classes subject to rational basis scrutiny. Rational basis scrutiny historically required a statute to be upheld if there was any remotely logical basis for it, but in Romer v. Evans, the United States Supreme Court applied a rational basis test with teeth to strike down a Colorado constitutional amendment that permanently barred legislation forbidding sexual orientation discrimination.[43]

---

[37] 711 N.Y.S.2d 295, 296 (Fam. Ct. Westchester Co. 2000); Report, *supra,* note 1, at 79.

[38] J.C. v. C.T., 711 N.Y.S.2d at 297-300.

[39] Janis C. v. Christine T., 742 N.Y.S.2d 381, 383 (App. Div. 2002). *See* Alison D. v. Virginia M., 77 N.Y.2d 651 (1991); *see also* Report, *supra* note 1, at 78.

[40] Janis C., 742 N.Y.S.2d at 383.

[41] Eskridge, *supra* note 26.

[42] Hawaii, in Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993), found that denial of marriage rights constituted sex discrimination and was subject to strict scrutiny under the Hawaii constitution. *See also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 970 (Mass. 2003) (Greaney, J., concurring) (denial of same-sex marriage rights should constitute sex discrimination under Massachusetts constitution). For a critique of sex discrimination as a basis for finding same-sex marriage rights, see Edward Stein, Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights, 49 UCLA L. Rev. 471 (2001) (sexual orientation discrimination is a more coherent analytical category).

[43] 517 U.S. 620 (1996), discussed in Report, *supra* note 1, at 86. On equal protection generally, see Report, *supra* note 1, at 84 (Part I.C.2). As noted in the Report, Vermont (in Baker v. State, 744 A.2d 864 (1999)) and the Alaska Supreme Court (in Brause v. Bureau of Vital Statistics, 21 P.3d 357 (Alaska 2001)) applied intermediate scrutiny under

Since the Report, both Massachusetts and Canada have applied rational-basis-with-teeth standards under their respective constitutions to require recognition of gay relationships. In Goodridge v. Department of Public Health, the Massachusetts Supreme Judicial Court mandated gay marriage:

> 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.[44]

The state argued that the ban on same-sex marriage had a rational basis under the Massachusetts Constitution in the government's encouragement of procreation.[45] The court rejected this, noting that many opposite-sex couples do not procreate, yet can marry, while many same-sex couples have children.[46] The court similarly dismissed the rationale that the same-sex marriage ban promoted the optimal raising of children.[47] It noted the massive changes in American family demography in recent decades, with the dominance of the nuclear family giving way to a variety of family structures.[48] The ban on same-sex marriage denied legal stability to children being raised by same-sex couples, the court held, requiring same-sex parents to engage in elaborate legal documentation and procedures that only partially replicate the legal status given to children by marriage.[49] The

---

their state constitutions. *See also* Lawrence v. Texas, 123 S.Ct. 2472, 2486-87 (O'Connor, J., concurring) (advocating that law prohibiting same-sex sexual conduct be struck down using rational-basis-with-teeth test); Limon v. Kansas, 123 S.Ct. 2638 (2003) (remanding statutory rape case involving differential ages for same-sex and opposite-sex offenses in light of Lawrence; since there is no substantive due process right to engage in statutory rape—substantive due process being the primary rationale in Lawrence—this arguably applied an implicit rational-basis-with-teeth test), *aff'd* 2004 WL 177649 (Kan. App.) (apparently applying minimum scrutiny in finding rational basis for imposing seventeen-year sentence for same-sex statutory rape by mentally impaired boy when opposite-sex statutory rape would have received one-year sentence).

[44] 798 N.E.2d 941, 949 (Mass. 2003). The court later issued an advisory opinion clarifying that the Massachusetts Constitution requires same-sex marriage rather than civil union. *See* Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

[45] 798 N.E.2d at 961.

[46] *Id.* at 962 (noting, among other things, permissibility of deathbed marriages). On the large numbers of same-sex couples with children, see *supra* note 5. *But see* Wardle, Multiply, *supra* note 36.

[47] Goodridge, 798 N.E.2d at 963.

[48] *Id.* at 962-63.

[49] *Id.*

Commonwealth of Massachusetts conceded that many same-sex parents were excellent parents, and failed to show that the ban increased the supply of traditional opposite-sex married couples.[50] Finally, the court rejected the Commonwealth's contention that same-sex couples were less financially interdependent than opposite-sex couples, and that the ban conserved state resources by reserving the public and private financial benefits of marriage for opposite-sex couples: there was no evidence of this, and opposite-sex married couples were not required to demonstrate financial interdependence before marrying.[51]

The Ontario Court of Appeals applied a similar analysis in Halpern v. Toronto (City), construing Section 15(1), the equal protection provision of the Canadian Charter (the Canadian equivalent of the United States Constitution) to require full marriage rights.[52] The court found no rational basis in the allegedly unique character and needs of opposite-sex couples with respect to procreation, child-rearing abilities, or companionship. Given the Attorney General of Canada's failure to provide evidence of the inferiority of same-sex relationships, the court said, "In the absence of cogent evidence, it is our view that the objective is based on a stereotypical assumption that is not acceptable in a free and democratic society that prides itself on promoting equality and respect for all persons."[53] In addition, the Halpern court cautioned that modern marriage was not just about making and raising babies:

> [N]o one . . . is suggesting that procreation and childrearing are the only purposes of marriage, or the only reasons why couples choose to marry. Intimacy, companionship, societal recognition, economic benefits, the blending of two families, to name a few, are other reasons that couples choose to marry. . . . Denying same-sex couples the right to marry perpetuates the . . . view . . . that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships. Accordingly, in our view, the common law requirement that marriage be between persons of the opposite sex does not accord with the needs, capacities and circumstances of same-sex couples. This factor weighs in favour of a finding of discrimination.[54]

---

[50] *Id.* at 963. *See also* Developments: Inching, *supra* note 36 (noting increasingly functionalist cast of family law).

[51] Goodridge, 798 N.E.2d at 964.

[52] [2003] O.A.C. 276.

[53] *Id.* at ¶ 123.

[54] *Id.* at ¶¶ 94-95.

Courts in British Columbia and Quebec came to similar conclusions.[55] The Canadian government elected not to appeal these rulings, hence Canada now recognizes gay marriages.[56]

As explained in the Report, there is a strong argument for a similar rational-basis-with-teeth analysis under the United States Constitution. Even the conservative Justice Scalia noted in his Lawrence v. Texas dissent that procreation is an insufficient rational basis for the ban on same-sex marriage "since the sterile and the elderly are allowed to marry."[57] The majority in Lawrence, however, stated that its analysis had no bearing on the constitutionality of same-sex marriage.[58]

Other jurists, however, continue to use a minimum scrutiny rational basis test to uphold bans on same-sex marriage. In Standhardt v. Superior Court, the Arizona Court of Appeals held that opposite-sex couples' potential procreation and possible child-rearing advantages allowed the ban on same-sex marriage to survive rational basis scrutiny under the Arizona and United States Constitutions.[59] The court did not address the lack of social science proof of the inferiority of same-sex relationships, observing: "Even assuming that the State's reasoning for prohibiting same-sex marriages is debatable or arguably unwise, it is not arbitrary or irrational."[60] Similarly, the three dissenters in Goodridge, while not suggesting that same-sex families were inferior to opposite-sex couples in child rearing, argued that given the traditional model of the opposite-sex family, the legislature could rationally conclude that there was insufficient evidence to date that same-sex couples were equally good at child rearing, and therefore could refuse same-sex marriage without violating the Massachusetts constitution's equal protection clause.[61]

While social science research is ongoing, no evidence has emerged to suggest that same-sex couples are inferior at child rearing.[62] And given the desirability of legal stability for the hundreds of thousands of children being raised by same-sex couples, using the parenting rationale to deny

---

[55] EGALE Canada Inc. v. Canada, [2003] B.C.L.R. (4th) 1; Hendricks c. Québec (Procureur Général), [2002] R.J.Q. 2506.

[56] Clifford Krauss, Canadian Leaders Agree to Propose Gay Marriage Law, N.Y. Times, June 18, 2003, at A1.

[57] 123 S.Ct. 2472, 2498 (2003) (Scalia, J., dissenting).

[58] *Id.* at 2484. *See also id.* at 2488 (O'Connor, J., concurring) (cursory assertion that rational basis for ban on same-sex marriage).

[59] 77 P.3d 451, 460-64 (Ariz. Ct. App. 2003).

[60] *Id.* at 464 (citations and internal quotations omitted).

[61] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 978-82 (Mass. 2003) (Sosman, J., dissenting); *id.* at 997-1005 (Cordy, J., dissenting).

[62] For a review of the social science evidence, see Wald, *supra* note 36.

same-sex marriage would seem counterproductive. As more opposite-sex relationships move away from the procreation and child-rearing model, and as more same-sex relationships include children, the minimum scrutiny rational basis test may seem increasingly tenuous.

B. Fundamental Right and Substantive Due Process Analysis

As noted in Report, Part I.C.1,[63] the miscegenation case of Loving v. Virginia held that marriage is a fundamental right under the United States Constitution's Equal Protection Clause.[64] Yet despite the power of the analogy between the bans on interracial and same-sex marriage, recent decisions have edged away from fully applying that analysis.[65] Goodridge and Halpern (the latter discussing the equivalent of fundamental rights theory under the Canadian Charter) offered extensive analyses showing that marriage was fundamental to human relationships.[66] Neither court, however, used fundamental rights theory as the rationale for its decision, perhaps because fundamental rights analysis is less developed than rational basis equal protection analysis and courts have difficulty articulating clear limits on precedent.[67] The Goodridge court tried to offer some reasoning, observing, "The 'right to marry['] is different from rights deemed 'fundamental' for equal protection and due process purposes because the State could, in theory, abolish all civil marriage."[68] The court gave private property as a truly fundamental right that the state could not abolish, but,

---

[63] Report, *supra* note 1, at 82.

[64] 388 U.S. 1, 12 (1967).

[65] *See* Stephen Clark, Same-Sex But Equal: Reformulating the Miscegenation Analogy, 34 Rutgers L.J. 107 (2002); Josephine Ross, The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage, 37 Harv. C.R.-C.L. L. Rev. 255 (2002) (miscegenation laws and ban on same-sex marriage reflect excessive sexualization of interracial and same-sex relationships, respectively).

[66] Goodridge, 798 N.E.2d at 957-58; Halpern v. Toronto (City), [2003] O.A.C. 276, ¶¶ 87, 102-07.

[67] *See* Clark, *supra* note 65 (miscegenation fundamental rights analogy would produce overly broad precedent). The courts may have been haunted by the specter of polygamy: if it is a fundamental right to marry anyone you want, then polygamists can argue for a constitutional right to marry as many people as they want. This has been a conservative objection to the recognition of same-sex marriage. *See, e.g.*, George W. Dent, Jr., The Defense of Traditional Marriage, 15 J.L. & Pol. 581 (1999). Two scholars have examined the basis for the polygamy ban. James M. Donovan, Rock-Salting the Slippery Slope: Why Same-Sex Marriage is Not a Commitment to Polygamous Marriage, 29 N. Ky. L. Rev. 521 (2002) (polygamy distinguishable); Robson, *supra* note 36 (favoring recognition of polygamous marriage as part of radical assault on marriage). The rational basis test permits courts to deny a polygamous marriage claim based on a minimum scrutiny standard.

[68] 798 N.E.2d at 957 n.14.

reflecting the ad hoc nature of the category, the example is weak, since twentieth-century Communist states did just that.

Although the United States Supreme Court did not formally apply fundamental rights analysis under the Equal Protection Clause in Lawrence v. Texas,[69] it created a parallel substantive due process right to liberty for private same-sex conduct:

> The Casey decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows:
>
> "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." Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.[70]

Lawrence can be interpreted to imply that the substantive due process liberty interest requires respect for the private marital decisions of same-sex couples as well. The Ontario Court of Appeals did this in Halpern, finding a liberty interest supporting the right to same-sex marriage under parallel provisions of the Canadian Charter:

> One of [the] essential values is liberty, basically defined as the absence of coercion and the ability to make fundamental choices with regard to one's life. . . . Limitations imposed by this Court that serve to restrict this freedom of choice among persons in conjugal relationships would be contrary to our notions of liberty. In this case, the common law requirement that persons who marry be of the opposite sex denies persons in same-sex relationships a fundamental choice—whether or not to marry their partner.[71]

But Standhardt held that Lawrence, in protecting autonomy for private same-sex sexual acts, did not create a right, under fundamental rights analysis or the Due Process Clauses of the United States and Arizona

---

[69] 123 S.Ct. 2472 (2003).

[70] *Id.* at 2481-82 (citing Planned Parenthood v. Casey, 505 U.S. 833 (1992)).

[71] O.A.C. 276 at ¶ 87.

Constitutions, to state-sanctioned same-sex marriage.[72] Standhardt distinguished Loving as applying to opposite-sex couples, and noted that while same-sex relationships were receiving more recognition within the United States and in foreign jurisdictions,[73] an expansion of fundamental rights analysis was not justified given 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."[74] The Standhardt court also declined to find a fundamental right to same-sex marriage based on the privacy provisions of the Arizona constitution, citing original intent and distinguishing earlier privacy cases that protected against intrusion.[75]

IV. CIVIL UNION AND DOMESTIC PARTNERSHIP

In the wake of Vermont's passage of a civil union law and European recognition of same-sex relationships, three more jurisdictions have moved up Eskridge's gradient to recognize same-sex relationships through means short of marriage. Germany has adopted domestic partnership legislation.[76] The New Jersey Domestic Partnership Act created a weak form of domestic partnership limited to medical visitation and decisionmaking rights, tax exemptions, and some health and pension benefits.[77] California bypassed a voter initiative barring same-sex marriage[78] to enact marriage lite in the form of a domestic partnership statute that provides equivalent rights for property, children, government benefits, and arrangements after death, and makes partners responsible for each other's debts.[79] The American Law Institute's Principles of the Law of Family

---

[72] Standhardt v. Super. Ct., 77 P.3d 451, 457 (Ariz. Ct. App. 2003).

[73] *Id.* at 456-60.

[74] *Id.* at 460.

[75] *Id.*

[76] Reuters, *supra* note 12.

[77] 2003 N.J. Sess. Law Serv. ch. 246. The statute also requires the couple to be financially interdependent in order to become domestic partners.

[78] Cal. Fam. Code § 308.5 (West 2004).

[79] 2003 Cal. Legis. Serv., ch. 421 (West). *See also* Jones & Vogel, *supra* note 14. California's grant of government benefits to same-sex partners would not bind the federal government unless the federal Defense of Marriage Act, 1 U.S.C. § 7 (2003), which bars the federal government from recognizing same-sex relationships created under state law, is unconstitutional under the United States Constitution.

In addition (although omitted from the Report), shortly after Hawaii voters banned same-sex marriage in that state, they enacted a domestic partnership law giving substantial rights to same-sex partners. Eskridge, *supra* note 26.

Dissolution also recommended the full recognition of same-sex couples in its sphere.[80]

Yet, as noted in the Report, civil union legislation and its step-sibling, domestic partnership, remain second-best alternatives. Even apart from the comity and full faith and credit issues discussed in the Report, Part II, and in Part V of this Foreword, these alternatives lack the clearly-defined body of statutory and case law that defines rights and responsibilities under marriage. However, a statute establishing one of these alternatives is clearer when, like Vermont's, it simply transports marriage concepts over to the new legal structure.[81] In contrast, when legislatures enumerate rights through domestic partnership, litigation risks increase, since there may be gaps and inconsistencies in contrast to full marriage rights. For example, California does not grant same-sex couples full equality with opposite-sex couples for purposes of state income tax,[82] and permits domestic partners cohabiting for less than five years who do not have children and have limited assets to obtain nonjudicial dissolution.[83] The American Law Institute Family Dissolution proposal is even more problematic: it would create a perpetual litigation machine by mandating facts-and-circumstances tests to determine partnership, parental status, and other critical issues.[84] The New York Workers' Compensation Law amendment, which covers same-sex survivors of September 11 victims, also uses a facts-and-circumstances test.[85] It has already prompted New York Governor Pataki to ask for a rehearing on a claim he felt was wrongly denied.[86]

Civil union may provide a politically palatable way station that allows the heterosexual majority to become comfortable with the idea that same-sex relationships are socially constructive and not immoral,[87] but it is

---

[80] *See supra* text accompanying note 35.

[81] *See* Report, *supra* note 1, text accompanying note 87 (at Part I.D). *See also* Seufert, *supra* note 10 (comparing Vermont civil union with Netherlands marriage).

[82] Couples cannot file jointly and earned income is not treated as community property for tax purposes, Cal. Fam. Code § 297.5(g) (West 2003), presumably because granting full rights and responsibilities would create chaos for taxpayers trying to fill out federal and state income tax returns with conflicting definitions of "spouse."

[83] Cal. Fam. Code § 299(a) (West 2003).

[84] *See* ALI Principles of Family Dissolution, § 2.03(1)(b) & (c) (2002) (parent by estoppel and de facto parent status determined by facts and circumstances); id. §§ 6.03(3), 6.04 (2002) (domestic partnership begins when parties share primary residence unless one party can prove that partners did not begin sharing life as couple until later).

[85] N.Y. Workers' Comp. Law § 4 (McKinney 2003).

[86] Steven Greenhouse, Board Asked to Reconsider Jobless Benefits for a Same-Sex Partner, N.Y. Times, May 31, 2003, at B2.

[87] *See* Eskridge, *supra* note 26; Developments: Inching, *supra* note 36; Johnson, *supra* note 36; *see also* Jes Kraus, Note, Monkey See, Monkey Do: On Baker, Goodridge,

not full marriage. Although Canada's federal government and several Canadian provinces provided domestic partnership rights before Halpern, the Ontario Court of Appeals held this insufficient:

> [W]e do not agree that same-sex couples are afforded equal treatment under the law with respect to benefits and obligations. In many instances, benefits and obligations do not attach until the same-sex couple has been cohabiting for a specified period of time. Conversely, married couples have instant access to all benefits and obligations. Additionally, not all benefits and obligations have been extended to cohabiting couples. For example . . . Nova Scotia's legislation . . . provides only married persons with equalization of net family property upon breakdown of the relationship. Ontario's Family Law Act, R.S.O. 1990, c. F.3, similarly excludes cohabiting opposite-sex and same-sex couples from equalization of net family property. Opposite-sex couples are able to gain access to this legislation as they can choose to marry. Same-sex couples are denied access because they are prohibited from marrying.[88]

Any recognition of same-sex relationships is valuable, but civil union and domestic partnership cannot provide the stability of equal marriage.

V. COMITY AND FULL FAITH AND CREDIT: CONFUSION IN CHOICE OF LAW

The Report predicted that "civil union is a new concept that is likely to lead to decades of litigation, limiting its value as a planning tool for same-sex couples."[89] That prophecy has already been borne out in the choice of law area, where United States courts have considered what effect to give to Vermont civil unions. Many same-sex couples from other jurisdictions have been traveling to Vermont or Canada for legal recognition of their relationships,[90] and some face family law or estate issues on their return. Given Americans' high mobility and New York's role as a center for business and immigration, many lawsuits are likely.

---

and the Need for Consistency in Same-Sex Alternatives to Marriage, 26 Vt. L. Rev. 959 (2002) (focusing primarily on choice of law and recognition issues).

[88] Halpern v. Toronto (City), [2003] O.A.C. 276, ¶¶ 104-05. *See also* Mark Strasser, Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees, 33 Loy. U. Chi. L.J. 597 (2002) (granting civil unions rather than marriage as a means of defusing religious objections violates Free Exercise Clause of United States Constitution's First Amendment).

[89] Report, *supra* note 1, at 90.

[90] *See supra* note 18 and accompanying text.

As noted in Part II of the Report, under common law rules of comity, a jurisdiction will recognize a marriage or other act celebrated in another jurisdiction unless it would violate the receiving jurisdiction's public policy.[91] New York applies an extremely narrow public policy exception, refusing to grant comity only to spousal relationships that are "offensive to the public sense of morality to a degree regarded generally with abhorrence."[92] The United States Defense of Marriage Act (DOMA) preempts common law comity for federal law purposes, such as benefits, by refusing recognition to same-sex marriages celebrated in other jurisdictions.[93] Most states have similar mini-DOMAs, which sometimes bar recognition of same-sex marriages, and sometimes bar recognition of all same-sex relationships.[94]

A measure of comity is required under the United States Constitution's Full Faith and Credit Clause, which requires states to give full faith and credit to each others' public acts, records, and judicial proceedings.[95] Marriage, civil union, and domestic partnership do not fit neatly into any of those categories, however, and the United States Supreme Court has historically given states wide leeway in determining whether to recognize foreign marriages.[96] DOMA complicates full faith and credit analysis still further by purporting to give states the right to refuse recognition of same-sex marriages celebrated in foreign jurisdictions.[97] It does not address civil unions. As noted in the Report, DOMA's attempt to legislate an anti-same-sex marriage interpretation of the Full Faith and Credit Clause may be unconstitutional.[98]

Where terms such as "spouse" are used both in Vermont's civil union statute and the jurisdiction where recognition of the civil union is sought, a court may be more likely to grant comity. This occurred when a

---

[91] *See* Report, *supra* note 1, at 90, 93-96.

[92] *In re* May's Estate 114 N.E.2d 4, 7 (N.Y. 1953). *See also* Report, *supra* note 1, at 96 (quoting Intercont'l Hotels Corp. v. Golden, 203 N.E.2d 212, 212 (N.Y. 1964), which denies recognition only to "a transaction which is inherently vicious, wicked, or immoral, and shocking to the prevailing moral sense").

[93] 1 U.S.C. § 7 (2003).

[94] *See, e.g.*, Cal. Fam. Code § 308.5 (West 2004); Ga. Code Ann. § 19-3-3.1(b) (2003) (barring recognition of foreign same-sex marriages); Tex. Fam. Code Ann. § 6.204 (Vernon 2003) (barring recognition of foreign same-sex marriages and civil unions).

[95] U.S. Const. art. IV, § 1.

[96] Developments in the Law: III. Constitutional Constraints on Interstate Same-Sex Marriage Recognition, 116 Harv. L. Rev. 2028 (2003) (Full Faith and Credit Clause provides few constitutional constraints against denial of recognition of same-sex marriages).

[97] Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7, 28 U.S.C. § 1738C (2003)). On DOMA, see Report, *supra* note 1, at 70, 96-97.

[98] *See* Report, *supra* note 1, at 96-97.

New York court recognized a Vermont civil union in determining that a surviving same-sex spouse can sue for medical malpractice under New York's wrongful death statute. In Langan v. St. Vincent's Hospital, the Nassau County Supreme Court found that a "civil union under Vermont law is distinguishable from marriage only in title."[99] Since Vermont law defines parties to a civil union as "spouses," the court applied comity to deem the surviving partner a "spouse" under New York's Estates, Powers & Trust Law, which governs wrongful death.[100] The court declined to apply the public policy exception to comity and full faith and credit, citing New York's long tradition of recognizing foreign marriages, such as common-law marriages, that could not be legally celebrated in New York.[101] It explored the many ways in which New York recognizes same-sex relationships, concluding:[102]

> Upon examination of the rejection of homosexual unions in the past, the reasons propounded for supporting distinctions, such as the at will nature of homosexual relationships and the absence of children, society's future, from their unions, simply do not apply, in light of the Vermont civil union and New York's and Vermont's rules regarding adoption. The civil union is indistinguishable for societal purposes from the nuclear family and marriage.[103]

A court in California (which had a limited domestic partnership statute in place at the time[104]) came to a similar conclusion on comity and full faith and credit for Vermont civil unions in wrongful death cases.[105]

There is less clarity when a partner in a civil union or domestic partnership tries to avail herself of law in other jurisdictions relating to "marriage" given that, as courts in Georgia and Connecticut observed, the

---

[99] 765 N.Y.S.2d 411, 417 (Sup. Ct. Nassau Co. 2003). The case is currently on appeal to New York's Appellate Division, Second Department. The author is lead counsel on an amicus curiae brief in the appeal submitted by The Association of the Bar of the City of New York, the New York County Lawyers' Association, the Women's Bar Association of the State of New York, and the American Academy of Matrimonial Lawyers-New York Chapter, which advocates recognition of Langan as a spouse under the New York wrongful death statute.

[100] *Id.* at 417-20.

[101] *Id.* at 414. *See also* Report, *supra* note 1, at 93-96.

[102] Langan, 756 N.Y.S.2d at 415-16. *See also supra* Part II; Report, *supra* note 1, at 76-80 (at Part I.B).

[103] Langan, 756 N.Y.S.2d at 421.

[104] 1999 Cal. Stat. ch. 588.

[105] Smith v. Knoller, No. 319532, slip op. (Cal. Super. Ct. Aug. 9, 2001). In addition, a pre-Vermont District of Columbia case granted comity. Solomon v. D.C., 21 Fam. L. Rptr. 1305, 1316 (D.C. Super. Ct. 1995).

Vermont civil union statute states that civil union is not marriage.[106] Trial courts in Iowa, West Virginia, and Texas granted comity to same-sex partners for the purpose of dissolving Vermont civil unions, but the Iowa decision is on appeal and the Texas court vacated its decision after protests from the Texas attorney general.[107] The gap between civil union and marriage permits courts to deny recognition by combining statutory interpretation with an aggressive interpretation of the public policy exception to comity.[108] In Burns v. Burns, a divorcing opposite-sex couple signed an agreement barring their children's visitation with a parent engaged in cohabitation with someone to whom the parent was not married.[109] The ex-wife had visitation with her children while cohabiting with her same-sex partner, and was held in contempt of court.[110] The court did not perform a comity analysis, arguing that even if civil union were marriage, Georgia's mini-DOMA statute would bar recognition.[111]

In Rosengarten v. Downes,[112] the court denied subject matter jurisdiction for a divorce between Vermont civil union partners, limiting its jurisdiction to cases involving marriage,[113] and adding that Connecticut had enough contacts with the case (the partner seeking the dissolution was a Connecticut resident) to apply its own law without running afoul of the Full

---

[106] Vt. Stat. Ann. tit. 15, §§ 1201(2), 1201(4), 1202(2) (2003); Burns v. Burns, 560 S.E.2d 47 (Ga. Ct. App. 2003); Rosengarten v. Downes, 802 A.2d 170 (Conn. App. Ct. 2002).

[107] *In re* Gorman and Gump, Civ. Ac. No. 02-D-292 (W. Va. Fam. Ct. 2002); David Pitt, Iowa Supreme Court Temporarily Halts Divorce Case, Associated Press, Feb. 3, 2004 (Brown v. Perez); Debra Rosenberg & Pat Wingert, Breaking Up Is Hard to Do, Newsweek, U.S. Edition, July 7, 2003, at 44 (Texas and West Virginia cases); Molly McDonough, Court OKs Divorce Without Recognizing "Marriage": Gay Couple's Civil Union, Created in Vermont, Is Dissolved in Texas, ABA e-report, Mar. 21, 2003 (on file with author) (discussing Texas case of *In re* Marriage of R.S. & J.A., No. F-185,063). In response to the R.S. ruling, Texas enacted a mini-DOMA barring recognition of same-sex relationships. Tex. Fam. Code Ann. § 6.204 (Vernon 2003).

[108] *But see* Katie Eyer, Note, Related within the Second Degree? Burns v. Burns and the Potential Benefits of Civil Union Status, 20 Yale L. & Pol'y Rev. 297 (2002) (civil union status may offer more flexibility under comity rules than marriage, since DOMA and state mini-DOMAs bar recognition of marriage).

[109] Burns, 560 S.E.2d at 48.

[110] *Id.*

[111] *Id.* at 49. The court also cited the federal DOMA law.

[112] 802 A.2d 170.

[113] *Id.* at 174-78. The court refused to apply a catch-all provision granting the Superior Court jurisdiction over "all such other matters . . . concerning . . . family relations as may be determined by the judges of said court," Conn. Gen. Stat. § 46b-1 (2002), finding that Connecticut policy did not treat Vermont civil unions as "family relations." 802 A.2d at 177-78.

Faith and Credit clause.[114] Connecticut domestic law, in turn, specifically recognized only marriages between a man and a woman.[115] The court found a strong public policy against recognition of Vermont civil unions based on custom and tradition, the Connecticut legislature's failure to act on a civil union law, and express provisions in the state sexual orientation nondiscrimination statute stating that it did not authorize marriage[116]—though a domestic legislature's failure to act should not ordinarily evidence a strong policy against recognition of a foreign marriage. The court more plausibly cited legislators' statements that the Connecticut same-sex second-parent adoption statute should not become a wedge for the recognition of same-sex marriage.[117] It found a strong policy against subject matter jurisdiction for Rosengarten's civil union dissolution.[118] Because Rosengarten, who was ill, was unable to dissolve the Vermont civil union, his estranged same-sex partner inherited a statutory share of Rosengarten's estate, which reduced Rosengarten's children's inheritance.[119]

Unlike civil union and domestic partnership statutes, Canadian and (if it comes to pass) Massachusetts marriage statutes will be fully congruent with state marriage statutes, but will still generate litigated cases over the public policy exception to comity and Full Faith and Credit. The Langan court offered one path through these issues, holding that failure to grant full faith and credit to the Vermont civil union for wrongful death purposes would lack a rational basis, and hence violate the Equal Protection Clauses of the United States and New York State constitutions.[120]

New York, with its narrow public policy exception, is likely to grant broader recognition than many other states. But the nature of the public policy analysis is painstaking and case by case. The Langan court carefully limited its decision to the same-sex surviving partner's rights under the wrongful death statute, expressly avoiding any broader holding on comity.[121] Nationwide, courts will proceed issue by issue through matters of inheritance, spousal support, child custody and visitation, and spousal

---

[114] 802 A.2d at 178-79.

[115] *Id.* at 179-80.

[116] *Id.* at 179-82.

[117] *Id.* at 181.

[118] *Id.* at 180-82.

[119] In the end, Rosengarten's AIDS-related medical expenses reportedly ate up his estate. Rosenberg & Wingert, *supra* note 107.

[120] Langan, 765 N.Y.S.2d at 421. The Report made a similar argument, *supra*, note 1, at 74-75.

[121] Langan, 765 N.Y.S.2d at 415.

benefits.[122] At times the approach may be illogical: if same-sex unions are against public policy in Connecticut and Texas, courts in those states should eagerly assist in their termination. But courts clearly fear that recognition for one purpose means recognition for all purposes, notwithstanding that under modern interest analysis in choice of law, courts are supposed to choose based on the specific issue involved.[123]

Paradoxically, given the number of same-sex couples obtaining legal recognition of their relationships outside their domiciles, same-sex marriage, civil union, and domestic partnership may soon embody a conservative dream: covenant marriage. In this form of marriage, currently available only in Louisiana and Arizona, opposite-sex couples waive their right to a quick divorce with the aim of promoting marital stability.[124] Many same-sex couples, returning home after marrying in Canada or entering into a Vermont civil union, may discover that they will be unable to dissolve their relationships if they continue to reside in their domiciles. Instead, they may have to establish residence for the necessary period (often a year) in the jurisdiction where the relationship was first celebrated. Given the need to leave a job behind in order to dissolve a relationship (and, in Canada, restrictions on the right of American citizens to work while waiting out the residence period), some couples may find that they have unwittingly tied the knot "'til death do us part."

Despite this grim possibility, as the number of same-sex couples in marriages and civil unions increases, their status becomes more normalized, and the chaos created by failing to recognize their status becomes more

---

[122] DOMA's bar to recognition of same-sex marriages at the federal level, 1 U.S.C. § 7 (2003), combined with provisions pre-empting state benefits law in ERISA, will likely generate litigation about whether DOMA pre-empts state employee benefit and antidiscrimination statutes providing benefits for same-sex couples. *See* Jeffrey G. Sherman, Domestic Partnership and ERISA Preemption, 76 Tul. L. Rev. 373, 428-29 (2001) (arguing no pre-emption with respect to domestic partnerships).

[123] F. H. Buckley and Larry E. Ribstein, in Calling a Truce in the Marriage Wars, 2001 U. Ill. L. Rev. 561, suggest that comity decisions be left to state discretion. They add that contractual arrangements between the parties, including those implied by state law (custody, visitation, inheritance, spousal support) should generally be respected, while the state may have a stronger interest in applying the public policy exception and not recognizing the same-sex relationship when regulatory aspects of local law, such as tax issues or subsidies, are at issue. *See also* William A. Reppy, Jr., Choice of Law Problems Arising When Unmarried Cohabitants Change Domicile, 55 SMU L. Rev. 273 (2002) (for unmarried cohabitants, national split in authority on granting comity among (1) supporting unmarried cohabitants' claims, (2) denying enforcement because relationship immoral, and (3) enforcement of parties' express contracts); Elaine M. De Franco, Comment, Choice of Law: Will a Wisconsin Court Recognize a Vermont Civil Union?, 85 Marq. L. Rev. 251 (2001) (ambiguous answer given Wisconsin's marriage evasion statute); Eyer, *supra* note 108. See also Babcock v. Jackson, 191 N.E.2d 279, 283-84 (N.Y. 1963), which applied an issue-by-issue approach in launching the interest analysis revolution in choice of law.

[124] Buckley & Ribstein, *supra* note 123, at 562, 572-78.

obvious, the public policy exception may be applied in ways that are friendlier to same-sex couples.

VI. CONCLUSION

International trends in the advanced world are running in favor of recognition of same-sex relationships, with an increasing number of states in the American Northeast (Vermont, New Jersey, Massachusetts, and to a degree New York) and West (California, Hawaii, Oregon) following suit. Within the United States, litigation continues to provide the impetus for change, with courts (Vermont, Massachusetts, Hawaii, Alaska, Oregon) using an equal protection analysis to construe their state constitutions to recognize same-sex relationships.[125] In much of the United States, however, resistance to legal recognition will lead to an increasing volume of comity cases from same-sex couples who married or entered into civil unions in other jurisdictions.

New York, with its narrow public policy exception to comity and support of same-sex relationships, is likely to grant generous comity to foreign same-sex civil unions and marriages. And given New York's law and public policy, the Report's analysis has been bolstered by recent events: New York should allow same-sex marriages under current law.

[125] For Hawaii, Alaska, and Oregon, *see* Report, *supra* note 1, at Part I.D.