

REPORT ON MARRIAGE RIGHTS FOR SAME-SEX COUPLES IN NEW YORK

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON LESBIAN AND GAY RIGHTS, COMMITTEE ON SEX AND LAW, AND COMMITTEE ON CIVIL RIGHTS*

*Editor's Note: The following Report was issued jointly by several committees of The Association of the Bar of the City of New York in May 2001. In it, the Association supports marriage rights for same-sex couples in New York, and maintains that these rights exist now and should be recognized promptly under state law. While focused on New York, the Report's thorough analysis of federal and state constitutional, statutory, and comity issues is relevant to other jurisdictions. Since the Report, the relevant laws in New York, the United States, and the world have been changing quickly and dramatically. Nonetheless, the Association's arguments here, in its most recent analysis of the status of same-sex marriage in the state, remain compelling. To update readers, we have included in this issue a detailed discussion of recent developments by the Project Coordinator of the Report.***

There is currently a national debate over the right of lesbian and gay couples to enter into state-sanctioned marriage. Much of this debate stems from Vermont's recent legislation permitting same-sex civil unions. Lawsuits in Hawaii and Alaska attacking the constitutionality of prohibitions on same-sex marriage have also fueled the debate. In addition, many states are currently considering, and some have adopted, legislation attempting to prevent recognition of same-sex marriages performed in sister states. Most notably, in 1996, Congress enacted the Defense of Marriage Act (DOMA), which could give states that enact such legislation further ammunition in their efforts to deny recognition to same-sex marriages that may be legally sanctioned in sister states.

The constitutionality of measures denying recognition of same-sex marriage is in doubt, especially in light of the United States Supreme

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** Jay Weiser, Foreword: The Next Normal—Developments Since Marriage Rights for Same-Sex Couples in New York, 13 Colum. J. Gender & L. 48 (2004).

Court's apparent shift in its consideration of gay and lesbian rights. Fifteen years ago, the Court found that a state sodomy statute enforced only against homosexuals violated no constitutionally protected rights.¹ In contrast, in 1996, the Court found that by subjecting one group to a disadvantage that no other group had to suffer, a state constitutional amendment that barred anti-discrimination measures protecting lesbians and gay men violated the United States Constitution's Equal Protection Clause. In so doing, the Court took the remarkable step of invoking the landmark dissent in Plessy v. Ferguson in the opening paragraph of its decision: "[T]he Constitution 'neither knows nor tolerates classes among its citizens.' Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake."² The Court made clear that it would not countenance a legal distinction that raised the "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."³

This Report, which is an update of a report issued by the Association in 1997,⁴ addresses the issue of whether same-sex couples have the right to marry in New York and obtain the legal rights afforded to opposite-sex couples. In addition, it addresses the ancillary issue of whether New York should recognize same-sex marriages and legal unions entered into in sister states and abroad. This Report takes the position that same-sex couples currently have the right to marry. It argues in Parts I.A, I.B, and I.C that same-sex couples should be permitted to marry in New York because New York's marriage laws are gender-neutral, because same-sex marriage is entirely consistent with New York's public policy, and because a strong argument can be made that the Equal Protection Clauses of both the federal and New York constitutions require that the fundamental right of marriage be available to *all* couples of suitable capacity regardless of their sex.⁵ Failing a prompt recognition of this right, as for example through an opinion of the Attorney General, or legislative or judicial action, this Report argues in Part I.D that New York should, as an interim measure, enact civil union legislation similar to that recently enacted in Vermont. In Part I.E, this Report also explores the ways in which gender identification issues

¹ Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

² Romer v. Evans, 517 U.S. 620, 623 (1996) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

³ *Id.* at 634.

⁴ 52 Record of the Association of the Bar of the City of New York 343. The Association also issued a report in opposition to DOMA (Report on H.R. 3396, S. 1740 (1996), available from the Association).

⁵ This Report acknowledges that there is a diversity of opinion about the institution of marriage. However, this Report focuses solely on the fundamental right of all couples, regardless of their sex, to enter into state sanctioned marriage if they determine that it is appropriate for them, and takes no position on the debate regarding the institution.

affect the legal analysis of same-sex marriage. Finally, this Report concludes in Part II that New York should recognize same-sex marriages and civil unions entered into in other states and countries, in accordance with the Full Faith and Credit Clause of the federal constitution and New York's conflict-of-laws jurisprudence.

I. SAME-SEX COUPLES SHOULD NOT BE EXCLUDED FROM EXERCISING THE RIGHT TO MARRY IN NEW YORK

A. New York's Marriage Statute is Gender-Neutral and Therefore Poses No Bar to Same-Sex Marriage

In New York, marriage is governed by the Domestic Relations Law. Nowhere in Article 3, which sets out the requirements and procedure for entering into a marriage, is there any requirement that applicants for a marriage license be of the opposite sex.⁶ Nor are same-sex marriages among the categories of marriages that are void or voidable.⁷ The gender-neutrality of the New York Domestic Relations Law has never been analyzed by a court; however, the commentary to Article 2 acknowledges the gender-neutrality of New York's statutory scheme. The commentary notes that although the courts have "rejected the legal viability of same sex marriage . . . the Domestic Relations Law does not directly address the issue. The New York statutes do not explicitly state that marriage is limited to persons of opposite sex."⁸

⁶ N.Y. Dom. Rel. Law § 10 (McKinney 1999). There are sporadic gendered references in Articles 9, 10, and 11, which respectively govern actions for annulment, divorce, and separation, and one reference to "groom" and "bride" in Article 3. As compared to the pervasive gender-neutrality of Article 3, these do not rise to the level of establishing a legislative intent to prohibit same-sex marriage.

⁷ Article 2 makes only incestuous and bigamous marriages void and provides that marriages are voidable only due to certain defects in contracting capacity, such as being underage, under duress, or subject to mental illness. *Id.* §§ 5-7.

⁸ N.Y. Dom. Rel. Law, art. 2 General Commentary (McKinney 1999).

Only one lower court in New York has considered directly the issue of same-sex marriage knowingly entered into, and it found that New York does not authorize such marriages.⁹ However, that decision was issued early in the same-sex marriage debate, before the enactment of civil union legislation in Vermont and similar laws abroad, and before the spread of domestic partnership laws and private company benefits in this country, described in more detail below. The law has developed considerably in the intervening years since that decision. The court in that case did not engage in any analysis of the marriage statute, but rather, in a brief opinion, proceeded directly to a cursory constitutional analysis on the apparent assumption that the statute applies only to opposite-sex couples. The gender-neutrality of the statute, therefore, has yet to be analyzed.

Additionally, there are two cases from the early 1970s that considered the validity of a same-sex marriage and found the marriage void.¹⁰ Both of those decisions, however, were based on the doctrine of mistake, in that the plaintiff in each case entered into what was believed to be an opposite-sex union only to learn the spouse's true sex after the wedding.

In cases arising under the Estates, Powers and Trusts Law (E.P.T.L.), the First and Second Departments of the Appellate Division have interpreted "spouse" to exclude same-sex partners, but have not addressed the issue of gender-neutrality under the language of the Domestic Relations Law.¹¹ A policy reason for this interpretation was articulated in *In re Petri*: the state's "interest in having its descent and distribution scheme clear, simple, predictable and capable of determining heirs at the moment of

⁹ *Storrs v. Holcomb*, 645 N.Y.S.2d 286, 288 (Sup. Ct. Tompkins County 1996), *appeal dismissed*, 666 N.Y.S.2d 835 (3d Dep't 1997). See also *Robin v. Cook*, N.Y.L.J., Oct. 30, 1990, at 22 (Sup. Ct. N.Y. County 1987) (noting in dicta that the Domestic Relations Law limits the ability of same-sex couples to enter into "spousal type relationship[s]," but with no discussion or analysis of the gender-neutrality of the marriage statute).

¹⁰ *Frances B. v. Mark B.*, 355 N.Y.S.2d 712 (Sup. Ct. Kings County 1974); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. Queens County 1971).

¹¹ *Raum v. Rest. Assocs., Inc.*, 675 N.Y.S.2d 343 (1st Dep't 1998) (same-sex partner cannot bring wrongful death action), *appeal dismissed*, 704 N.E.2d 229 (N.Y. 1998); *In re Cooper*, 592 N.Y.S.2d 797 (2d Dep't 1993) (surviving partner of a same-sex relationship cannot assert spousal rights against the deceased partner's will), *appeal dismissed*, 624 N.E.2d 696 (N.Y. 1993). The *Raum* opinion drew a strong dissent by Justice Rosenberger, who observed that "spouse" could have a variety of meanings in different contexts. 675 N.Y.S.2d at 345. See also *Secord v. Fischetti*, 653 N.Y.S.2d 551 (1st Dep't 1997) (unmarried same-sex partner ineligible to receive monetary awards under Executive Law § 624(b)(1) upon the death of partner who was a crime victim); *Greenwald v. H & P 29th Street Assoc.*, 659 N.Y.S.2d 473 (1st Dep't 1997) (unmarried same-sex partner ineligible to assert spousal privilege under N.Y. C.P.L.R. § 4502(b)). Neither *Secord* nor *Greenwald* analyzed or affected rights under the Domestic Relations Law.

death.”¹² This policy would not be undermined by a gender-neutral interpretation of the Domestic Relations Law, but rather would be supported: when same-sex couples are able to obtain marriage licenses, their marital status will be “clear, simple, [and] predictable” for judges deciding cases under the E.P.T.L.

While rejecting the E.P.T.L. claim, the court in *In re Petri* acknowledged the gender-neutrality of the Domestic Relations Law when it stated:

[T]he requirement of a solemnized marriage may not be assumed to be based on sexual orientation. Section 3 of the Domestic Relations Law has no requirement that applicants for a marriage license be of different sexes. The only authority in this state for the prohibition of same-sex marriage is contained in two lower court decisions . . . With no clear precedent, the assumption that same sex marriages are prohibited in New York is premature. . . It is questionable whether, in this era of domestic partnerships and alternative lifestyle education in grammar schools, it can still be said that marriage has one universal meaning which does not include couples of the same sex.¹³

At worst, the Domestic Relations Law is ambiguous on the issue of same-sex marriage. This fact invokes two well-established rules of statutory construction to which the decisions discussed above have given no attention. The first such rule is that ambiguity in a statute should be resolved in light of the purpose of the statutory provisions at issue.¹⁴ That inquiry involves assessing the purpose of marriage and the purpose of the state in recognizing and enforcing marriage vows.

While marriage can involve an expression of religion and/or faith, and some religious views may oppose same-sex marriages, the state cannot ground its relationship to the support of marriage on the enforcement of religious doctrine. Nor is it tenable to tie state involvement in the creation and protection of a marriage relationship to the encouragement of procreation. Procreation is not the object of a significant number of

¹² N.Y.L.J., Apr. 4, 1994, at 29 (Sur. Ct. N.Y. County) (internal citations omitted) (surviving gay partner could not inherit from deceased partner's estate when there was neither a will nor a marriage license). Like intestate rights, spousal maintenance is unavailable to unmarried partners who separate. See *Robin*, N.Y.L.J., at 22 (lesbian plaintiff denied support from former partner); see also Vincent C. Green, *Same-Sex Adoption: An Alternative Approach to Gay Marriage in New York*, 62 Brook. L. Rev. 399, 405 (1996).

¹³ N.Y.L.J., Apr. 4, 1994, at 29 (Sur. Ct. N.Y. County) (internal citations omitted).

¹⁴ See Commentary to Consolidated Laws of N.Y. § 76 (McKinney 1971) (where a statute is ambiguous it must be construed in light of legislative intent and purpose, and “if a statute viewed from the standpoint of the literal sense of the language works an unjust or unreasonable result, an obscurity of meaning exists which calls for judicial construction”).

marriages. Maintenance of a stable family relationship for the rearing of children is arguably a state interest. However, same-sex couples may have and adopt children,¹⁵ and this interest is therefore furthered by allowing same-sex marriage.

A conception of the purpose of marriage that is not unduly underinclusive is warranted. That purpose is the creation of a public, durable, legal relationship that expresses a commitment to emotional support, financial interdependence, and personal dedication to one another.¹⁶ The purpose of the state in recognizing marriage is to create the opportunity for such expression and to provide a framework where people can make a durable promise to support and be dedicated to one another.

Viewed in light of these purposes, any resolution of statutory ambiguity against the possibility of same-sex marriage would be irrational. The expressive needs of same-sex couples and the benefits that they can achieve under a legal regime that allows them to make a lasting commitment to one another are not different from the needs of and benefits accruing to different-sex couples.

The second rule of statutory construction invoked by statutory ambiguity is that an ambiguous statute should be construed so as to avoid a substantial constitutional issue. In Goodell v. Goodell, the court preserved the constitutionality of New York's alimony statute, which imposed financial obligations only against the husband, by reading it expansively to apply to all spouses.¹⁷ Similarly, in People v. Liberta, the Court of Appeals interpreted New York's forcible rape and sodomy statutes in a gender-neutral fashion in order to cure the statutes' liability exemption for women.¹⁸ The United States Supreme Court recently employed this rule of statutory construction in United States v. X-Citement Video, Inc. when it applied a federal statute's scienter provision beyond its grammatical reading in order to avoid finding the statute violative of the First Amendment.¹⁹

¹⁵ See, e.g., In re Jacob/In re Dana, 660 N.E.2d 397 (N.Y. 1995).

¹⁶ See Turner v. Safley, 482 U.S. 78, 95-96 (1987).

¹⁷ 429 N.Y.S.2d 789, 791 (3d Dep't 1980).

¹⁸ 474 N.E.2d 567, 578 (N.Y. 1984), *cert. denied*, 471 U.S. 1020 (1985).

¹⁹ 513 U.S. 64, 78-79 (1994). See also *id.* at 69 (applying rule "that a statute is to be construed where fairly possible so as to avoid substantial constitutional questions" since "[w]e do not assume that Congress, in passing laws, intended" arguably unconstitutional results); DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

B. New York's Public Policy Supports Permitting Same-Sex Marriages

New York's public policy supports the gender-neutral application of New York's marriage statute to reach same-sex couples. New York courts have increasingly recognized that long-standing, committed same-sex relationships deserve the protections that were previously afforded only more traditionally recognized relationships. The hallmark of these decisions is a willingness to evaluate intimate relationships based on how they function, not on the sex of the participants. Several recent cases involving housing, adoption, and funeral arrangements illustrate this trend.

In Braschi v. Stahl Associates Co., the New York Court of Appeals held that the gay life partner of a tenant in a rent-controlled apartment is to be considered a family member under the rent control statute and entitled to protection from eviction.²⁰ As the term "family" is not defined in the rent control code, the Appellate Division had found that the non-eviction provision applies only to "family members within traditional, legally recognized familial relationships."²¹ The Court of Appeals reversed, holding that "[i]n the context of eviction, a more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence."²² The court found that to define "family" in this manner fulfilled the legislative intent of extending "protection to those who reside in households having all of the normal familial characteristics."²³

Another recent landmark decision is In re Jacob/In re Dana, the "second parent" adoption case, in which same-sex and opposite-sex live-in partners of the children's biological mothers sought permission to adopt without the termination of the mothers' parental status as required by Section 117 of the Domestic Relations Law.²⁴ The Court of Appeals held that second-parent adoptions can be granted because they permit the creation of stable legal ties between one partner and the biological or adopted children of the other partner.²⁵ In reaching its decision, the court stressed the many emotional, social, and financial factors of legal parent-child status that are very similar to those accompanying the status of being married:

²⁰ 543 N.E.2d 49 (N.Y. 1989).

²¹ Braschi v. Stahl Assocs. Co., 531 N.Y.S.2d 562, 563 (1st Dep't 1988), *rev'd*, 543 N.E.2d 49 (N.Y. 1989).

²² Braschi, 543 N.E.2d at 53-54.

²³ *Id.* at 54.

²⁴ 660 N.E.2d 397 (N.Y. 1995).

²⁵ *Id.* at 399.

[The best interests of the child] would certainly be advanced in situations like those presented here by allowing two adults who actually function as a child's parents to become the child's legal parents. The advantages which would result from such an adoption include Social Security and life insurance benefits in the event of a parent's death and disability, the right to sue for the wrongful death of a parent, the right to inherit under rules of intestacy and eligibility for coverage under both parents' health insurance policies. In addition, granting a second parent adoption further ensures that two adults are legally entitled to make medical decisions for the child in case of emergency and are under a legal obligation for the child's economic support. Even more important, however, is the emotional security of knowing that in the event of the biological parent's death or disability, the other parent will have presumptive custody.²⁶

A further example of New York's supportive public policy is found in *Stewart v. Schwartz Brothers-Jeffer Memorial Chapel, Inc.*²⁷ In that case, the plaintiff sought to honor his deceased gay partner's preference for the treatment of his remains, over the objections of the decedent's mother and brother.²⁸ Departing from the general rule that only the surviving spouse or next of kin may determine disposition absent testamentary directives to the contrary, the court looked to the nature of the relationship between the plaintiff and the decedent and granted the surviving partner standing.²⁹ The court characterized the couple as having had a "close, spousal-like relationship" and found that to deny the partner standing as the surviving spouse would "illustrate a callous disregard of [their] relationship" and would effectively ignore the decedent's wishes "merely because the Plaintiff does not fit neatly into the legal definition of a spouse or next of kin."³⁰

Despite the courts' increased willingness to recognize same-sex relationships in case-specific situations and grant certain corresponding rights, it remains enormously important for New York to allow same-sex couples to avail themselves of the presumptions flowing from marital status and thereby bring some certainty to their domestic relations. Marriage encourages social stability, permitting partners to rely on each other rather than the government. As M.V. Lee Badgett and Josh A. Goldfoot have observed:

²⁶ *Id.* (citations omitted).

²⁷ 608 N.Y.S.2d 965 (Sup. Ct. Queens County 1993).

²⁸ *Id.* at 966.

²⁹ *Id.* at 968.

³⁰ *Id.*

Encouraging economically stable families has obvious social benefits. Children have increased access to parental resources, both economic and social. Adults will likely improve their own standard of living, share in the responsibility of child-rearing, and have built-in financial support during tough times. Evidence further suggests that married adults are healthier and live longer than single ones. As well, business and industry get a more stable customer base and a stronger current and future labor force. Though difficult to quantify, these are just some of the social benefits of marriage.³¹

Although lesbian and gay couples have always formed committed, loving partnerships, their unions have been deprived of state recognition and the benefits and burdens that accompany such recognition throughout the life cycle. Those benefits and burdens have great emotional, social, and financial importance and cannot be achieved in other ways. For example, under state law, spouses are automatically entitled to act for each other in healthcare decisions, to hold real estate as tenants by the entirety, to file joint tax returns, to apply for joint insurance policies, to inherit with or without a will, to receive pension and annuity payments, to attend to funeral arrangements and estate administration, and to pursue orderly dissolution or divorce proceedings.³² With those rights come burdens, such as liability for a spouse's debts, for child support, and possibly for spousal maintenance.

A poignant example of what can happen in the absence of the presumptions that accompany marriage is the case of Alison D. v. Virginia M.³³ In that case, a lesbian couple planned to have a child together, had a son after one of them was donor inseminated, and shared all responsibilities of child rearing for nearly two and a half years until the non-biological mother moved out of the home when the couple separated.³⁴ The couple worked out a visitation schedule for the child, who continued to call both women "Mommy," but after several years the couple severed their

³¹ 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>. Additional potential benefits to the state from allowing same-sex marriages include increased state tax revenues, a decrease in the cost of anti-poverty programs, and a significant increase in tourism. See 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).

³² See David L. Chambers, What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples, 95 Mich. L. Rev. 447 (1996); Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach, 41 Ariz. L. Rev. 417 (1999); Evan Wolfson, Why We Should Fight for the Freedom to Marry, 1 J. Gay Lesbian, & Bisexual Identity 79 (1996).

³³ 572 N.E.2d 27 (N.Y. 1991).

³⁴ *Id.* at 28.

economic ties and the biological mother first restricted, and then cut off, the child's contacts with her former partner.³⁵ The Court of Appeals refused to grant the non-biological parent visitation rights.³⁶ Finding that the non-biological parent lacked standing, the court reasoned that granting visitation "to a third person" would hinder the biological parent's right to custody, but Chief Judge (then Judge) Kaye's compassionate dissent chided the majority for failing to look "to modern-day realities in giving definitions to statutory concepts."³⁷

At least one New York court has interpreted *Alison D.* narrowly. In *In re J.C. v. C.T.*,³⁸ a Westchester County family court judge considered another parental visitation dispute between same-sex partners who had separated.³⁹ The court suggested that a non-biological parent might establish standing to seek visitation under an equitable estoppel theory already adopted by the courts of New Jersey and Minnesota.⁴⁰ The court explained that:

[u]nder this test, if a non-biological or non-adoptive person, who is not otherwise granted statutory standing, seeks visitation with a child or children with whom he or she alleges a parental relationship, they must demonstrate: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by [undertaking] significant responsibility for the child's care, education and development, including contributions to the child's support, monetary or otherwise, without the expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have

³⁵ *Id.*

³⁶ *Id.* at 30.

³⁷ *Id.* at 29; *id.* at 33 (Kaye, J., dissenting). *Alison D.* illustrates the importance to same-sex couples of "licensing mechanisms," such as marriage, that formalize family ties. If the petitioner in *Alison D.* had adopted the child, as would now be possible, the court would probably have ordered visitation under Domestic Relations Law Section 70. The Court of Appeals has held, however, that the adoption process may not be used as an alternative means for two people seeking to obtain legality of a non-marital sexual relationship, whether the relationship is homosexual or heterosexual in nature. *In re Adoption of Robert Paul P.*, 471 N.E.2d 424 (N.Y. 1984).

³⁸ 711 N.Y.S.2d 295 (Fam. Ct. 2000).

³⁹ *Id.* at 297.

⁴⁰ *Id.* at 299.

established with the child a bonded, dependent relationship which is parental in nature.⁴¹

New York's executive orders also reveal a willingness to recognize and support same-sex relationships through its benefits policies. In 1983, Governor Cuomo issued an executive order prohibiting discrimination based upon sexual orientation and providing health insurance benefits to same-sex domestic partners of state employees.⁴² Governor Pataki continued the policy in 1996⁴³ and as of March 3, 2001, health benefits for same-sex partners are available for all state employees.⁴⁴ Similarly, in New York City, Mayor Koch issued an executive order banning sexual orientation discrimination, and Mayor Dinkins established a domestic partner registry with the City Clerk.⁴⁵ This trend is aligned with a broader national trend recognizing same-sex relationships. Over 2,000 private employers, thirty-two unions, seventy-six academic institutions, and sixty-six government agencies offer domestic partner benefits.⁴⁶ Forty-eight states and local governments offer domestic partnership registries.⁴⁷

Last year, the New York legislature explicitly recognized the particular needs of gays and lesbians in enacting the Hate Crimes Act of 2000.⁴⁸ The legislature recognized that legislation imposing increased penalties for bias-related crimes should protect persons who are victimized because of their sexual orientation, as well as other classes of persons traditionally protected under human rights laws.

⁴¹ *Id.*

⁴² N.Y. Comp. Codes R. & Regs. tit. 9 § 4.28 (1983) (Cuomo, Gov.); *id.* § 5.32 (1996) (Pataki, Gov.) (continuing § 4.28). *See also id.* § 4.28.1 (1987) (Cuomo, Gov.).

⁴³ *Id.* § 5.32 (1996) (Pataki, Gov.); *id.* § 5.33 (1996) (Pataki, Gov.).

⁴⁴ In January 2001, State Senate Majority Leader Joseph Bruno announced the extension of health insurance benefits to the same-sex partners of State Senate employees. The State Senate employees were the final group of state employees to receive these benefits. *See* Richard Perez-Pena, Bruno Agrees on Domestic-Partner Benefits, N.Y. Times, Jan. 20, 2001, at D1.

⁴⁵ Exec. Order No. 94 (June 20, 1986) (Koch, Mayor); Exec. Order No. 48 (Jan. 7, 1993) (Dinkins, Mayor). In June 1998, New York City extended to all registered domestic partners full equality with married couples in every area of policy and practice controlled by the municipal government. *See* Partners Task Force for Gay and Lesbian Couples, Registration for Domestic Partnership (2000), at <http://www.buddybuddy.com/d-p-reg.html>.

⁴⁶ Lambda Legal Defense & Education Fund, Domestic Partnership Listings, Resources (Nov. 6, 2000), at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=21>.

⁴⁷ Lambda Legal Defense & Education Fund, States and Municipalities Offering Domestic Partnership Registries, Resources (Nov. 22, 2000), at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=403>.

⁴⁸ 2000 N.Y. Laws 107.

The essence of the marriage relationship is a couple's decision to become an economic and emotional partnership, with the intention to remain so for life. Although that essence is assumed to exist when opposite-sex couples marry, the courts must currently engage in searching inquiries to determine whether it is present in a same-sex relationship. For example, in Braschi, the Court of Appeals stated that:

In making this assessment, the lower courts of this State have looked to a number of factors, 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.⁴⁹

Committed same-sex relationships deserve the same protections and benefits enjoyed by opposite-sex couples without the uncertainty and second-guessing of an extensive, multi-factored analysis.⁵⁰

C. The New York and Federal Equal Protection Clauses Protect the Fundamental Right to Marry for All Citizens

As recently as the 1960s, many Americans considered interracial marriage unnatural and immoral. Courts had declared interracial marriages void because religion had deemed such unions intrinsically unnatural and because society had traditionally viewed marriage as a union between people of the same race. In the seminal case of Loving v. Virginia, however, the United States Supreme Court held that marriage is a fundamental right.⁵¹ As a result, the choice of *whom* to marry became, with narrow exceptions not applicable here, beyond the reach of state regulation: "the government [is] prevented from interfering with an individual's decision about whom to marry."⁵² Even deeply-rooted traditions failed to justify a violation of the "central meaning of the Equal Protection Clause" of the United States Constitution.⁵³

⁴⁹ Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (citation omitted).

⁵⁰ In fact, New York and United States law currently offer substantial protections and benefits to married opposite-sex couples even if they are not committed to each other.

⁵¹ 388 U.S. 1, 12 (1967). See also Zablocki v. Redhail, 434 U.S. 374, 383 (1978).

⁵² People v. Shepard, 409 N.E.2d 840, 842 (N.Y. 1980). See also Doe v. Coughlin, 518 N.E.2d 536, 539 (N.Y. 1987) ("The right to privacy, in constitutional terms, involves freedom of choice, the broad general right to make decisions concerning oneself and to

The parallels between the anti-miscegenation laws of a generation ago and current attempts to prohibit same-sex marriage are striking, and the assumption that only opposite-sex couples are privileged to marry is as constitutionally questionable as the assumption that only white people are privileged to marry other white people.⁵⁴ A strong argument can be made that any prohibition on the right of same-sex couples to marry would violate the Equal Protection Clauses of both the New York and federal constitutions.⁵⁵

1. Same-Sex Marriage as Guaranteed by the Fundamental Right to Marry

Any classification by which one group is denied a fundamental right is discriminatory and subject to strict scrutiny.⁵⁶ Under this standard, the state must demonstrate a compelling interest in excluding same-sex couples from the right to marry, and it must show that legislation is narrowly tailored to that interest.

Loving established that marriage is clearly a fundamental right. Is it possible, however, to characterize the refusal to recognize same-sex marriage as the denial of a fundamental right? After all, in Bowers v. Hardwick the Court refused to find a fundamental right to engage in sodomy, since such conduct was not, in its words, "deeply rooted in this

conduct oneself in accordance with those decisions free of governmental restraint or interference."), *reargument denied*, 521 N.E.2d 446 (N.Y. 1988), *cert. denied*, 488 U.S. 879 (1988).

⁵³ Loving, 388 U.S. at 12. In addition to offending the Equal Protection Clause, limiting marriage to opposite-sex couples offends Due Process, as it denies a fundamental right to a distinct group. See Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992) ("It is also tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified. But such a view would be inconsistent with our law." Thus Loving was correct in finding that marriage is "an aspect of liberty protected against state interference by the substantive component of the Due Process Clause.").

⁵⁴ See James Trosino, Note, American Wedding: Same-Sex Marriage and the Miscegenation Analogy, 73 B.U. L. Rev. 93, 96 (1993).

⁵⁵ See, e.g., Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (holding that the denial of a marriage license to same-sex couples merited strict scrutiny analysis under the Hawaii Constitution); Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that Vermont's refusal to issue a marriage license to same-sex couple violated state constitutional equal protection provisions); see generally Mark Strasser, Loving, Baehr, and the Right to Marry: On Legal Argumentation and Sophistical Rhetoric, 24 Nova L. Rev. 769 (2000) (comparing Baehr with Loving).

⁵⁶ See Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969) (holding that an infringement of a fundamental constitutional right is subject to review under the "strict scrutiny" standard).

Nation's history and tradition" or implicit in "the concept of ordered liberty."⁵⁷

There is strong reason to conclude under Loving that the refusal to recognize same-sex marriage is the denial of a fundamental right under the Fourteenth Amendment, notwithstanding Bowers. Unlike the issue of sodomy in Bowers, which concerned the scope of the right to privacy, same-sex marriage concerns the unquestioned fundamental right to marry. Furthermore, the holding in Bowers is inapplicable to the question of same-sex marriage *per se*, because Bowers held all sodomy, whether heterosexual or homosexual, not to be a fundamental right.⁵⁸ Lastly, under Loving, it was irrelevant whether a species of marriage (for example, miscegenation) was itself deeply rooted in the Nation's traditions or central to the concept of ordered liberty—it was implicitly sufficient for marriage as a category to meet these criteria.

As the Superior Court of Alaska explained in Brause v. Bureau of Vital Statistics:

[I]t is self-evident that same-sex marriage is not "accepted" or "rooted in the traditions and collective conscience" of the people . . . The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one's own life partner is so rooted in our traditions.⁵⁹

Recognizing this, the Alaska Superior Court found that one's choice of life partner is a fundamental right and that any limitations on that right are subject to the strict scrutiny standard.⁶⁰

The argument that same-sex unions are incompatible with the basic nature of marriage for historical and functional reasons is also doubtful. As Loving demonstrated, traditional or religious notions of the institution of marriage (for example, that it is limited to same-race couples) are insufficient bases for prohibiting otherwise qualified couples from

⁵⁷ 478 U.S. 186, 194 (1986).

⁵⁸ See Mark Strasser, Sex, Law, and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudence, 14 Notre Dame J.L. Ethics & Pub. Pol'y 753 (2000) (discussing Bowers in the context of same-sex marriage and arguing that Bowers does not preclude the claim that same-sex marriage is a fundamental right).

⁵⁹ 1998 WL 88743, at *4 (Alaska Sup. Ct. 1998) (quoting Baehr, 842 P.2d at 57) (While the court in Baehr found that a ban on same-sex marriage warranted strict scrutiny under the Hawaii Constitution, it incorrectly found same-sex marriage not to be a fundamental right, which the Alaska Superior Court disputed. Ultimately, the decisions in both Baehr and Brause were mooted by subsequent amendments to the respective state constitutions.).

⁶⁰ *Id.* at *6.

marrying.⁶¹ Likewise, the argument that procreation is the purpose of marriage has no foundation, either legally or empirically. The Supreme Court⁶² has described the fundamental right to marry as an expression of emotional support, public commitment, personal dedication, and religious faith, with no limitation of marriage as solely or primarily an institution for sanctioned procreation.⁶³ Indeed, many opposite-sex married couples do not raise children, while many same-sex couples do, and allowing same-sex marriage would serve to support the interest of fostering marriage by making it available to more couples who share the emotional bonds that characterize marriage and by allowing their children to be raised by parents with a state-recognized relationship.⁶⁴

2. Level of Review of a Prohibition on Same-Sex Marriage under Ordinary Equal Protection Analysis Standards

Even if same-sex marriage is not analyzed as a fundamental right, the constitutionality of a prohibition on same-sex marriage is questionable under the federal Equal Protection Clause, whether a strict scrutiny, intermediate scrutiny, or rational basis test is applied. Assuming that denial of same-sex marriage is not the denial of a fundamental right, a prohibition on same-sex marriage would represent a classification on the basis of sex, warranting intermediate scrutiny. Three cases in other states followed this logic in recognizing that laws denying same-sex couples the freedom to marry violate state constitutions guaranteeing equal protection rights. Baehr applied a strict scrutiny test in holding that denying same-sex couples the right to marry constitutes sex discrimination under the Hawaii Constitution.⁶⁵ The court ordered the state to demonstrate a compelling

⁶¹ “[A]s Loving amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.” Baehr, 852 P.2d at 63. *But see Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (no fundamental right of same-sex marriage under United States Constitution, relying in part on Book of Genesis), *appeal dismissed*, 409 U.S. 810 (1972).

⁶² See Turner v. Safley, 482 U.S. 78, 95-96; Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

⁶³ Turner, 482 U.S. at 95-96.

⁶⁴ See William M. Hohengarten, Same-Sex Marriage and the Right to Privacy, 103 Yale L.J. 1495 (1994) (discussing at length and ultimately dismissing the arguments that tradition and the function of procreation limit marriage to opposite-sex couples); *see also Loving in the New Millennium: On Equal Protection and the Right to Marry*, 7 U. Chi. L. Sch. Roundtable 61 (2000) (discussing Loving and arguing that the various “legitimate interest” rationales suggested by commentators to support bans on same-sex marriage have no merit).

⁶⁵ Baehr, 852 P.2d 44. In addition, in Tanner v. Oregon Health Sci. Univ., 971 P.2d 435 (Or. Ct. App. 1998), the court held that the privileges and immunities clause of the Oregon Constitution required a university to extend health and life insurance benefits to the unmarried domestic partners of its gay and lesbian employees. *Id.* at 448. The court

reason for limiting marriage to opposite-sex couples, and in December 1996, on remand, the trial court found that the state had failed to meet its burden and ordered the issuance of marriage licenses to same-sex couples.⁶⁶ In *Baker v. State*,⁶⁷ the Vermont Supreme Court applied an intermediate level of scrutiny in holding that denying same-sex couples the rights and protections that come with civil marriage violates the Vermont Constitution's equality guarantee,⁶⁸ as did the Alaska Superior Court in *Brause*.⁶⁹

explained that defining a suspect class depends not on the immutability of a class-defining characteristic, but on (1) whether the characteristic has historically been regarded as defining a distinct socially-recognized group, and if so (2) whether that group has been the subject of adverse social or political stereotyping. *Id.* at 446. Applying this test, the court concluded that the plaintiffs, three lesbian couples, were members of a suspect class under the privileges and immunities clause of the Oregon Constitution.

Moreover, the Appellate Division, First Department, has held that sexual orientation is a suspect classification under the federal and state Equal Protection clauses. See *Under 21 v. City of New York*, 488 N.Y.S.2d 669 (1st Dep't 1984), *rev'd on other grounds*, 482 N.E.2d 1 (N.Y. 1985), *order aff'd as modified*, 482 N.E.2d 1 (N.Y. 1985).

It is true that a number of federal circuit courts have rejected claims that sexual orientation should be treated as a suspect classification subject to strict scrutiny. See, e.g., *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998); *Equal Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 296 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998); *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. Def. 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). State courts interpreting their state constitutions, of course, are not bound by these interpretations of the federal Equal Protection Clause.

⁶⁶ *Baehr v. Miike*, 65 U.S.L.W. 2399 (Haw. Cir. Ct. 1996).

⁶⁷ 744 A.2d 864 (Vt. 1999).

⁶⁸ The *Baker* court's state constitutional analysis does not precisely mirror the scrutiny classifications of federal equal protection law, but the analysis appears to be closest to federal intermediate scrutiny.

⁶⁹ *Brause v. Bureau of Vital Statistics*, 1998 WL 88743. The court in *Brause* held that, because the right to choose one's life partner is a fundamental right, the strict scrutiny test applied. It then went on to state that, "[w]ere the right to choose one's life partner not fundamental, . . . 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." *Id.* at *6. Ultimately, as explained above, the Hawaii and Alaska cases were rendered moot by state constitutional amendments.

While the federal courts have thus far rejected sexual orientation as a suspect classification, *supra* note 65, even under the federal Equal Protection Clause, a prohibition of same-sex marriage should be viewed not as a classification based on sexual orientation but as one based on sex, and therefore subject to an intermediate level of scrutiny. As the court in *Brause* explained: "That this is a sex-based classification can readily be demonstrated: if

Even if a prohibition on same-sex marriage were to be analyzed under the rational basis standard, the lowest level of constitutional scrutiny, the state would still have to show that the prohibition bears a *rational relation* to a *legitimate* state interest.⁷⁰

The rational basis analysis that the Supreme Court applied in Romer v. Evans is highly relevant to the issue of same-sex marriage. In Romer, the Court struck down a Colorado constitutional amendment banning laws that protected homosexual citizens from discrimination.⁷¹ As the Court held, even a law that seems unwise or incidentally disadvantages a particular group will satisfy the Equal Protection Clause if it rationally advances a legitimate government interest.⁷² Nevertheless, the Court struck down the Colorado amendment because its dramatic breadth was not connected to any "legitimate purpose or discrete objective" and because the disadvantages it imposed were likely born of animosity towards gays and lesbians.⁷³

Similarly, it is difficult to understand how prohibiting two people of the same sex from pursuing a loving relationship in a state-sanctioned marriage could serve any legitimate purpose or result from anything other than animosity toward the homosexual community.⁷⁴

Regardless of the result under the federal Equal Protection Clause, New York courts, like those in Vermont, Hawaii, and Alaska, are free to take a more expansive view of the state constitution. The New York Constitution's Equal Protection Clause⁷⁵ states broadly that "[n]o person

twins, one male and one female, both wished to marry a woman and otherwise met all of the Codes' requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious." 1998 WL 88743, at *6.

⁷⁰ See, e.g., Romer v. Evans, 517 U.S. 620, 631-32 (1996).

⁷¹ *Id.* at 623.

⁷² *Id.* at 632.

⁷³ *Id.* at 634-35.

⁷⁴ Cf. Raum v. Rest. Assocs., Inc., 675 N.Y.S.2d 343, 347 (1st Dep't 1998) (Rosenberger, J., dissenting) (denial of same-sex partner's right to sue for wrongful death under E.P.T.L. does not meet even rational basis test). But see In re Cooper, 597 N.Y.S.2d 797 (2d Dep't 1993) (applying rational basis standard to E.P.T.L. definition of spouse).

⁷⁵ See People v. Scott, 593 N.E.2d 1328, 1338 (N.Y. 1992) (The Court of Appeals is "bound to exercise its independent judgment" when it considers constitutional law issues and has "decline[d] to adopt any rigid method of analysis which would . . . require [it] to interpret provisions of the State Constitution in 'Lockstep' with the Supreme Court's interpretations of similarly worded provisions of the Federal constitutional rule at issue." Rather, the court must "determine whether under established New York law and traditions some greater degree of protection must be given."); see also William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535, 548 (1986); S. Pollock, State Constitutions as Separate Sources of Fundamental Rights, 35 Rutgers L. Rev. 707, 717-19 (1983); H. Linde, First Things First, Rediscovering the States' Bill of Rights, 9 U. Balt. L. Rev. 379, 381-82 (1980).

shall be denied the equal protection of the laws of the state.”⁷⁶ Indeed, New York’s Equal Protection Clause has been interpreted in some contexts to afford even more protection than its federal counterpart.⁷⁷ The New York Court of Appeals has held that a law that treats people differently on the basis of sex “violates equal protection unless the classification is substantially related to the achievement of an important governmental objective.”⁷⁸ Particularly in areas of individual liberties and fundamental rights, the Court of Appeals has articulated a willingness to expand state constitutional protections.⁷⁹ Even where the state constitutional provision is identical to the federal provision, this expansive view of state constitutional protection applies if the court finds state statutory or common law defining the individual right, a history or tradition in the state of protecting the right, or that the right is of a peculiar state or local concern.⁸⁰ Given New York’s public policy expressed in the cases and executive orders discussed above, as well as this state’s history of tolerance, New York courts should interpret New York’s Equal Protection Clause as allowing marriage for same-sex couples even if the federal Equal Protection Clause does not.

As explained above, only one lower New York case has considered directly the issue of same-sex marriage in an equal protection context.⁸¹

⁷⁶ N.Y. Const. art. I, § 11.

⁷⁷ See, e.g., People v. Kern, 554 N.E.2d 1235, 1241 (N.Y. 1990) (finding that the use of peremptory challenges by the defense to exclude jurors of a particular race violates the Equal Protection Clause of the state constitution). But see Under 21 v. City of New York, 482 N.E.2d 1, 8 n.6 (N.Y. 1985); Esler v. Walters, 437 N.E.2d 1090, 1094 (N.Y. 1982) (dicta in both cases that the New York Constitution’s Equal Protection Clause is no broader than the United States Constitution’s Equal Protection Clause).

⁷⁸ People v. Liberta, 474 N.E.2d 567, 576 (N.Y. 1984).

⁷⁹ In fact, the New York Court of Appeals often parts company with the United States Supreme Court when it interprets state constitutional provisions that parallel those in the federal constitution. See Peter J. Galie, The New York State Constitution, at 44, 46, 48, 52, 60-61 (1991) (discussing various Courts of Appeals decisions that have granted greater protections under the New York Constitution to the right to counsel, the right against self-incrimination, the right to due process of law, the right of freedom of the press, and the right to be protected from unreasonable searches and seizures); see also People v. Harris, 570 N.E.2d 1051, 1054 (N.Y. 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., 523 N.E.2d 277, 280 n.3 (N.Y. 1988) (“[t]he protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum recognized by the First Amendment”); Doe v. Coughlin, 518 N.E.2d 536, 553 (N.Y. 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 our lives”).

⁸⁰ See People v. Alvarez, 515 N.E.2d 898, 899 (N.Y. 1987).

⁸¹ Storrs v. Holcomb, 645 N.Y.S.2d 286, 288 (Sup. Ct. Tompkins County 1996).

However, that case should not be considered controlling precedent. First, the court's reasoning was based on notions of marriage that pre-dated the enactment of civil union legislation in Vermont and similar laws internationally, and before the spread of domestic partnership laws and private company benefits throughout this country. Both the law and public opinion have changed considerably in the intervening years.⁸² Second, the court's equal protection analysis relied heavily on a case finding that the E.P.T.L. defined spouses as opposite-sex persons, and that this definition had a rational basis under the Equal Protection Clause.⁸³ As discussed above, the E.P.T.L.'s need for "clear, simple, [and] predictable" rules for determining entitlement to estates⁸⁴ is distinguishable from the equal protection issue under the Domestic Relations Law, where this interest is not implicated.⁸⁵ Moreover, the court did not analyze the marriage statute or its plain language. Consequently, the court ignored the marriage statute's gender-neutrality and the absence of any statutory basis for imposing an opposite-sex requirement.⁸⁶

Thus, same-sex marriage has both a statutory and a constitutional basis. Nothing in either state law or the federal and state constitutions bars same-sex marriage; indeed, they provide the foundation for the legal recognition of those marriages.

D. Civil Union Legislation

While this Report argues that same-sex marriage is lawful, the needs of gay and lesbian couples should not await the acceptance of that view by the judiciary. A legislative act that would provide full rights for same-sex marriages is desirable. If that much cannot be achieved promptly, New York at a minimum should, as an interim step, follow the lead set by Vermont, and several foreign countries and provinces, to establish an institution that affords same-sex couples the vast majority of benefits and burdens that accompany opposite-sex marriage—civil union. Indeed, the trend toward judicial and executive recognition of same-sex relationships in New York discussed above, combined with principles of equality, justifies an immediate, interim step of recognition of same-sex civil unions through an act of the legislature. Such an interim legislative solution should, however, be without prejudice to an ultimate judicial holding that same-sex marriage is lawful.

⁸² See *supra* Part I.A.

⁸³ *In re Cooper*, 592 N.Y.S.2d 797 (2d Dep't 1993), *appeal dismissed*, 624 N.E.2d 696 (N.Y. 1993).

⁸⁴ *In re Petri*, N.Y.L.J., Apr. 4, 1994, at 29.

⁸⁵ See *supra* text accompanying note 11.

⁸⁶ See *supra* Part I.A.

On July 1, 2000, the State of Vermont became the first in the nation to grant same-sex couples virtually all of the state-related rights and responsibilities accorded to opposite-sex married couples through the enactment of same-sex civil unions.⁸⁷ That law resulted from the Vermont Supreme Court's December 1999 decision in *Baker*⁸⁸ discussed above. The court in *Baker* ordered the legislature to take steps to end the state's discriminatory exclusion of same-sex couples from the marriage laws, and in response the Vermont legislature passed "An Act Relating to Civil Unions,"⁸⁹ which accords same-sex couples virtually all of the state law benefits, protections, and responsibilities of marriage. The Vermont legislature's findings supporting the legal recognition of civil unions cite to the state's interest in encouraging close and caring families and acknowledge that "despite longstanding social and economic discrimination, many gay[s] and lesbian[s] have formed lasting, committed, caring and faithful relationships with persons of their same sex. These couples live together, participate in their communities together, and some raise children and care for family members together, just as do couples who are married."⁹⁰

The Vermont legislature announced that civil unions were intended to give eligible same-sex couples the opportunity to obtain the same benefits, protections, and responsibilities afforded to married opposite-sex couples "whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law."⁹¹ The non-exclusive list of laws and policies that are now applied equally to civilly-united couples includes intestacy and survivorship rights of spouses, adoption law, insurance law, medical care rights, state-granted family leave benefits, state tax laws, and spousal privileges in court.⁹² Like a marriage, a civil union is initially licensed by a town clerk and certified by a justice of the peace, a judge, or a member of the clergy.⁹³ Similarly, civil union dissolution falls under the jurisdiction of the family court and follows the same procedures established for marital divorces.⁹⁴ Civil union is not a perfect solution, however. While marriage is a clearly defined bundle of benefits and

⁸⁷ An Act Relating to Civil Unions, Vt. Stat. Ann. tit. 15, §§ 1201-1207 (2003).

⁸⁸ 744 A.2d 864 (Vt. 1999).

⁸⁹ Tit. 15, §§ 1201-1207, 5002, 5006-5008, 5012, 5160, 5164-5166, 5169.

⁹⁰ 2000 Vt. Acts & Resolves 91 § 1(9).

⁹¹ Tit. 15, § 1204(a).

⁹² *Id.* § 1204(e).

⁹³ Tit. 18, § 5164.

⁹⁴ Tit. 15, § 1206. See generally *Recent Legislation: Domestic Relations—Same-Sex Couples—j Vermont Creates System of Civil Unions*, 114 Harv. L. Rev. 1421 (2001).

responsibilities, 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.

Internationally, there has been an increasing trend in favor of affording legal recognition to same-sex relationships. The Netherlands recently passed a law allowing same-sex couples to marry and adopt children.⁹⁵ Denmark, Norway, Iceland, Greenland, and Sweden all offer significant legal protections to same-sex couples.⁹⁶ France has also extended limited marriage rights to same-sex couples.⁹⁷ The Canadian province of Quebec has extended the status of "*conjoints de fait*" to same-sex couples.⁹⁸ Australia treats the long-term partners of gay men and lesbians the same as spouses for immigration purposes. And Canada, Israel, Namibia, South Africa, the Czech Republic, Spain, and Hungary all recognize same-sex relationships for a variety of purposes.⁹⁹ The Vermont civil union legislation was therefore in line with legal trends abroad.

Adoption of a Vermont-style civil union law is a viable, albeit incremental step for New York on the road to same-sex marriages.¹⁰⁰ Through civil union legislation, Vermont has attempted to remedy the equal protection violation that is inherent in denying same-sex couples access to marriage. It therefore stands as an example for states like New York that wish to begin to live up to their constitution's promise of equal treatment.

⁹⁵ Same-Sex Dutch Couples Gain Marriage and Adoption Rights, N.Y. Times, Dec. 20, 2000, at A8. *See also* First Gay Couples Marry in the Netherlands, N.Y. Times, Apr. 2, 2001, at A7.

⁹⁶ Barbara J. Cox, But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate But (Un)equal, 25 Vt. L. Rev. 113, 119-20 (2000); William N. Eskridge, Jr., Comparative Law and the Same-Sex Marriage Debate: A Step-By-Step Approach Toward State Recognition, 31 McGeorge L. Rev. 641, 647 (2000). *See also* M. Pedersen, Denmark: Homosexual Marriage and New Rules Regarding Separation and Divorce, 30 J. Fam. L. 289 (1992) (discussing amendments to Denmark's Registered Partnership Act); M. Roth, The Norwegian Act on Registered Partnership for Homosexual Couples, 35 J. Fam. L. 467 (1997) (discussing Norway's Act on Registered Partnership for Homosexual Couples).

⁹⁷ Charles Trueheart, Gay Unions Legalized in France: Unmarried Couples Win Equal Rights, Wash. Post, Oct. 14, 1999, at A17.

⁹⁸ Robert E. Rodes, Jr., On Law and Chastity, 76 Notre Dame L. Rev. 643, 733 n.527 (2001). In addition, in Ontario, same-sex couples must be treated the same as opposite-sex couples. *See M. v. H.*, [1999] S.C.R. 3 (holding that the Family Law Act, R.S.O., ch. F-1, § 29 (1990) (Can.), unlawfully discriminates against same-sex couples in denying them spousal support available to opposite-sex couples).

⁹⁹ Barbara J. Cox, "The Little Project": From Alternative Families to Domestic Partnerships to Same-Sex Marriage, 15 Wis. Women's L.J. 77, 81 (2000).

¹⁰⁰ *See* Cox, *supra* note 96. Although discrimination on the basis of marital status is illegal in New York, the New York Court of Appeals has interpreted marital status discrimination very narrowly to mean whether an individual is classifiable as single, married, separated, divorced, or widowed. Manhattan Pizza Hut, Inc. v. N.Y. State Human Rights Appeal Bd., 415 N.E.2d 950 (N.Y. 1980). If civil union legislation is adopted, New York should extend that definition to include people in civil unions.

E. Impact of Gender Identity on Same-Sex Marriage

Another emerging area of the law that may have a significant impact on the development of same-sex marriage law is the effect that gender identity may have on the legal status of same-sex marriage. There are at least two situations in which the issue of gender identification may impact the very definition of same-sex marriage. The first situation occurs when two people of different genders enter into a legally recognized marriage and, later, one of the spouses transitions from one gender to another. Does the fact that the two individuals are now biologically the same sex have an impact on the legal status of their pre-existing marriage?

Although there are few published decisions on this issue, many “same-sex married couples” in this situation have not faced legal challenges primarily because there are relatively few situations in which anyone other than one of the spouses has legal standing to challenge the validity of a marriage. Legal problems may arise, however, in a number of contexts. For example, surviving spouses may face a challenge when they attempt to collect survivorship benefits or claim inheritance or other tax benefits that are restricted to married couples. Similarly, an employer may challenge the validity of such a marriage in the context of trying to exclude one spouse from an employer-provided health plan.

The second situation occurs when individuals marry after they transition their gender. Whether such a union is a same-sex union depends on how a particular state defines gender.¹⁰¹ Of the handful of decisions addressing the validity of such marriages, all but two have held that such unions are null and void.¹⁰² Very recently, for example, a Texas appellate

¹⁰¹ Julie A. Greenberg, *When is a Man a Man and When is a Woman a Woman*, 52 Fla. L. Rev. 745 (2000). The issue of gender identification is further complicated by the fact that many transsexual people do not have genital surgery, either because they are unable to obtain it for medical or financial reasons or because they do not want it. Because most states require genital surgery as a prerequisite for changing one’s birth certificate, transsexual people who fall into this category are frequently in a legal limbo with regard to their “legal” sex. At least in the context of marriage, allowing same-sex couples to marry will eliminate this dilemma.

¹⁰² See *In re Estate of Marshall G. Gardiner*, No. 85030, 2001 WL 497777 (Kan. Ct. App. May 11, 2001) (upholding validity of marriage involving a transsexual woman and giving full faith and credit to birth certificate amendment in Wisconsin); *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. 1976) (upholding validity of a marriage involving a “post-operative” transsexual woman), *cert. denied*, 364 A.2d 1076 (N.J. 1976); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. N.Y. County 1971) (nullifying marriage involving a female-to-male transsexual where spouse alleged that he had defrauded her by not informing her of his transsexual status prior to marriage); *In re Ladrach*, 513 N.E.2d 828 (Ohio Ct. App. 1987) (concluding that “there is no authority in Ohio for the issuance of a marriage license to consummate a marriage between a post-operative male to female transsexual person and a male person”).

court held in Littleton v. Prange¹⁰³ that a post-operative transsexual woman could not recover damages in a wrongful death action brought on behalf of her spouse. The Littleton court reasoned that because gender is determined, as a matter of Texas law, by the gender designation on an individual's birth certificate, the plaintiff had actually entered into a void same-sex marriage notwithstanding her biological gender at the time of her marriage.¹⁰⁴

Many states have passed laws (or adopted administrative policies) allowing a transsexual person to change the gender designation on his or her birth certificate.¹⁰⁵ This is important because, by allowing birth certificate changes, a state is essentially acknowledging that changing one's gender can be legally recognized as a status—a female person can become male for all legal purposes, presumably including marriage.

Although the law governing marriages involving a transsexual person is far from settled, the existing transgender marriage cases, and those that will surely follow, call into question the very rationality of imposing gender norms on marriage in the first place.¹⁰⁶ Gender-neutral marriage would eliminate these difficult issues.

II. NEW YORK SHOULD RECOGNIZE SAME-SEX MARRIAGES AND CIVIL UNIONS ENTERED INTO IN OTHER JURISDICTIONS

Traditional principles of full faith and credit, comity, and choice-of-law support New York's recognition of same-sex marriages and civil unions performed in foreign states. The Full Faith and Credit Clause of the United States Constitution states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."¹⁰⁷ In addition, with rare exceptions, New York's choice-of-law rules require the enforcement of foreign laws, especially laws governing marriages, even where such laws contradict or differ significantly from our own.

¹⁰³ 9 S.W.3d 223 (Tex. Ct. App. 1999), *cert. denied*, 531 U.S. 872 (2000).

¹⁰⁴ *Id.* at 231.

¹⁰⁵ States with statutes allowing a transsexual person who has undergone sex-reassignment surgery to change his or her birth certificate include Arizona, California, Colorado, Georgia, Hawaii, Illinois, Iowa, Louisiana, Massachusetts, Maryland, Michigan, North Carolina, Nebraska, New Jersey, New Mexico, Oregon, Utah, and Wisconsin; a number of others have administrative policies to the same effect.

¹⁰⁶ See Taylor Flynn, Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 Colum. L. Rev. 392, 415-20 (2001).

¹⁰⁷ U.S. Const. art. IV, § 1. In addition, 28 U.S.C. § 1738 (2000) states that "Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which

As explained above, the courts of several states recently have recognized that laws denying same-sex couples the freedom to marry violate state constitutions guaranteeing equal protection and privacy rights.¹⁰⁸ Those courts broke ground in recognizing the right of same-sex couples to marry and have paved the way for other states and countries to eliminate their prohibitions on same-sex marriage, as Vermont essentially did when it recently gave same-sex couples the right to join in civil unions. Since the Vermont act was passed, many couples have obtained Vermont civil union licenses, and the majority of those couples are not Vermont residents.¹⁰⁹ Some same-sex couples that have legally married or entered into civil unions under the laws of other jurisdictions will eventually move to New York. Legal issues are bound to arise as they separate,¹¹⁰ die, have or adopt children, become disabled, or attempt to file joint tax returns in other states.

Given New York's continuing role as the "golden door" of immigration,¹¹¹ New York courts will likely confront same-sex marriages and legal unions entered into under the laws of other countries. As explained above, numerous countries offer significant legal protections to same-sex couples.¹¹² As more and more same-sex couples marry or enter into legally sanctioned unions abroad, they will no doubt demand recognition of their status in New York. The question becomes whether New York will recognize same-sex marriages and legal unions entered into in other jurisdictions.

For over one hundred years, New York courts have held that out-of-state and foreign marriages must be recognized in New York so long as they are valid where consummated.¹¹³ Thus, for example, while New York

they are taken." See also Robert L. Cordell, Same-Sex Marriage: The Fundamental Right of Marriage and an Examination of Conflict of Laws and the Full Faith and Credit Clause, 26 Colum. Hum. Rts. L. Rev. 247, 264-71 (1994).

¹⁰⁸ See discussion *supra* Part I.C.

¹⁰⁹ Shannon P. Duffy, Pushing the States on Gay Unions, Nat'l L.J., Dec. 4, 2000 (75 percent of the nearly 1,000 couples who have obtained Vermont civil union licenses do not live in Vermont).

¹¹⁰ Under Vermont law, a civil union can be terminated in Vermont only if at least one of the parties is a resident of that state for one year. If other states do not provide such couples with access to divorce proceedings, then the only way for a couple to terminate a Vermont civil union will be to move to Vermont and meet the residency requirement.

¹¹¹ Emma Lazarus, The New Colossus (1883).

¹¹² See Part I.D nn.95-99.

¹¹³ Van Voorhis v. Brintnall, 86 N.Y. 18 (1881). See also Mott v. Duncan Petroleum Trans., 414 N.E.2d 657, 659 (N.Y. 1980) ("The law to be applied in determining the validity of an out-of-[s]tate marriage is the law of the [s]tate in which the marriage occurred.") (citations omitted); Bronislaw K. v. Tadeusz K., 393 N.Y.S.2d 534, 535 (Fam. Ct. 1977) (describing the "unquestioned recognition afforded in this state to the marriage practices" of other countries).

law does not permit common-law or proxy marriages, New York does recognize proxy and common-law marriages validly entered into in other jurisdictions.¹¹⁴ In addition, although the age of consent for marriage in New York is eighteen,¹¹⁵ New York courts have repeatedly recognized out-of-state marriages involving minors.¹¹⁶ This *lex loci contractus* principle has been enforced even where a New York couple purposefully left the state solely to avoid New York's marriage law and substitute that of another state.¹¹⁷

New York courts also routinely enforce contracts entered into under the laws of other jurisdictions, even where the contractual provisions would not be enforceable under New York law.¹¹⁸ In deciding whether or not to do so, courts apply the New York rule on choice-of-law, which is that "the law of the jurisdiction having the greatest interest in the litigation will be applied."¹¹⁹ In other words, New York courts balance New York's interest in having New York law apply against a foreign state's interest in having foreign law apply.¹²⁰ It is such considerations of comity that underlie New York's recognition of marriages entered into under the laws or practices of

¹¹⁴ *E.g.*, Black v. Moody, 714 N.Y.S.2d 30, 31 (1st Dep't 2000); In re Estate of Yao You-Xing, 667 N.Y.S.2d 462, 463 (3d Dep't 1998); Cross v. Cross, 476 N.Y.S.2d 876, 877-78 (1st Dep't 1984); In re Estate of Gates, 596 N.Y.S.2d 194, 198 (3d Dep't 1993) ("[a]lthough New York no longer permits common-law marriages, one validly contracted in a sister state will be recognized as valid in New York"); Carpenter v. Carpenter, 617 N.Y.S.2d 903, 904 (2d Dep't 1994) (recognizing Pennsylvania common law marriage under principles of comity); Ram v. Ramharack, 571 N.Y.S.2d 190, 191 (Sup. Ct. 1991) ("a common-law marriage validly consummated in another state or jurisdiction . . . can be recognized in New York under the doctrine of full faith and credit (U.S. Const. art IV, § 1) if the other state recognizes the validation of a common-law marriage"); In re Valente's Will, 188 N.Y.S.2d 732, 736 (Sur. Ct. 1959) (recognizing Italian proxy marriage); Ferraro v. Ferraro, 77 N.Y.S.2d 246, 249-50 (Fam. Ct. 1948) (recognizing proxy marriage from the District of Columbia).

¹¹⁵ N.Y. Dom. Rel. Law § 7 (McKinney 2000).

¹¹⁶ *E.g.*, Carr v. Carr, 104 N.Y.S.2d 269, 271 (Sup. Ct. 1951) (recognizing Michigan marriage to a minor); Simmons v. Simmons, 203 N.Y.S. 215 (1st Dep't 1924) (refusing to annul marriage to a fourteen-year-old in the British West Indies).

¹¹⁷ For example, in In re May's Estate, 114 N.E.2d 4 (N.Y. 1953), the court recognized an incestuous marriage entered into in Rhode Island even though both participants were New York residents and returned to New York two weeks after the ceremony.

¹¹⁸ See Bell v. Little, 197 N.Y.S. 674, 676 (4th Dep't 1922) ("It is doubtless the general rule that a contract entered into in another state or country, if valid there, is valid everywhere and this rule is often applied to the marriage contract.").

¹¹⁹ Intercont'l Planning, Ltd. v. Daystrom, Inc., 248 N.E.2d 576, 582 (N.Y. 1969) (citations omitted). See also Rosenthal v. Warren, 475 F.2d 438, 440-44 (2d Cir. 1973); Miller v. Miller, 237 N.E.2d 877, 879 (N.Y. 1968).

¹²⁰ Rosenthal, 475 F.2d at 444.

foreign jurisdictions.¹²¹ Implicit in that recognition is a respect for the interest that foreign states have in establishing their own laws governing family relationships,¹²² as well as a strong public policy that favors upholding the validity of marriage wherever possible¹²³ and providing freedom of movement to couples and families. Indeed, in a mobile society such as ours, where an intricate web of personal entitlements grows from marital status, the personal hardships and uncertainties associated with marriages that fade in and out of existence as the partners cross state and international boundaries counsel strongly in favor of recognition of locally valid marriages.¹²⁴ Moreover, given New York's status as one of the world's leading commercial jurisdictions, generous comity toward actions of other jurisdictions makes it more likely that New York's own laws and actions will receive comity from them.

With regard to the "civil contract"¹²⁵ of marriage, courts have held that one may overcome comity considerations only in the very narrow set of cases where New York has a strong public policy against the marriage in question.¹²⁶ In fact, New York has consistently invalidated only polygamous marriages.¹²⁷ Even an incestuous marriage between an uncle and niece, which would be illegal under New York law, was upheld by the

¹²¹ See *Brawer v. Pinkins*, 626 N.Y.S.2d 674, 676 (Sup. Ct. 1995) (explaining that it is "logical to afford to the courts of the state where the marriage is contracted the authority to decide if it is valid" because "[t]hat state has the most substantial contacts to the marriage contract itself [and] neither the passage of time nor change of domicile of the parties diminishes that connection").

¹²² *Cunningham v. Cunningham*, 99 N.E. 845, 847 (N.Y. 1912) ("The right of a government, as well as that of the several states of the Union, to determine the marital status of its own citizens and prescribe the terms and conditions upon which their relations may be changes is elementary and beyond question.").

¹²³ E. Scoles & P. Hay, *Conflict of Laws* § 13.8 (1986).

¹²⁴ See *Estin v. Estin*, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting) ("If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.").

¹²⁵ *In re Valente's Will*, 188 N.Y.S.2d 732, 735 (Sur. Ct. 1959).

¹²⁶ See *Van Voorhis v. Brintnall*, 86 N.Y. 18, 26; *Earle v. Earle*, 126 N.Y.S. 317, 319-20 (1st Dep't 1910); see also Restatement (Second) of Conflict of Laws § 283(2) (1971) (noting that a state is not required to recognize a marriage if "it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage").

¹²⁷ E.g., *People v. Ezeonu*, 588 N.Y.S.2d 116 (Sup. Ct. 1992) (rejecting a criminal defendant's defense that the woman he raped was his "junior" wife under Nigerian law); *In re Sood*, 142 N.Y.S.2d 591 (Sup. Ct. 1955) (upholding clerk's refusal to issue marriage license where man remained legally married to a woman in India).

New York Court of Appeals, which noted that such relationships were “not universally condemned.”¹²⁸

For all types of foreign laws, it is firmly established under New York’s choice-of-law principles that courts must enforce a foreign law “unless some sound reason of public policy makes it unwise for [the court] to lend [its] aid.”¹²⁹ A foreign law is not contrary to New York’s public policy merely because it is different or because New York has not legislated on the matter.¹³⁰ As Judge Cardozo stated in his famous opinion in Loucks v. Standard Oil Co., “[t]he courts are not free to refuse to enforce a foreign right at the pleasure of the judges. . . . They do not close their doors, unless [recognition] would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”¹³¹ More recently, the New York Court of Appeals stated that “foreign-based rights should be enforced unless the judicial enforcement of such a . . . [right] would be the approval of a transaction which is inherently vicious, wicked, or immoral, and shocking to the prevailing moral sense.”¹³² Accordingly, only rarely is the law of one state considered so far outside the social and moral standards of New York that it violates this state’s strong public policy. Certainly, a legal union between two consenting adults of the same sex cannot be considered “inherently vicious, wicked, immoral” or “shocking to the prevailing moral sense” such that it would be contrary to New York’s public policy. Rather, as discussed above, New York has a clear and growing public policy that favors recognizing the bonds between same-sex couples, and there is no legitimate state interest that is furthered by prohibiting same-sex marriages.

The DOMA, which Congress passed hastily in 1996, does not affect this analysis. DOMA purportedly granted states the right to refuse to recognize their domiciliaries’ same-sex marriages even if validly entered into in another state.¹³³ As an initial matter, DOMA is arguably

¹²⁸ In re May’s Estate, 305 N.Y. 486 (1953) (upholding marriage between Jewish uncle and niece entered into in Rhode Island, where Jews were exempt from the incest law). See also Campione v. Campione, 107 N.Y.S.2d 170 (Sup. Ct. Queens County 1951) (recognizing a marriage between a niece and her uncle).

¹²⁹ Schultz v. Boy Scouts of Am., Inc., 480 N.E.2d 679, 687 (N.Y. 1985).

¹³⁰ Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 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.”).

¹³¹ *Id.* at 202.

¹³² Intercont’l Hotels Corp. v. Golden, 203 N.E.2d 210, 212 (N.Y. 1964).

¹³³ DOMA states, in relevant part:

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

unconstitutional, since it violates and undermines the purposes of the United States Constitution's Full Faith and Credit Clause.¹³⁴ Regardless, nothing in DOMA changes state law or requires any state to ignore its own rules on comity or choice-of-law.

In short, a new consensus is emerging in which other states and countries are starting to recognize the right of same-sex couples to participate in the benefits and responsibilities that traditionally accompany marriage. Whether from the Netherlands or Vermont, same-sex couples who have been legally united in foreign jurisdictions will undoubtedly arrive in New York expecting their relationships to remain legally valid. As marriage rights are inevitably extended to same-sex couples in more and more jurisdictions, New York will be forced to answer the question of whether it will retreat from over a century of legal precedent and close its borders to same-sex couples or welcome a diversity of families into the state and provide equal recognition to all legally married couples. In accordance with its firmly established conflict-of-laws jurisprudence, New York should recognize same-sex marriages and civil unions entered into in sister states and abroad.¹³⁵

III. CONCLUSION

The institution of marriage confers countless rights and benefits on its participants that same-sex couples in New York are excluded from enjoying. That exclusion is questionable under the Equal Protection Clauses of both the federal and New York constitutions, as well as New York's public policy. New York should therefore allow same-sex marriages, and can presently do so without any amendment to the marriage statute. Failing this, New York should adopt a Vermont-style civil union law. Finally, fundamental notions of full faith and credit and choice-of-law require New

relationship between persons of the same sex that is treated as marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 28 U.S.C. § 1738C (2000)).

¹³⁴ Mark Strasser, *DOMA and the Two Faces of Federalism*, 32 Creighton L. Rev. 457, 457-62 (1998). By giving states the right to refuse to recognize same-sex marriages valid in the state of celebration, DOMA also imposes a special disability on lesbians, gays, and bisexuals, similar to the Colorado amendment that the United States Supreme Court struck down in *Romer v. Evans*, 517 U.S. 620, 634 (1996). Colorado's state constitutional amendment withdrew from "homosexuals, but no others, specific legal protection from the injuries caused by discrimination." *Id.* at 627. Because DOMA also singles out a disfavored minority for adverse treatment, it appears to suffer from the same constitutional defect.

¹³⁵ Of course, civil unions are not identical to marriages; however, as explained in Part I.D *supra*, a civil union is akin to a marriage contract. Thus, all of the rights and responsibilities that inure to couples in civil unions should continue to apply in New York.

York to recognize same-sex marriages and civil unions entered into in sister states and internationally.

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