The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn from Their Northern Neighbor Regarding Same-Sex Marriage Rights

Christy M. Glass  
Utah State University

Nancy Kubasek  
Bowling Green State University

Follow this and additional works at: http://repository.law.umich.edu/mjgl

Part of the Civil Rights and Discrimination Commons, Comparative and Foreign Law Commons, Family Law Commons, and the Sexuality and the Law Commons

Recommended Citation

Available at: http://repository.law.umich.edu/mjgl/vol15/iss1/4

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Gender and Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlawrepository@umich.edu.
THE EVOLUTION OF SAME-SEX MARRIAGE IN CANADA: LESSONS THE U.S. CAN LEARN FROM THEIR NORTHERN NEIGHBOR REGARDING SAME-SEX MARRIAGE RIGHTS

Christy M. Glass*
Nancy Kubasek**

I. INTRODUCTION • 144

II. THE UNITED STATES VS. CANADA: BASIS FOR COMPARISON • 147
   A. Legal Systems • 148
   B. State Institutions • 151
   C. Civil Rights Histories • 155

III. THE HISTORY OF THE LEGALIZATION OF SAME-SEX MARRIAGE IN CANADA • 160
   A. The Structure of the Canadian Government Establishes the Groundwork for Gay and Lesbian Marriage Rights • 160
   B. The Battle in the Courts: Focus on Ontario • 163
   C. The Civil Marriage Act • 168
   D. Parallel Progress at the Provincial Level • 169

IV. HISTORY OF SAME-SEX MARRIAGE RIGHTS IN THE UNITED STATES • 174
   A. Domestic Partnership Statutes and Civil Union Ordinances • 174
   B. U.S. Courts and Same-Sex Marriage • 178
   C. The Political Backlash in the United States • 185
   D. The Federal Marriage Protection Act • 188
   E. Post Script: Marriage as U.S. Anti-Poverty Policy • 191

V. COMPARISON OF THE TWO NATIONS' STRUGGLES FOR THE ACCEPTANCE OF SAME-SEX MARRIAGE • 193

VI. CONCLUSION: LESSONS THE UNITED STATES CAN LEARN FROM THE CANADIAN EXPERIENCE WITH LEGALIZATION OF SAME-SEX MARRIAGE • 197

* Christy Glass is Assistant Professor of Sociology at Utah State University, BA University of Michigan, M.A., M.Ph., Ph.D. Yale University. She is a comparative scholar whose primary research areas are social inequalities, welfare and work.

** Nancy Kubasek is a Professor of Legal Studies at Bowling Green State University, B.A. Bowling Green State University, J.D. University of Toledo College of Law. She is the author of over seventy law review articles and several books.
I. Introduction

Despite Constitutional provisions that guarantee equal protection under the law, until very recently same-sex couples around the globe have been denied access to the rights attached to marriage. However, beginning in the 1970s, same-sex couples in several nations began taking small steps toward gaining the legal right to participate in marital unions. While progress in the United States has been slow and at times fully impeded, the rights of same-sex couples have been fully recognized now in a growing number of other countries.¹

Despite the extension of marriage rights to same-sex couples in a number of countries, legislative progress in the United States has been thwarted by a backlash in which well-organized opponents of same-sex marriage have achieved passage of both federal and state laws restricting access to marriage rights and benefits for same-sex couples. The strength of these efforts led to the passage of the Defense of Marriage Act ("DOMA") in 1996,² as well as thirty-five state versions of DOMA, ¹

1. In 2001 the Netherlands became the first nation to recognize same-sex marriage rights under the Act Opening the Institute of Marriage, Burgerlijk Wetboek [BW] [Civil Code] art. 30:1 (Neth.). Same-sex marital relationships have also been recognized in Belgium since 2003, see Burgerlijk Wetboek [BW] [Civil Code] art. 143 (Belg.); in Canada since July of 2005 under The Civil Marriage Act, 2005 S.C., ch. 33 (Can.); in Spain since 2005, see Law 13/2005 (Código Civil [C.C.] [Civil Code] 2005, 157) (amending the Civil Code on the right to contract marriage); and in South Africa since 2006, see Civil Union Act 17 of 2006. France, Hungary, and Portugal all have laws recognizing civil partnerships, which grant most, if not all, of the rights associated with marriage to same-sex partners. See also International Gay and Lesbian Human Rights Commission, Where You Can Marry: Global Summary of Registered Partnership, Domestic Partnership, and Marriage Laws, http://www.iglhrc.org/site/iglhrc/ (last visited Feb. 4, 2008). Political debates regarding same-sex marriage rights remain ongoing in several countries, including Argentina, Australia, Austria, China, Estonia, Ireland, Italy, Latvia, Lithuania, New Zealand, Norway, Portugal, Romania, Sweden, Taiwan, United Kingdom and, of course, the United States. Id.

2. The Defense of Marriage Act, signed in 1996 by President Clinton, has two provisions. The first provision defines marriage, for federal purposes, as only heterosexual:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.


The second provision states:
which prohibit same-sex marriage. Yet, in the wake of state supreme court decisions in Massachusetts and Vermont that recognized significant problems with treating same- and opposite-sex couples differently, DOMAs are now viewed by some as providing insufficient protection for the traditional limitation of marriage to a man and a woman. Fearful of more courts granting marriage rights to same-sex couples and of sister states recognizing same-sex unions, opponents of same-sex marriage have now shifted their focus toward amending both state and federal constitutions.

Amending the United States Constitution is potentially the most powerful of these approaches. The Marriage Protection Amendment was proposed, heavily debated, and ultimately failed in 2006. However, if passed, this amendment would have not only ended the debate about whether same-sex couples would be allowed to marry, but may have also lead some states to revoke benefits previously extended to same-sex couples, thereby taking away benefits presently conferred on domestic

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.


8. Vermont, for example, passed its civil union statute, Act Relating to Civil Unions, No. 91, 2000 Vt. Acts & Resolves, only after a ruling by its state supreme court in Baker, 744 A.2d 864, that the Constitution required the State to extend to same-sex couples the same benefits and protections provided to opposite-sex couples.
partners in some locations. While this approach is still being pursued by some, the push for a marriage amendment seems to be stalled in Congress.

While recent U.S. efforts to expand same-sex marriage rights have been characterized by major set-backs and reversals, Canada has moved decisively in recent years to extend full marriage rights and benefits to all same-sex couples. Starting in 1999, many benefits associated with marriage were granted to same-sex couples in eight out of ten provinces and one out of three territories. In most cases, same-sex marriage rights were gained as a result of provincial or territorial courts’ rulings that declared existing bans on same-sex marriages unconstitutional. In July 2005, passage of the Civil Marriage Act, which officially legalized same-sex marriages across Canada’s ten provinces and three territories, made Canada only the third nation in the world to legalize same-sex marriage.

9. The relevant portion of the proposed amendment, introduced on February 6, 2007, reads as follows:

Section 1. Marriage in the United States shall consist only of the union of a man and a woman.

Section 2. No court of the United States or of any State shall have jurisdiction to determine whether this Constitution or the constitution of any State requires that the legal incidents of marriage be conferred upon any union other than a legal union between one man and one woman.


11. For a review of Canada’s recent history in extending benefits to same-sex couples, see Peter W. Hogg, Canada: The Constitution and Same-Sex Marriage, 4 INT’L J. CONST. L. 712 (2006). Same-sex marriage was legalized in Ontario and British Columbia in 2003, Quebec, the Yukon Territory, Manitoba, Nova Scotia, Saskatchewan, Newfoundland, and Labrador in 2004, and New Brunswick in 2005. Id. at 715–16. The nation-wide legalization of same-sex marriage in 2005 extended these rights to same-sex couples living in Alberta, Prince Edward Island, Nunavut and the Northwest Territories. Id. at 712.

12. The Netherlands legalized same-sex marriage in 2001 and Belgium did the same in 2003; Spain joined Canada in 2005 by legalizing same-sex marriage, and the following year South Africa legalized same-sex marriage nationwide. See supra note 1. In their study of state policies on homosexual relations, Frank and McEneaney found that of eighty-six countries in their analysis, twenty-four liberalized policies regarding homosexuals between 1984 and 1995. Not all of these countries legalized marriage between same-sex partners during this eleven-year period, but the trend toward liber-
The broad differences between the United States and Canadian cases briefly outlined above raise important questions about the social, political and legal factors that have promoted the extension of marriage rights in Canada while retarding similar efforts in the U.S. This article will compare the recent history of same-sex marriage laws in the United States and Canada. We argue that proponents of same-sex marriage as well as lawmakers could learn important lessons from the recent legalization of same-sex marriage in Canada. Section II develops a framework for comparing the U.S. and Canadian experience with same-sex marriage law. The next section traces Canada's recent history of marriage law amendments. Section IV provides a parallel legal history of same-sex marriage rights in the U.S., including the recent introduction of the Marriage Protection Act (MPA). Section V systematically compares the two cases to illuminate those factors that have supported the extension of same-sex marriage rights in Canada and hindered the extension of equivalent rights in the United States. The article concludes that the Canadian experience presents several important lessons the U.S. could learn in order to extend marriage rights to same-sex couples and therefore uphold the Constitutional right to equal protection.

II. THE UNITED STATES VS. CANADA: BASIS FOR COMPARISON

The United States and Canada present an ideal cross-national comparative case study because while these two nations share cultural, social, economic and political traditions, they vary dramatically with respect to legal rights granted to same-sex couples. Indeed, according to Card and Freeman, "few countries offer a more natural pairing for evaluating policies and institutions or for uncovering the reasons for differences in outcomes than the United States and Canada." For the purposes of this analysis, we focus in particular on those spheres that are likely to have the most significant impact on determining marriage rights. Thus, this section outlines the significant overlap between the legal systems, state institutions, and civil rights histories in Canada and the U.S. By holding these features constant, we can better identify

14. We do not emphasize other significant areas of overlap, including the massive economic flows between the two countries and the commonalities with respect to labor
those factors that have led to wide variation in marriage law in the two countries.

A. Legal Systems

First, Canada and the United States have a closely intertwined colonial history that established parallel legal traditions rooted in English common law. As established within most former British colonies, English common law imposed a legal system that empowers judges to make decisions based on legal precedent. Under common law systems, the facts of any particular case are compared to previous cases in order to reach a decision by analogy. Courts are organized in an appellate hierarchy where decisions by higher courts are binding on all lower courts. Civil legal systems, by contrast, rely upon a set of codified guidelines that judges must employ to decide the outcome of legal cases. In such systems, legal precedent has significantly less authority over judicial decisions, as it is non-binding.

Both Canadian and American legal systems are subject to federal constitutions, which serve as the highest legal authority in both nations. Furthermore, a shared tradition in English common law and federalism established a parallel system of courts in Canada and the U.S. whereby both national and local courts have legal authority. In Canada, courts are organized at the provincial lower court and appellate level. While no provincial decision can be binding on another province's authority, all provincial courts are subject to the authority of the Canadian Supreme Court. Similarly, in the United States courts are organized at the local, state and regional appellate level. As in Canada, all courts are subject to the authority of one supreme court.

Despite these broad similarities, however, there are two important distinctions between the Canadian and American legal systems that are relevant for our analysis. The first lies in the sphere of criminal law. In Canada, criminal law falls under the exclusive jurisdiction of the federal

market institutions. See id. (providing an overview of the similarities between the Canadian and American experiences).

15. Two notable exceptions to this rule are Quebec and Louisiana. Louisiana state law is based on Napoleonic Code, inherited from France during the colonial period. The Canadian province of Quebec practices enforces a civil law system based on the French model.

16. Malta and Scotland are two exceptions. While both were British colonies, neither adopted English common law.

17. The U.S. Constitution was adopted in 1787, whereas the Constitution of Canada was not established until 1867.
Criminal Code whereas in the United States, state-level courts can erect and enforce criminal statutes and penalties.

The recent history of sodomy law in Canada and the U.S. illustrates the importance of this distinction for understanding the evolution of same-sex marriage rights in the two cases. British laws criminalizing sodomy were inherited by both nations and remained in force through most of the twentieth century. However, Canada repealed its sodomy laws in 1969\(^\text{18}\) under Prime Minister Pierre Trudeau, who famously argued, "There's no place for the state in the bedrooms of the nation."\(^\text{19}\) In the United States, by contrast, sodomy laws remained part of state criminal statutes until 2003 when the U.S. Supreme Court struck down criminal prohibition against homosexual sodomy at the state level.\(^\text{20}\)

According to political scholar Miriam Smith, the legalization of sodomy in Canada was a watershed moment for the expansion of citizenship rights to gays and lesbians. The failure of the United States to follow suit meant that the American gay and lesbian movement had to overcome the substantial stigma of the criminalization of homosexual acts, leading to a "defensive posture" that did not exist in Canada.\(^\text{21}\) Indeed,

---


20. In 1986—nearly twenty years after Canada legalized sodomy—the Court ruled that the Constitution does not protect homosexual acts and, therefore, permitted state-level anti-sodomy statutes to stand. Bowers v. Hardwick, 478 U.S. 186 (1986). However, the U.S. Supreme Court eventually overturned state-level anti-sodomy laws in 2003. Lawrence v. Texas, 539 U.S. 558 (2003). At the time the Court agreed to hear the case, thirteen states still imposed criminal penalties on sodomy. Charles Lane, Court to Hear Texas Case on Gay Rights, WASH. POST, Dec. 3, 2002, at A12. These thirteen states were Alabama, Florida, Idaho, Kansas, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Texas, Utah, and Virginia. Wyatt Buchanan, Top Court to Address Sodomy, S.F. CHRON., Dec. 3, 2002, at A3. In a dissenting opinion, Justice Antonin Scalia wrote the "Court . . . has largely signed onto the so-called homosexual agenda . . . ." Lawrence, 539 U.S. at 602 (Scalia, J., dissenting).


according to legal scholar Christopher Leslie, the criminalization of homosexuality in the United States has continuously proved a major setback to equality legislation. He writes that a variety of public and private actors "rely on the criminality of sodomy to justify discrimination against gay and lesbian Americans. Sodomy laws are used to facilitate employment discrimination, bias against gay and lesbian parents in custody disputes, discrimination against gay organizations, discriminatory enforcement of solicitation statutes, and immigration discrimination."[22]

The second important distinction between the legal systems of the U.S. and Canada lies in the sphere of sub-national constitutions. Despite the jurisdictional strength of Canadian provinces generally speaking, Canadian provinces—with the exception of British Columbia—lack written constitutions.[23] This absence distinguishes the Canadian legal system from that of the U.S., where each state has a written constitution.[24] What this means in practice—particularly with regard to marriage rights—is that in the U.S. both the state and federal legislatures are able to grant or restrict marriage rights: the federal legislature through the U.S. Constitution and state-level legislatures through state-level constitutions. The existence of state-level constitutions has enabled opponents of same-sex marriage rights to successfully pass same-sex marriage bans at the state level.[25]

23. See F.L. Morton, Provincial Constitutions in Canada, Address Before the Conference on “Federalism and Sub-National Constitutions: Design and Reform,” Center for the Study of State Constitutions, Rockefeller Center, Bellagio Italy (Mar. 22–26, 2004). Morton notes that even the exception to the rule, British Columbia, has a constitution that can be easily amended. Id. Instead of written constitutions, Morton argues that Canadian provinces rely on the British practice of “unwritten constitutions” or systems of general rules and procedures that are not officially codified in a written document. Id.
24. Id. Morton argues that this absence not only distinguishes Canada from the United States but from nearly all mature federal democracies. He also argues, “Canada shares with India the dubious honor of being one of the only two mature federal democracies with no sub-national constitutional systems.” Id.
25. Maryland became the first state to enforce a law against same-sex marriage in 1973. However, the introduction and passage of marriage bans at the state level have occurred rapidly over the past several years as opponents of same-sex marriage have become more organized and vocal. In 1995, Utah Governor Mike Leavitt signed into law the firm state-level statute that allowed Utah to ignore out-of-state marriages that violated state public policy. The following year then-President Clinton signed into law the federal Defense of Marriage Act (DOMA), which allowed states to ban same-sex marriages and to refuse to recognize such marriages performed in other states. Two years later, in 1998, Alaska voters approved the first state-level constitutional amendment banning same-sex marriage. Several other states followed Alaska’s lead, including Nebraska in 2000 and Nevada in 2002. In November 2004, voters in thir-
In contrast, Canadian opponents of same-sex marriage lacked provincial- or territorial-level mechanisms to block or stall the passage of the Civil Marriage Act. Nor can a Canadian province invoke the Constitution's override clause, because the definition of marriage is within the exclusive legislative authority of Parliament.\textsuperscript{26} As a result, the Liberal minority government, which was favorable toward same-sex marriage rights, was able to pass the Civil Marriage Act despite broad opposition from the Conservative party, well-organized evangelical organizations, and oppositional provinces.\textsuperscript{27}

B. State Institutions

Like formal legal systems, state welfare institutions play a critical role in defining and regulating social relationships among citizens. In particular, modern states organize social welfare through the institution of marriage in a variety of ways, including taxation, torts, social policies and benefit eligibility, parental rights and property rights.\textsuperscript{28} In fact, the marriage contract was one of the primary ways in which women gained

\footnotesize{teen states (Missouri, Louisiana, Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon and Utah) passed state constitutional amendments prohibiting the recognition of same-sex marriages. The following year, voters in Kansas and Texas passed similar bans, followed by voters in Alabama, Idaho, Colorado, South Dakota, South Carolina, Tennessee, Virginia and Wisconsin in 2006. In fact, Arizona remains the only state where a ballot initiative to ban same-sex marriage has failed. To date, forty-five states have banned same-sex marriage through state-level constitutional amendments and/or statutes. For a comprehensive review and analysis of state-level political actions regarding marriage rights, see generally DANIEL R. PINELLO, AMERICA'S STRUGGLE FOR SAME-SEX MARRIAGE (2006). For a complete timeline of the passage of state-level amendments and statutes, see Christine Vestal, Gay Marriage Ripe in 2 Courts, STATELINE.ORG, Sept. 20, 2007, http://www.stateline.org/live/details/story?contentId=20695.}


\footnotesize{28. For an extensive review of how the state organizes policies around marriage and the economic effects of these practices in the United States, see Nancy Kubasek & Christy M. Glass, A Case Against the Federal Protection of Marriage Amendment, 16 TEX. J. WOMEN & L. 1, 25–43 (2007).}
social citizenship rights historically. Early social reformers in several Western democracies successfully mobilized for maternalist state policies to support women's roles as wives and mothers. These efforts assumed women's economic dependency within marriage and women's "natural" roles as caretakers of children. Thus, many Western welfare states developed a system of policies and benefits based on a male-breadwinner and female-caregiver family. Marital relationships continue to play a central role in nearly all modern states' definitions of benefit eligibility.

29. Early welfare state theorist T.H. Marshall identified three types of citizenship rights: civil, political, and social. Civil rights of citizenship are those "rights necessary for individual freedom" including freedom of speech, freedom of religion, property rights, and contractual rights. T.H. Marshall, Citizenship and Social Class, in The Welfare State Reader 32, 32 (Christopher Pierson & Francis G. Castles eds., 2000). Political rights include "the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body." Id. Finally, social rights encompass economic well-being, economic security, and equality with others. Id. While Marshall did not explore the ways in which access to citizenship rights were circumscribed by gender, recent scholars have used his concepts to analyze the gendered history of contemporary welfare states. This scholarship has shown that while women were traditionally denied political and civil rights, they gained access to social citizenship primarily through their roles as wives and mothers. For an overview of this literature, see generally Ann Orloff, Gender in the Welfare State, 22 Ann. Rev. Soc. 51 (1996).

30. For a review of these social movements, see Mothers of the New World: Maternalist Politics and the Origins of the Welfare State (Seth Koven & Sonya Michel eds., 1993) (providing a broad comparative history of these movements in France, Britain, Sweden, Australia, Germany and the United States); Susan Pederson, Family, Dependence, and the Origins of the Welfare State: Britain and France 1914-1945 (1993) (providing a history of maternalist politics in Britain and France); Theda Skocpol, Protecting Soldiers and Mothers (1992) (providing a history of maternalist politics in the United States).

31. Maternalism has been defined as "ideologies and discourses which exalted women's capacity to mother and applied to society as a whole the values they attached to that role: care, nurturance, and morality." Koven & Michel, supra note 30, at 4. As a guiding political principle, this ideology reinforces notions of gender difference, and privileges women's roles as "caretakers" of husbands, children and nation. Id.


33. For comparative analyses of the ways in which contemporary welfare policies recognize marital relationships in terms of benefit eligibility, see Sainsbury, Gender, Equality, supra note 32; Edward McCaffrey, Taxing Women (1997); Ilona Ostner & Jane Lewis, Gender and the Evolution of European Social Policies, in European Social Policy: Between Fragmentation and Integration 159 (1995); Jane Jensen, Who Cares? Gender and Welfare Regimes, 4 Soc. Pol. 182 (1997); Jane Lewis,
Within the broad comparative scholarship on welfare state regimes, Canada and the United States are routinely grouped together as ideal representatives of the liberal form of welfare provisioning, which privileges the market as the primary mechanism of social provision. Indeed, according to Esping-Andersen's classic statement on comparative welfare regimes, "the archetypical examples of this model are the United States, Canada and Australia." More recent scholarship has reinforced this pairing by uncovering the growing strength of neoliberal ideologies in Canada and the United States, which have inspired recent political attempts to scale back spending and social rights in both countries. Liberal welfare regimes rely heavily on means-tested assistance, modest universal transfers, and/or modest social insurance. Guided by classical liberal ideology, these regimes encourage individuals to meet their social welfare needs through work in and/or purchase on the market, or through dependence on unpaid care-giving work in the family. Thus, state-provided benefits are modest or even meager and often bound by strict eligibility rules and social stigma.


34. The other two regime types, according to the classical regime typology literature, are the conservative corporatist model, which predominates in Continental Europe, and the social-democratic model, which prevails in Scandinavia. Corporatist regimes preserve particular status and class-based distinctions. Thus, while workers in key economic sectors enjoy broad social citizenship, non-workers and workers outside the privileged sectors enjoy substantially weaker benefits. The social-democratic model, in sharp contrast to the liberal and corporatist models, offers full and universal social citizenship rights. As a result, social stratification is weakest in these countries compared to countries that follow the other two models of welfare provision. For an extensive elaboration of these regime types, see Gösta Esping-Andersen, The Three Worlds of Welfare Capitalism (1990) [hereinafter Esping-Andersen, The Three Worlds]. For a more recent formulation, see Gösta Esping-Andersen, Social Foundations of Postindustrial Economies (1999) [hereinafter Esping-Andersen, Social Foundations].

35. Esping-Andersen, The Three Worlds, supra note 34, at 27.


38. Id. According to Esping-Andersen, the social consequences of this model typically include "an order of stratification that is a blend of a relative equality of poverty
The origins of the breadwinner-caregiver liberal model in the United States and Canada date back to the early influence of British liberal ideology on the state building projects in both nations. While liberal ideologies championed natural equality and individual freedom in theory, contradictory notions of natural differences between men and women characterized early state and institutional building projects. While men were seen as the ideal-typical citizens capable of full participation in the state and market, women's economic and political dependence on fathers and husbands was seen as an inevitable feature of the natural social order. According to O'Connor et al., "As individuals and the heads of families, men were physical participants in labour markets and actors in political life. As wives, at least, women's natural dependency placed them in the private domain of home and family, removed from both politics and market." Thus, built into the system of liberal social provisioning in both countries was an implicit assumption that individuals would marry and thereby access their social welfare needs through a combination of market work and unpaid domestic labor. As a result, both welfare state regimes institutionalized a traditional gender division of labor through a combination of liberal and maternalist policies.

The contemporary legacies of liberal welfare ideology in the United States and Canada include parallel systems in which individuals are required to obtain their basic needs privately, through a combination of

---

39. At least in the United States, these domestic standards for women did not apply equally to women of color, who were expected to work in order to support the non-work of white women. See O’Connor et al., supra note 36, at 49.


41. O’Connor et al., supra note 36, at 49.
market work and private family provisioning. In both systems, care work undertaken within the family receives very little public material support. Thus, marriage is taken for granted as a primary institution in which unpaid caretaking work of one partner is subsidized or supported by the market work of the other partner. In both countries, therefore, a great deal of social provisioning is obtained privately—meaning outside the state and market—through the family in general and the institution of marriage in particular.

Thus, within both systems, one's marital status continues to impact significantly one's access to a wide variety of private and public social benefits, including joint and survivor pension benefits, tax exemptions, parental rights and benefits, automatic inheritance, income support programs, and joint insurance and property ownership. Indeed, by legally endorsing the marriage contract, the state in both nations goes a great distance toward protecting married individuals' joint investments. As a result of this state-provided security and of the continuing significance of the marriage contract in private and public social provisioning, married individuals in the United States and Canada earn more, accumulate more wealth over the life course, and are better protected against economic risk than are non-married individuals.

C. Civil Rights Histories

A final arena with broad relevance to understanding cross-national variation in same-sex marriage rights is the degree of political mobilization around issues of gay and lesbian civil rights. In the sphere of civil rights, both countries witnessed the rise of feminist and gay rights movements starting in the 1960s and 1970s, which aimed to secure full citizenship rights for women and homosexuals. The first Canadian gay rights march took place in Ottawa in 1971 and was followed in subsequent years by growing political mobilization of Canada's gay and

42. O'Connor et al., supra note 36, at 121, 133.
44. Kubasek & Glass, supra note 28.
lesbian communities and their allies.\textsuperscript{47} These efforts were initially focused on formal equality, such as securing equal protection for gays and lesbians in employment, housing and immigration. It was not until the mid-1990s that efforts to include “sexual orientation” as a protected category in Section 15 of the Canadian Charter of Rights and Freedoms met with success.\textsuperscript{48}

The watershed moment for the American gay rights movement took place following a police raid on an illegal gay bar, the Stonewall Inn, in New York’s Greenwich Village. The five days of riots that followed the raid are widely considered to have ignited the modern gay rights movement in the United States.\textsuperscript{49} As with the gay rights movement in Canada, early political efforts focused on achieving formal equality for gays and lesbians. Thus, in addition to efforts to repeal anti-sodomy laws, American activists pursued anti-discrimination equal rights for gays and lesbians in housing and employment.\textsuperscript{50} While these

\begin{itemize}
\item \textsuperscript{47} Id. at 3–4.
\item \textsuperscript{48} See Egan v. Canada, [1995] 2 S.C.R. 513 (Can.) (holding that “sexual orientation” falls within the ambit of Section 15).
\item \textsuperscript{49} See David Carter, Stonewall: The Riots that Sparked the Gay Revolution 1 (2004) (discussing that the Stonewall Riots “are widely credited with being the motivating force in the transformation of the gay political movement [in the United States]”). See also, Dudley Clendinen & Adam Nagourney, Out for Good: The Struggle to Build a Gay Rights Movement in America 11–13 (1999); John D’Emilio, After Stonewall, in Making Trouble: Essays on Gay History, Politics and the University 234 (John D’Emilio ed., 2002); Martin Duberman, Stonewall (1993). David Carter concludes his historical analysis of the events surrounding the Stonewall Riots by arguing that the legacy of Stonewall can be traced to contemporary struggles for same-sex equality: “While this fight is far from over, it is now a worldwide movement that has won many significant victories, most of them flowing from those six days in the summer of 1969 when gay people found the courage to stand up for themselves on the streets of Greenwich Village.” Carter, supra, at 266. The event also serves as an important symbolic antecedent to contemporary social activism and is regularly commemorated in gay rights parades and celebrations. See John D’Emilio, The World Turned: Essays on Gay History, Politics, Culture (2002); Marc Stein, City of Sisterly and Brotherly Loves: Lesbian and Gay Philadelphia 290 (2000) (quoting an activist who stated, “No event in history, with perhaps the exception of the French Revolution, deserves more [than the Stonewall Riots] to be considered a watershed.”).
efforts have resulted in many state and local anti-discrimination statutes, to date the American LGBT rights movement has been unable to achieve the degree of federal protection from discrimination enjoyed by gays and lesbians in Canada.

As a result of these sustained efforts, broad public support for anti-discrimination measures has increased in recent years in both nations. Paul Brewer has documented a steady change in Americans' opinions on gay rights beginning in the 1990s. Ironically, as opposition to same-sex marriage rights grew more vocal, the American public grew more supportive of extending rights to gays and lesbians. Indeed, between 1992 and 1998, the proportion of Americans who believed that homosexual acts were "always wrong" declined by nearly 20 percent. Also, during the 1990s, public support for equal rights of gays and lesbians in the military and employment grew substantially. Perhaps more surprisingly, two-thirds of Americans believe that same-sex marriage will become legal during this century.

While the majority of Americans oppose same-sex marriage, attitudes on this issue have also softened in recent years. In 2004, 63 percent of Americans opposed same-sex marriage; by 2006 this number had dropped to 51 percent. Brewer attributes this marked decrease in


53. See Brewer, supra note 52, at 1208.

54. Id. at 1212–13.


hostility and increase in support for gay-friendly policies in part to the successful efforts of gay rights activists and advocates in disseminating notions of homosexuality as genetically heritable, or at least unchangeable, and increasing the public exposure of gays and lesbians.\textsuperscript{57}

Canadian public opinion toward the rights of gays and lesbians has followed a parallel trend. For instance, Howard-Hassmann reports that, similar to trends in the United States, Canadian public opinion toward gays and lesbians became much more favorable during the 1990s.\textsuperscript{58} Over the course of that decade, Canadians became much more accepting of gay rights, particularly with regard to marriage and adoption rights.\textsuperscript{59} Howard-Hassmann reports support for same-sex marriage more than doubled between 1992 and 1996, and the proportion that believed same-sex couples should be able to adopt children increased from 31 percent to 42 percent during the same period.\textsuperscript{60} More recent public opinion surveys have confirmed growing acceptance of gay rights in Canada. For instance, prior to the legalization of same-sex marriage, over half of Canadians opposed extending marriage rights to same-sex couples. However, shortly after legalization, 55 percent of Canadians favored the law. Within a year of legalization, 59 percent favored the legislation and over 60 percent stated that the issue should not be reopened by Parliament.\textsuperscript{61}

Despite these broad similarities in the trajectories of political mobilization around gay and lesbian rights, the framing of these issues has varied between the two cases. While gay rights have been framed as an issue of human rights in Canada, political debates about the extension of civil rights to gays and lesbians in the United States have been framed overwhelmingly in moral and religious terms.\textsuperscript{62} This tendency has rele-

\textsuperscript{57} Brewer, supra note 52, at 1211. Brewer cites several examples of increased exposure in popular culture, including \textit{Ellen}, \textit{Will and Grace}, and Richard Hatch, the original winner of \textit{Survivor}. \textit{Id.}

\textsuperscript{58} RHODA E. HOWARD-HASSMANN, COMPASSIONATE CANADIANS: Civic Leaders Discuss Human Rights 93 (2003).

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} \textit{Id.}


\textsuperscript{62} See Southern Poverty Law Center, supra note 52. This is due in large part to the well-organized anti-gay rights organizations that have shaped the national debate regarding citizenship rights for gay and lesbian Americans. Many organizations that comprise the anti-gay movement grew out of fundamentalist religious organizations and include: Focus on the Family, one of the wealthiest fundamentalist ministries in the United States; the Moral Majority, a large fundamentalist organization founded by
gated issues regarding equal protection and economic discrimination to the background of the debate.\textsuperscript{63} Perhaps because of this rhetorical difference, Canada has gone much further in recent years toward extending full citizen rights to homosexuals, including granting full legal recognition of same-sex parental rights and banning both private and public discrimination against gays and lesbians.\textsuperscript{64} In the United States, by contrast, legal recognition of the citizenship rights of gays and lesbians remains partial at best.\textsuperscript{65} In many jurisdictions, for instance, it remains legal to discriminate against homosexuals in employment and housing,\textsuperscript{66} and in some states homosexuals and same-sex couples are prohibited from adopting children.\textsuperscript{67}

We argue that the significant degree of overlap between the two cases in terms of legal systems, state institutions, and gay rights histories allow us to attribute the significant variation in outcomes in terms of marriage rights to specific institutions or social patterns. It seems clear that the variation in marriage rights at the national level is part of a

\textsuperscript{63} See Kubasek & Glass, supra note 28, at 25–43 (discussing the ways in which current U.S. marriage law represents state-sanctioned economic discrimination against same-sex couples and thereby violates Constitutional guarantees of equal protection).

\textsuperscript{64} Smith, Politics, supra note 21, at 225–26.

\textsuperscript{65} Scholar Barry Adam has argued, "[L]egislation to bring gay and lesbian Americans full citizenship rights has been proceeding at a glacial pace." Id.

\textsuperscript{66} Only twenty states ban discrimination based on sexual orientation, and many cities have introduced anti-discrimination legislation at the local level as well. See National Gay and Lesbian Task Force, supra note 51. According to Smith, however, state and local bans against discrimination are often ineffectual because they lack effective enforcement efforts. Smith, Politics, supra note 21, at 225.

\textsuperscript{67} Five states (Florida, Michigan, Mississippi, Nebraska, and Utah) enforce laws restricting adoption by same-sex couples or gay individuals, while North Dakota permits adoption agencies to discriminate based on religious or moral objection. For a state-level map of existing adoption laws, see National Gay and Lesbian Task Force, Adoption Laws in the U.S. (Sept. 17, 2007), http://www.thetaskforce.org/downloads/reports/issue_maps/adoption_laws_09_07_color.pdf. Additionally, only four states (California, Colorado, Connecticut, and Vermont) authorize second-parent adoption by statute. See National Gay and Lesbian Task Force, Second-Parent Adoption in the U.S. (May 2007), http://www.thetaskforce.org/downloads/reports/issue_maps/2nd_parent_adoption_5_07_color.pdf. Second-parent adoption allows the lesbian or gay partner of the biological or adoptive parent to legally adopt a child without infringing upon or negating the parental rights of the original parent. See Elizabeth A. Delaney, Statutory Protection of the Other Mother: Legally Recognizing the Relationship Between the Nonbiological Lesbian Parent and Her Child, 43 Hastings L.J. 177 (1991).
broader pattern of extending or denying political and economic rights to individuals based on sexual orientation in the United States and Canada. Given the broad similarities between the two countries outlined above, this variation in political outcomes offers an opportunity to identify those factors that impede or promote the expansion of same-sex marriage rights at the national level. The next two sections provide the detailed political and legal histories of the same-sex marriage debates in Canada and the United States.

III. THE HISTORY OF THE LEGALIZATION OF SAME-SEX MARRIAGE IN CANADA

In the 1990s and the years that followed, Canadian courts were full of lawsuits by gays and lesbians seeking equality under the law. While these litigated battles were among the most recent and prominent elements of the history of same-sex legalization in Canada, the story actually began much earlier. The process by which gay and lesbian couples received the right to marry under Canadian law was first laid out by seemingly unrelated legislative actions and a fortuitous aspect of the government structure alluded to in Section II. While the litigation period of the 1990s and early 2000s was a crucial moment in the struggle for equality in Canada, the movement would not have been successful if not for the prior foundation.

A. The Structure of the Canadian Government Establishes the Groundwork for Gay and Lesbian Marriage Rights

As explained in the foregoing section, Canadian federalism differs from American federalism in two important ways. The Canadian provinces do not have individualized criminal laws nor do they have provincially legislated family laws because, unlike in the United States, family and criminal law in Canada are legislated by the national government, not the state or provincial government. Thus, throughout the country what constitutes an adoption never varies, and the elements of robbery in a Quebecois court are the elements of robbery in an Albertan court.68

At first, this difference in authority granted to the state and provinces in these federal systems seemed relatively unimportant. It certainly was not initially advantageous to gays and lesbians. In fact, the institu-

---

68. See generally Smith, Politics, supra note 21, at 225.
tion of marriage in Canada has historically been exclusive—not only denied to gays and lesbians, but to a variety of people in the Canadian minority, including Jews, Catholics, agnostics, atheists and some citizens of First Nations. While under French domain, Quebec had recognized Protestant, Catholic and Jewish marriages, yet at the very beginning of British colonization, the government recognized only Episcopalian marriage as legal marriage. Not until 1847 and 1857, respectively, did the British colony of Canada recognize Catholic and Jewish marriages. A purely civil or secular definition of marriage for heterosexuals did not exist until 1950. And this definition was not extended to same-sex couples until 2005 with the passage of the Civil Marriage Act. But because family law is nationally legislated—and was for centuries before the LGBT equal rights movement began—gays, lesbians, and their allies did not have to lobby thirteen separate provinces and territories to change the definition of marriage, as the American LGBT movement has had to do with separate state legislatures.

Without the Canadian federal system and its inclusion of family and criminal law under national domain, the important step of decriminalizing sodomy for the Canadian gay and lesbian minority may have taken decades longer. The United States did not nationally decide on the constitutionality of sodomy laws until 2003, in the U.S. Supreme Court decision, Lawrence v. Texas. Prior to that decision, gay men could be jailed for sexual activity in one state, but be protected from such invasions of privacy just one state north. In Canada, the criminalization of sodomy dated back to the origins of the colony, a lingering remnant of the British legal influence. In 1969, Parliament passed a series of family reform laws; among these reforms was the national

69. Interestingly, the United States started out with fewer restrictions on marriages of minorities, denying marriage only to members of the same sex and members of different races. Indeed anti-miscegenation laws date back to the late seventeenth century and were enforced by each of the Thirteen Colonies. A federal law against interracial marriage was never enacted, however, despite several proposed constitutional amendments. For an excellent history of anti-miscegenation laws and the fight for their repeal, see Elise Lemire, “Miscegenation:” Making Race in America (2002).


71. Id. at 601–02.

72. Id. at 603.

73. Marriage Act, R.S.O., ch. 222, § 25 (1950) (Ont.).

74. Civil Marriage Act, 2005 S.C., ch. 33 (Can.).

75. See Smith, Politics, supra note 21, at 226.

76. Lawrence, 539 U.S. at 558.
decriminalization of sodomy. The public’s reaction to the decriminalization of sodomy was actually slight; in fact, there was greater controversy caused by easier access to divorce granted by these reforms. This legislation was important, not only because of its initial implications for sexually active gay men, but because gays and lesbians would not have been able to seek protection under the subsequent Canadian Charter of Rights and Freedoms if the equality status they sought was tainted by “criminal” behaviors.

A major institutional barrier to the struggle for same-sex marriage rights in Canada related to the absence of court-enforced legal protections of minority rights. Throughout most of Canadian history, Canadian courts were not protectors of minority rights. In fact, until 1982 the Canadian courts did not have jurisdiction to hear cases related to human or civil rights violations. The legislatively mandated role of the courts was to apply and interpret the laws of Parliament. But in 1982 Parliament passed the Canadian Charter of Rights and Freedoms. Among other provisions, the Charter extended the role of the Canadian judiciary, allowing them to be the “guarantors of the rights entrenched in the charter.” Without this legislation, Canadian gays and lesbians would not have had the legal route to sue for equal treatment under the law.

77. Smith, Politics, supra note 21, at 226.
78. Id. It was shortly after the family law reforms that Canada saw its first piece of anti-discrimination legislation, when the City of Toronto passed its anti-discrimination ordinance in 1973. See Elliott, supra note 70, at 606.
80. Id. (“As the former Chief Justice of the Supreme Court Bora Laskin noted, in the pre-Charter days, when a rights question came before the courts, the question was which of the two levels of government, federal or provincial, had the power to work the injustice, not whether the injustice itself should in fact be prevented”).
81. Id. The Charter was the result of the efforts of Prime Minister Pierre Elliott Trudeau, a strong proponent of a constitutionally guaranteed Bill of Rights. See Elliot, supra note 70, at 606–07.
82. Cotler, supra note 79, at 61.
83. Id. at 62 (“The dramatic nature of the 1982 Constitution Act and the Charter resulted in a situation where all these groups that were discriminated against now not only have a panoply of rights and remedies that they never had before, but these issues are now justiciable before the courts. Before the adoption of the Charter, groups such as women, . . . or same-sex couples would not even have had the standing, in many instances, to bring their concerns before the courts. . . .”); id. at 61 (“Individuals and groups became rights holders or rights claimants with respect to matters that had until then not even been justiciable, but rather had relied strictly on democratic accountability.”).
The section of the Charter from which gays and lesbians would eventually sue for equal rights was Section 15, commonly called the equality guarantee. The relevant portion reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." In order to pursue a complaint under Section 15, a person must prove not only that a law or policy violates Section 15, but also that the discrimination he or she is seeking to rectify is not a "reasonable limit prescribed by law," as Section 1 of the Charter demands.

B. The Battle in the Courts: Focus on Ontario

As in the United States, the courts in Canada had traditionally recognized marriage as between a man and a woman. However, this limited view of marriage was formulated prior to the adoption of the Canadian Charter of Rights and Freedoms. With the passage of the Charter, the doors of the judiciary were open to gays and lesbians. The first course of action was to ask the courts to consider whether Section 15 even applied to gays and lesbians. The phrase "in particular" seemed to indicate that minorities outside the enumerated list might also have equal protection under the law, but the question remained whether gays and lesbians were among those minorities.

In Andrews v. Law Society of British Columbia, one of the earliest attempts to sue for same-sex equality under Section 15 of the Charter,

84. See Hogg, supra note 11, at 713.
86. Id. at § 1. ("The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.").
87. See, e.g., Hyde v. Hyde and Woodmansee, [1866] 1 L.R.P. & D. 130, 133 (U.K.) (stating that marriage is "the voluntary union for life of one man and one woman... ").
89. Andrews v. Law Soc’y of British Columbia, [1989] S.C.R. 143, 145 (Can.). This case involved an American citizen who met all the requirements to join the British Columbia bar except the Canadian citizenship requirement. He sued on the grounds that the citizenship requirement was discriminatory under the Charter. The court held that

The grounds of discrimination enumerated in s. 15(1) are not exhaustive. Grounds analogous to those enumerated are also covered and the section
the Supreme Court of Canada set a precedent for determining whether a
distinction violated the equality guarantee in the Charter. The Court
held that Section 15 does not prohibit all statutory distinctions, but
only those based on grounds that are listed in the section or are “analo-
gous” to those that are listed.

In another early decision, *Andrews v. Ontario*, the Ontario court
had to decide whether the individuals suing under Section 15 were
members of a distinct class. It ruled that cohabitating homosexual
couples did qualify as members of a distinct class. Then the court had
to decide whether their class was similarly situated to that of heterosex-
ual couples. The court ruled that although the defendants were
members of a distinct class, they were not treated differently than any
similarly situated class because, due to biological differences between
opposite-sex couples and same-sex couples, heterosexual married couples
were not a class similarly situated.

This biological difference argument would influence decisions for
several years. In fact, this argument was the basis of an Ontario court’s
decision in the first instance the Charter was applied to appeal for same-
sex marriage rights. This initial unsuccessful bid to have the common
law prohibition against gay marriage struck down as a violation of Sec-
tion 15 of the Charter was supported by the Metropolitan Community
Church of Ottawa, which intervened on behalf of the gay male couple
seeking to marry. However, the court was unsympathetic to their argu-
ments.

On hearing the appeal of this case, the court recognized that homo-
sexuals were a discrete minority, but found that their inability to

---

may be even broader than that although it is not necessary to answer that
question in this case since the ground advanced in this case falls into the
analogous category.

Id. at 145.
91. *Andrews v. Law Soc’y of British Columbia*, S.R.C. at 145. See also Hogg, supra note 11, at 713.
92. *Andrews v. Ontario*, [1988] 64 O.R.2d 258 (Can.). The issue in this case was
whether a same-sex couple who cohabited and were in a long-term relationship could
sue for health insurance benefits for the significant other of the insured party under
the Ontario Health Insurance Plan.
procreate distinguished them from opposite-sex couples. Since procreation was such an integral part of the marital relationship, it was a difference that allowed the couples to be treated differently.

In order to effectively litigate same-sex equality, the gay and lesbian litigants would need a court to establish sexual orientation as analogous to one of the classes included in the enumerated list in the Charter. In 1995, the Supreme Court of Canada did so in the case of Egan v. Canada. The lawsuit was brought by two homosexual men who had been in a committed relationship since 1948. One of the men applied for old age security benefits at the age of sixty-five and his partner applied at age sixty, which was the age permitted for spouses of recipients under the Old Age Security Act. The application was rejected on the basis that the definition of spouse under the Act was exclusive to heterosexual couples. While the Supreme Court upheld the definition of marriage in the Act, the decision also established an important precedent stating that, “sexual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of [Section] fifteen protection as being analogous to the enumerated grounds.”

100. Layland, 14 O.R.3d at 667 (holding that according to common law, a valid marriage is between a man and a woman). Specifically, the court determined that Section 15(1) of the Charter prohibited discrimination against groups analogous to those enumerated in Section 15(1), but that homosexual couples were not analogous to heterosexual couples because heterosexual couples could procreate. Id. at 664. It held that because the purpose of state-sanctioned marriage is to encourage procreation, the Charter could not be used to extend marriage to homosexual couples. Id. at 666.


102. Egan v. Canada, [1995] 2 S.C.R. 513 (Can.). See also Vriend v. Alberta, [1998] S.C.R. 493 (Can.). Vriend was fired from a conservative Christian college because of his sexual orientation. He sued to be reinstated, but Alberta did not provide anti-discrimination protection for gays and lesbians. Id. The outcome of Vriend, while similar to that of Egan, is important because several of the justices (most notably the Chief Justice) changed their positions from the earlier Egan ruling. See Brenda Cossman, Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms, 40 OSGOODE HALL L. J. 223, 231 (2002) (discussing Vriend as a turning point in same-sex marriage litigation).

103. Egan, 2 S.C.R. at 528.


106. Egan, 2 S.C.R. at 514. The Egan Court also wrote:

[M]arriage's ultimate raison d'être . . . is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate . . . . [M]arriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.
While Egan was in the Ontario court system, another important case for gay and lesbian equality was being argued on different grounds. In the 1995 case of Miron v. Trudel, the court established another analogous ground by which gays and lesbians could sue for benefits. This case, filed by an unmarried heterosexual couple, established that discriminating against people based on their marital status violated the Charter of Rights and Freedoms. Because of this decision, same-sex couples sued for employment, pension, insurance, and other similar lawsuits prior to the Halpern v. Canada decision, basing their discrimination claims on both sexual orientation and marital status.

After Miron, both same-sex common law couples and opposite-sex common law couples could sue for equal rights and protection under the 1982 Charter. Some laws, however, disadvantaged same-sex couples while including heterosexual couples in common law marriages. One of these laws was the Family Law Act of 1990. The Family Law Act defined "spouse" as not only a married man or woman, but also a man and woman "who are not married to each other and have cohabitated . . . continuously for a period of not less that three years." In 1999, the Supreme Court of Canada heard M. v. H, which challenged this law and led to subsequent challenges of other laws that discriminated against common law couples who were homosexual. The court found in favor of M. and ruled that the Family Law Act violated Section 15 of the Charter of Rights and Freedoms, and this violation was not justifiable under Section 1.

---

Id. at 515. This reasoning changed markedly in Halpern v. Canada, [2003] 65 O.R.3d 161 (Can.), which established the unconstitutionality of same-sex exclusion from marriage. The court in Halpern stated that "no one . . . is suggesting that procreation and childbearing 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." Id. at 187.

108. Miron, 2 S.C.R. at 418.
109. Halpern, 65 O.R.3d at 161. For additional discussion of the Halpern decision, see supra note 106.
112. M. v. H., S.C.R. 3. After cohabitating for ten years M was suing H for an order to sell the house they had purchased together and for spousal support under the Family Law Act. See also Cossman, supra note 102 (discussing the importance of M. v. H. in the litigation of same-sex equality rights).
113. M. v. H., S.C.R. 3. The court articulated the test to be applied as: 1) the objective of the legislation must be pressing and substantial, and 2) there must be proportionality between the gain achieved by the public interest served by the legislation and the
While much of the progress in Canada was occurring in the courts, Parliament was involved with the extension of equal rights to same-sex couples even before the Civil Marriage Act. Because of the number of statutes that were invalidated during the mid to late 1990s, the liberal Parliament passed a comprehensive law in 2000 called the Modernization of Benefits and Obligations Act. This law amended sixty-eight federal laws to ensure equality to same-sex couples.

The case that finally established the right of same-sex couples to marry in Ontario and set the stage for the passage of the Civil Marriage Act was *Halpern v. Canada*. The Ontario Court of Appeals ruled that the common law definition of marriage as union of man and woman violated equality rights of same-sex couples under Section 15 of the Canadian Charter of Rights and Freedoms. The Court held that though the common law defined marriage as the union between opposite sexes, no statutory impediment to same-sex marriage existed. The Court then declared the common law definition constitutionally invalid. The Court also noted that changes in society resulted in acceptance of these same-sex couples and that biological arguments defending same-sex exclusion from marriage under Section 1 of the Charter were not valid in that marriage is no longer considered solely for procreation and child-bearing. The Court of Appeals ordered that the definition of marriage be immediately changed. The Toronto same-sex marriages that started this important case were now the first legal same-sex marriages in the world aside from the same-sex marriages legalized in the Netherlands in 2001.

_114. Modernization of Benefits and Obligations Act, 2000 S.C., ch. 20 (Can.)._
_115. See Cotler, supra note 79, at 64._
_116. See Halpern, 65 O.R.3d at 161. This case involved a church, which conducted marriage services for same-sex couples, and seven same-sex couples who sought orders that would require the issuance of marriage licenses to these couples. Id._
_117. Halpern, 65 O.R.3d at 164. The common law definition of marriage prior to this decision originated from an English case regarding the legality of an American heterosexual, and arguably polygamous, marriage: “I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of others.” Hyde v. Hyde and Woodmansee, 1 L.R.P. & D. at 133._
_118. Halpern, 65 O.R.3d at 164._
_120. See Kevin G. Alderson, A Phenomenological Investigation of Same-Sex Marriage, 13 CAN. J. OF HUMAN SEXUALITY 107, 108 (2004) (noting that Ontario was the first Canadian province to legalize same-sex marriage, followed by British Columbia (July
C. The Civil Marriage Act

Of course the Civil Marriage Act did not immediately follow the decisions in *Halpern* and *Barbeau*. The Canadian Parliament took several actions before drafting and voting on such a controversial and progressive act. During the first half of 2003, before the *Halpern* and *Barbeau* decisions, Parliament had created a House of Commons standing committee to research the possibility of changing the definition of marriage throughout Canada to be same-sex inclusive. The standing committee heard from about 500 witnesses from around the country. Additionally, following the decisions, Parliament requested a "reference" opinion from the Supreme Court of Canada to advise Parliament of whether it had the power to legalize same-sex marriage. In this advisory opinion, the Court concluded that Parliament did have the authority it sought.

The Civil Marriage Act has two basic premises. First, the Act defines marriage: "Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others." Secondly, it assures the freedom of religion when it provides that churches are under no obligation to perform same-sex ceremonies. When Parliament voted on the Act, it was considered a free vote, allowing members of the Liberal caucus to vote their conscience rather than being bound to their normal parliamentary obligations to vote with the party. The Act passed Parliament by a majority of 158 to 133 and became law when it received Royal Assent on July 20, 2005.

Though it was enacted in July of 2005, the bill actually faced its final challenge in late 2006. On December 7 of that year, members of

---

2003), Quebec (Mar. 2004), The Yukon (July 2004), Manitoba and Nova Scotia (Sept. 2004), and Saskatchewan (Nov. 2004)).
123. *See Reference re Same-Sex Marriage, [2004] S.C.R. 698 (Can.).* In this decision, the Court expressed its interpretative jurisprudence when it wrote that the "Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life." *Id.* at 700.
124. Civil Marriage Act, 2005 S.C., ch. 33, § 2 (Can.).
125. Civil Marriage Act, 2005 S.C., ch. 33, pmbl. (Can.).
Parliament voted on a controversial bill to reopen the same-sex marriage debate.\footnote{128} The proposal went down in a 175 to 123 defeat.\footnote{129} This margin of victory for retention of same-sex marriage was significantly greater than the margin by which the bill legalizing same-sex marriage passed, perhaps indicating a growing acceptance of same-sex marriages.

\section*{D. Parallel Progress at the Provincial Level}

As explained in the foregoing section, Canadian marriage law is really federal law, and therefore required national action to legalize same-sex marriage in Canada. However, prior to the passage of the Civil Marriage Act, some of the provinces in Canada took same-sex marriage issues into their own hands.\footnote{130} These provincial efforts included attempts to extend a variety of benefits to same-sex couples, as well as attempts to push the federal government to consider these issues at the federal level. Provinces such as British Columbia, Alberta, New Brunswick, Nova Scotia, and Newfoundland and Labrador took significant steps toward supporting same-sex marriage and same-sex relationships. In some ways, we can see these actions at the provincial level as being somewhat analogous to the actions by some states in the United States.\footnote{131}

One of the earliest provinces to support equality for same-sex couples was British Columbia. In May of 2000 the Attorney General of the province, Andrew Petter, issued a written statement in support of same-sex marriage after a same-sex couple applied for a marriage license.\footnote{132} The written statement made it obvious that the British Columbian government supported same-sex marriage rights. Petter stated, “In a modern society there is no justification for denying same-sex couples the same option to form marital bonds as are afforded to opposite sex couples.”\footnote{133} He continued, “As a province, we have taken action to

\begin{footnotes}
\item[128] Id.
\item[129] Canadians For Equal Marriage, Announcement, http://www.equal-marriage.ca/ (last visited Jan. 26, 2008) (running the announcement “HARPER’S MOTION TO RE-OPEN EQUAL MARRIAGE DEFEATED! Prime Minister says the issue is settled”). The website also ran the language of the defeated motion: “That this House call on the government to introduce legislation to restore the traditional definition of marriage without affecting civil unions and while respecting existing same-sex marriages.” Id.
\item[130] Hogg, supra note 11, at 715.
\item[131] See infra Part IV, for a detailed discussion of the United States’ progress at the state level.
\item[133] Id.
\end{footnotes}
eliminate discrimination on the basis of sexual orientation within our areas of competence. We are continuing to remove legislative barriers that discriminate on the basis of sexual orientation.”134 Petter then requested that the federal government “resolve the matter by clarifying its legislation and offering same-sex couples the same opportunity to marry as is available to heterosexual couples.”135

This marked the first time a Canadian provincial government expressed its views in support of same-sex marriage. Two months later, after stating the belief that any law restricting the right of same-sex couples was “both unfair and unconstitutional,”136 the British Columbian provincial government, along with EGALE (Equality for Gays and Lesbians Everywhere), released a statement announcing the initiation of legal proceedings to challenge any restrictions on the rights of same-sex couples wanting to marry.137

In EGALE Canada Inc. v. Canada,138 the eight same-sex couples acting as petitioners argued that the bar against same-sex marriage violated Section 15 of the Charter, as solidified by Egan.139 The gay rights cause was unsuccessful in this case, with Justice Pitfield deciding that a marriage consists of a legal relationship between two people of the opposite sex. In reaching this decision, Pitfield relied on the definition of marriage set by the 1867 Constitution Act, which specified that the two parties involved must be of the opposite sex.140 The judge further claimed that any alteration of this standard would require a formal amendment of the Constitution.141 This was the first decision dealing with the legal status of same-sex marriage to be handed down by Canadian courts.142

This decision was eventually appealed, and in May 2003 the British Columbia Court of Appeal overturned the prior decision by the British Columbia Supreme Court,143 concurring with an intervening decision in

134. Id.
135. Id.
137. Id.
Quebec declaring the common law ban on same-sex marriage unconstitutional. Although the Court of Appeal initially delayed legal remedy until July 2004, the immediate enactment of lifting the bar on same-sex marriage in Ontario on June 10, 2003 led the Court to expedite the lifting of the bar in British Columbia as well. Thus, on July 8, 2003, same-sex marriage became legal in British Columbia, squarely placing this province among the international pioneers in securing equal rights for gays and lesbians.

Alberta also made small steps forward. On May 7, 2002 and December 4, 2002, Alberta passed two bills, respectively, that would give same-sex couples the same rights as heterosexual couples—Bill 29, the Intestate Succession Amendment Act, and Bill 30–2, the Adult Interdependent Relationships Act. Bill 30–2 still used the heterosexual definition of marriage, stating that the spouse is the husband or wife of a marriage. This bill also defined marriage as “the union of one man and one woman to the exclusion of all others.”

The government proposed a new category: adult interdependent partner. This category “allow[s] any two adults living in an interdependent relationship to register it, and amends laws relating to support, inheritance and property rights.” The Adult Interdependent Relationships Act amended sixty-eight laws in Alberta relating to financial benefits, property benefits, and responsibilities for people in unmarried

147. The Intestate Succession Amendment Act, 2002 S.A., ch. 16 (Can.).
149. Id. at pmbl.
151. Adult Interdependent Relationships Act, R.S.A., ch. A-4.5, § 3 (2002). The law defined adult interdependent partners as:

[A] person is the adult interdependent partner of another person if (a) the person has lived with the other person in a relationship of interdependence (i) for a continuous period of not less than 3 years, or (ii) of some permanence, if there is a child of the relationship by birth or adoption, or (b) the person has entered into an adult interdependent partner agreement with the other person under section 7.

Id.
relationships. However, because the bills still clearly preserved marriage as a status for only opposite-sex couples, some would argue that they were not really a step toward recognition of same-sex marriage.

In June 2001, Nova Scotia took steps towards recognizing same-sex marriage. The government began recognizing unions under Bill 75, Registered Domestic Partnership. This was a big step, but did not provide equality. After victory in Ontario, couples appealed to the Nova Scotia Supreme Court and successfully ended marriage discrimination in that province on September 24, 2004.

Newfoundland also legalized same-sex marriage after a same-sex couple went to court because their marriage license was rejected. On December 21, 2004—after only one day of deliberation—the court ruled in favor of ending discrimination against same-sex couples.

On June 7, 2002, Quebec passed Bill 84, which created civil unions. These unions were open to adults not already in a marriage or civil union. Spouses in civil unions must take a vow similar to the marriage vow. Once joined, the spouses owe each other respect, fidelity, succor and assistance, and are bound to live together.

Prince Edward Island was the first Canadian province to recognize same-sex marriages without being forced to do so by a court decision.

154. Id.
155. Id.
156. Id.
160. Id. at § 24. Section 24 amends article 373 of the Civil Code of Quebec to read:

Before solemnizing a marriage, the officiant ascertains the identity of the intended spouses, compliance with the conditions for the formation of the marriage and observance of the formalities prescribed by law. More particularly, the officiant ascertains that the intended spouses are free from any previous bond of marriage or civil union and, in the case of minors, that the person having parental authority or, if applicable, the tutor has consented to the marriage.

161. Id. at sec. 27, § 521.b.
162. Id.
As recently as December of 2004, the prime minister of Prince Edward Island had declared that the province would wait until the federal government passed legislation mandating equal treatment of same-sex couples before it recognized same-sex marriage. 164 But on July 8, 2005, the Attorney General of Prince Edward Island announced that the province would be legalizing same-sex marriage, ostensibly because the federal government had decided to do so—although, in reality, the bill legalizing same-sex-marriage at the federal level was still being reviewed by the Senate.165 The Attorney General’s announced plan was to pass an omnibus bill that would “say something to the effect of wherever the word spouse appears in [provincial] legislation, it includes same-sex and heterosexual marriages.”166

On August 19, 2005, the first same-sex marriage was performed in Prince Edward Island.167 The couple received their license that morning and was married that afternoon, despite the fact that the province’s laws had not yet been changed to reflect the acceptance of same-sex marriages.168

In New Brunswick in June of 2005, the Court of Queen’s Bench Judge Jude Clendenning ruled in favor of four gay couples who claimed that the current definition of marriage violated their rights.169 Judge Clendenning ruled that the current definition of civil marriage be changed from “a lawful union between a man and a woman” to “a lawful union between two persons.”170 According to Alison Menard, the lawyer who represented the four couples, “What [this decision] means is that anybody that meets the definition of capacity to marry is able to go and get a marriage license.”171

164. Id.
166. Id.
167. Homosexual (Same-Sex) Marriages in Canada, supra note 163.
168. Id.
170. Id.
171. Id.
IV. History of Same-Sex Marriage Rights in the United States

A. Domestic Partnership Statutes and Civil Union Ordinances

Since the 1970s, activists in the United States have been striving to gain marital rights for same-sex couples. These efforts have produced a number of successes, as well as several setbacks. Early advocates mobilized around domestic partnership ordinances and civil union statutes in lieu of calling for full marriage rights. Early gains were made in California, where the first domestic partnership ordinance was adopted in Berkeley in December 1984. The following year, West Hollywood mayor Valerie Terrigno created the first domestic partnership registry in the United States. This registry program allowed all city employees to...

172. In addition to gaining legal rights to some benefits comparable to those of married couples, progress has also been made in securing benefits from private sector employers. As of the summer of 2004, approximately 6,800 employers, 211 of them Fortune Five Hundred companies, offered benefits to same-sex partners. Am. Bar Ass'n of Family Law, A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships, 38 Fam. L. Q. 339, 348 (2004). Of course, while every additional employer who provides such benefits is important, these benefits are not guaranteed in the same way as legal benefits, and so are not quite as significant in the overall quest for equality between same-sex and opposite-sex couples. Firms may be generous when economic times are good, but are most likely to cut back on these benefits when they are needed most, in times of economic downturns. In addition to being offered voluntarily by private employers, private benefits tied to employment status do not provide same-sex couples with access to over 1,000 federal marriage benefits, including Social Security, family medical leave, federal taxation, and immigration policy. Vestal, supra note 25. A 1997 report by the General Accounting Office identified 1,049 federal laws in which "benefits, rights and privileges are contingent on marital status," including Social Security benefits, veterans' benefits, employment benefits, and taxation. GEN. ACCOUNTING OFFICE, No. B-275860, OGC-97-16 DEFENSE OF MARRIAGE ACT (1997), available at www.gao.gov.

173. As early as 1973, Maryland became the first state to enforce a law that defined marriage as a union between a man and a woman. Since then forty four states have moved to ban same-sex marriage, either through amending state constitutions or enacting statutes prohibiting the practice. Since 2004 alone, the year Massachusetts legalized same-sex unions, twenty-three states have amended their constitutions in order to prevent state-level judiciaries from ruling in favor of same-sex marriage, as happened in Massachusetts. Vestal, supra note 25.


register and receive benefits for same-sex partners. Similar benefits were granted to Berkeley city employees in 1987.\textsuperscript{176} Two years later, after several political setbacks,\textsuperscript{177} San Francisco granted full legal recognition to homosexuals and unmarried heterosexual couples by passing a domestic partnership ordinance.\textsuperscript{178} This step made San Francisco the first major U.S. city to provide full public registration of same-sex unions.\textsuperscript{179} Though these efforts provided a template for gay rights organizers in cities around the country, these early achievements were limited. Those ordinances that granted benefits to city workers were limited in both the benefits they offered and in terms of coverage, as only municipal employees were eligible.\textsuperscript{180} Furthermore, many city-wide domestic partnership ordinances did not provide legal rights to partners, only recognizing the union in the event an employer or business wished to extend benefits to domestic partners.\textsuperscript{181} Finally, none of these ordinances or registries granted same-sex couples access to the more than 1,100 federal benefits offered to married couples.\textsuperscript{182}

\begin{footnotesize}
\begin{enumerate}
\item[176.] Berkeley Domestic Partnership Information, \textit{supra} note 174.
\item[177.] In 1982 the San Francisco Board of Supervisors passed an ordinance that would have granted health insurance coverage to domestic partners. Katherine Bishop, \textit{San Francisco Grants Recognition to Couples Who Aren't Married}, \textit{N.Y. Times}, May 31, 1989, at A17. However, under intense pressure from the local Catholic Church, then-Mayor Dianne Feinstein vetoed the measure. \textit{Id.} Feinstein also rejected a recommendation from her own Task Force to extend health insurance to domestic partners of city employees. \textit{Id.} For a history of San Francisco's domestic partnership ordinance, see \textit{Diane Whitacre, Will You Be Mine?} (1992). \textit{See also} Craig A. Bowman & Blake M. Cornish, Note, \textit{A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances}, 93 \textit{Colum. L. Rev.} 1164 (1992).
\item[178.] The ordinance defined domestic partnership as "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring, who live together, and who have agreed to be jointly responsible for basic living expenses incurred during the Domestic Partnership." Partners must certify that they live together, share living expenses, and are not currently married. Domestic Partnership, S.F. ADMIN. CODE § 62, \textit{available at} \url{http://www.sfgov.org/site/countyclerk-page.asp?id=5549} (last visited Feb. 6, 2008).
\item[179.] \textit{Id.}
\item[180.] \textit{See} Berkeley Domestic Partnership Information, \textit{supra} note 174. Under Berkeley's plan, premiums for both the city employee and his or her domestic partner are paid for by the city. Perhaps surprisingly, four years after the ordinance was passed, the city found that the costs of its premiums had increased only minimally. Robert Chow, \textit{S.F. Supervisors OK 'Domestic Partners' Law}, \textit{L.A. Times}, May 23, 1989, at Metro Desk, 3.
\item[181.] For a discussion of the limitations of municipal domestic partnership ordinances, see Bowman & Cornish, \textit{supra} note 177.
\item[182.] Federal law offers over 1,000 benefits to married couples, including social security benefits and federal income tax. Vestal, \textit{supra} note 25. For a review of the economic benefits of marriage in the United States, see Kubasek & Glass, \textit{supra} note 28.
\end{enumerate}
\end{footnotesize}
Starting in the 1990s, efforts to expand the rights of same-sex couples began in earnest at the state level. To date, five states and the District of Columbia have passed domestic partnership laws,\footnote{183} four states recognize civil unions,\footnote{184} and one state allows reciprocal benefits to


184. Vermont passed a civil union statute in 2000, Act Relating to Civil Unions, No. 91, 2000 Vt. Acts & Resolves; Connecticut in 2005, Act Concerning Civil Unions, Pub. Act No. 05-10, 2005 Conn. Acts (Reg. Sess.); and New Hampshire in 2007, Act of May 31, 2007, ch. 58, 2007 N.H. Laws. Civil union statutes provide more significant rights than most domestic partnership statutes because they generally offer all the state rights afforded married couples to those who enter into a civil union. For example, the Vermont statute provides that “Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.” \textit{Vt. Stat. Ann. tit. 15, § 1204}. The state’s civil union law further enumerates some of the more significant benefits and responsibilities same-sex couples who register their civil union in the state are entitled to, including: a requirement of mutual financial support; the application of the state laws of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance, adoption, and spouse abuse to the relationship; the same application of laws regarding child custody and support as apply to marital partners; similar application of property law and laws relating to decedents estates and probate; equal treatment of marital and domestic partners under tort law; the same application of tax laws and provision of public assis-
same-sex couples. Massachusetts is currently the only state that grants full marriage rights to same-sex couples. While there have been a handful of successful efforts to expand domestic partnership rights at the state level, other similar efforts have failed. By granting same-sex partners
tance; the same statutory spousal benefits related to group insurance for state employees, victims' compensation, workers compensation, family leave benefits, and state pay for military service; and treatment equal to that of a spouse under laws relating to emergency and non-emergency medical care and treatment, hospital visitation and other health care related legal benefits. The Vermont statute also provides that the rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, are the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage. Among other legal rights and responsibilities for same-sex partners, the Vermont statute provides that a party to a civil union is included, by law, in any definition or use of the terms "spouse," "family," "immediate family," "dependent," "next of kin," and other terms that denote the spousal relationship, as those terms are used throughout Vermont law.

185. In 1997, Hawaii enacted a reciprocal beneficiary registry for adult couples prohibited from legally marrying. Act of July 8, 1997, No. 383, 1997 Haw. Sess. Laws. This registry allows registered beneficiaries to be treated the same as spouses for purposes of protection under Hawaiian domestic violence laws, tort liability, cases of wrongful death and loan eligibility. It also allows registered partners to inherit from their partner without a will, consent to postmortem examinations, and have the same rights as spouses to hospital visitation and making health care decisions. Finally, registered domestic partners may also own property as joint tenants. However, relative to domestic partnership and civil union bills passed in other states, Hawaii's registry is extremely limited and ineffective. See Partners Task Force for Gay and Lesbian Couples, Reciprocal Beneficiaries: The Hawaiian Approach, http://www.buddybuddy.com/d-p-hawa.html. Four years after the law's enactment, only 578 reciprocal beneficiary relationships were registered. Arguably, the low number of registrants is evidence of the ineffectiveness of this law. See id.

186. In 2004, the Massachusetts Supreme Court ruled that state-level prohibition against same-sex marriage was unconstitutional. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948, 968 (Mass. 2003). However, recent mobilization has threatened the future legality of same-sex marriage in Massachusetts. In 2006, the Massachusetts Supreme Judicial Court upheld a state law banning couples from outside the state from marrying in Massachusetts if the marriage is not legal in their home state. In January 2007, the state legislature approved a ballot measure that would have amended the state constitution to ban gay marriage. Frank Phillips, Legislators Vote to Defeat Same-Sex Marriage Ban, BOSTON GLOBE, June 14, 2007, http://www.boston.com/news/globe/city_region/breaking_news/2007/06/legislators_vot_l.html. However, fifty legislative votes in two consecutive sessions were needed to place the amendment on the state-wide ballot in the 2008 elections. In June, the proposed ballot measure was defeated in the legislature by a vote of 151 to 45. See also Vesta l, supra note 25, at 1.

187. Colorado and Maryland are two examples of failed attempts to legislate domestic partnership benefits. In 2006, Colorado voters defeated a proposal, Referendum I, which was passed by both the state legislature and senate that would have granted same-sex couples access state-level marriage benefits. Kevin Simpson, Marriage, Gay Rights Amend 43 Supporters Revel in Double Victory, DENVER POST, Nov. 9, 2006, at
access to all state-level rights and benefits enjoyed by legally married couples, these statutes increased the number of same-sex couples receiving some state-level benefits, as well as increased the kinds of benefits available to such couples. However, as with municipal ordinances, the benefits they provide remain limited.  

B. U.S. Courts and Same-Sex Marriage

As the previous section illustrates, domestic partnerships and civil unions can provide some benefits for same-sex couples; however, many LGBT leaders are now seeking full marriage rights for same-sex couples. Thus far, they have made the greatest strides toward equality for same-sex couples through the court system. On November 18, 2003, the Massachusetts Supreme Court ruled in Goodridge v. Department of Public Health, that the statute barring same-sex couples from marrying was unconstitutional and ordered the state legislature to remedy the violation within six months. Barely four months later, in February of 2004, the high court further ruled that passage of a civil union statute could not remedy the violation, thereby giving same-sex couples in the state of Massachusetts the right to marry.


188. State-level benefits can include inheritance rights, workers compensation, health insurance and pension benefits for partners of state employees, paid family leave, hospital visitation rights, and healthcare decision-making. These statutes cannot provide the federal protections and benefits granted to legally married couples as outlined in a 1997 report by the General Accounting Office, which identified 1,049 federal laws in which "benefits, rights and privileges are contingent on marital status," including Social Security benefits, veterans’ benefits, employment benefits and taxation. See GEN. ACCOUNTING OFFICE, No. B-275860, supra note 172. For an analysis of the limitations of municipal domestic partnership ordinances, see Bowman & Cornish, supra note 177.

189. This victory, however, is a tenuous one. Opponents of gay marriage in Massachusetts almost forced a 2008 statewide vote on a constitutional gay marriage ban. Vestal, supra note 25, at 1. But on June 14, 2007, after three-and-a-half years of debate, the Massachusetts legislature narrowly upheld the court-imposed gay marriage law, protecting it from a constitutional ban for at least five more years. Id.

190. Goodridge, 798 N.E. 2d at 948.

191. In re Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004). Of course, because of the federal DOMA, the constitutionality of which has not yet been
Despite the significance of the Goodridge decision, most judicial decisions have not assisted those struggling for the recognition of same-sex marriage. Indeed, nearly all early legal efforts met with failure, beginning with the 1971 case of Baker v. Nelson, wherein a gay male couple argued unsuccessfully that the fact that the Minnesota marriage law did not state that marriage was limited to a man and a woman indicated a legislative intent to authorize marriage between any two individuals, not just individuals of the opposite sex. Rejecting this interpretation of the statute, the court found evidence to infer that the legislature intended for the relationship to be one between persons of the opposite sex. It based this conclusion on the statute's use of terms that are generally regarded as gender specific, such as "bride" and "groom," and "husband" and "wife."

The court also rejected the couple's two-pronged argument that the statute was unconstitutional. The couple had claimed,

[t]he prohibition of a same-sex marriage denies petitioners a fundamental right guaranteed by the Ninth Amendment to the United States Constitution, arguably made applicable to the states by the Fourteenth Amendment, and petitioners are deprived of liberty and property without due process and are denied the equal protection of the laws, both guaranteed by the Fourteenth Amendment.

The court rather summarily declared that there was no invidious discrimination involved in making a distinction between same-sex and
opposite-sex couples and that there was no fundamental right to marry anyone regardless of their sex.\textsuperscript{196}

A lesbian couple in Kentucky fared no better in 1973, when a Kentucky court also rejected arguments that the state's refusal to grant them a marriage license denied the couple the constitutional rights to marry, to freely associate, and to freely exercise religion, as well as constituted cruel and unusual punishment.\textsuperscript{197} Once again the statute itself did not specify that the marriage must be between a man and a woman. Emphasizing its obligation to employ the common meaning of the term, the court once again relied on dictionaries, all of which defined marriage as between a man and a woman, to find that what the petitioners proposed was not, by the common definition, a marriage.\textsuperscript{198} Because what the petitioners wanted was not a marriage, the court found that there could be no constitutional violation.\textsuperscript{199}

The following year, a male couple in the state of Washington unsuccessfully filed suit against the county auditor for refusing to issue them a marriage license. The Washington couple tried a slightly different approach, arguing that the denial of a marriage license violated the Equal Rights Amendment of the Washington State Constitution.\textsuperscript{200} The appellate court rejected their claim because the purpose of the law was to prohibit unequal treatment based on sex, primarily for economic purposes, not to legalize homosexual marriage.\textsuperscript{201} The Supreme Court of Washington simply denied the couple's appeal.\textsuperscript{202}

\begin{itemize}
  \item 196. Baker, 191 N.W.2d at 187. The court did address the petitioners' analogy to \textit{Loving v. Virginia}, 388 U.S. 1 (1967), in which the prohibition against marriage by parties of different races was struck down, finding that \textit{Loving} does indicate that not all state restrictions upon the right to marry are beyond reach of the Fourteenth Amendment. But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex. Baker, 191 N.W.2d at 187.
  \item 197. Jones v. Hallahan, 501 S.W.2d 588, 590 (Ky. 1973).
  \item 198. Jones, 501 S.W.2d at 589–90. The sources relied upon in this case were \textit{The Century Dictionary and Encyclopedia}, \textit{Webster's New International Dictionary}, and \textit{Black's Law Dictionary}.
  \item 199. Jones, 501 S.W.2d at 589–90. The court also cited to Baker, 191 N.W.2d at 185, and \textit{Anonymous v. Anonymous}, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971) (concluding that the Constitution did not prohibit limiting marriage to opposite sex couples).
  \item 201. Singer, 522 P.2d at 1194. The court noted that the law treated both sexes equally; neither gay men nor lesbian women were allowed to marry persons of the same sex. Singer, 522 P.2d at 1194.
\end{itemize}
The definition of the term “spouse” was the focus of an interesting federal case in 1975. Title 8, § 1151(b) of the U.S. Code exempts “immediate relatives”—including spouses—from the numerical limitations on immigration imposed by the Immigration and Nationality Act of 1952. Adams, an American citizen, had hoped that his same-sex partner, Sullivan, could stay in the United States after his visa expired, so the two obtained a marriage license from the county clerk in Boulder, Colorado, and were “married” by a minister. Adams petitioned the Immigration and Naturalization Service for classification of Sullivan as an immediate relative of an American citizen, based upon Sullivan’s status as Adams’ spouse. The petition was denied, and the parties appealed to the Board of Immigration Appeals, and then to the district court, which granted the INS summary judgment. The circuit court took the petitioners’ appeal to determine whether a citizen’s spouse under § 1151(b) must be a member of the opposite sex, and whether the statute, if so interpreted, was constitutional. Giving deference to the agency that is responsible for enforcing the statute, the court found that, given its finding of clear congressional intent to privilege only opposite-sex marriages, there was no reason to go against the interpretation of the INS that the term spouse referred to a marital partner of the opposite sex. Nor did the court find any constitutional problems with this interpretation. It relied on Congress’ broad authority to regulate immigration, saying that Congress can make regulations affecting immigrants that would not be acceptable if imposed on citizens. Thus, by focusing on the immigration aspect of the regulation, the court managed to sidestep the marriage issue. The U. S. Supreme Court denied certiorari.

Advocates of same-sex marriage had no better luck nine years later when a same-sex Pennsylvania couple terminated their relationship and one of the partners sued for divorce, alleging a common law marriage. The state appellate court simply stated that the legislature would have to amend the common law marriage statute to explicitly include same-sex couples before the court could recognize same-sex common law mar-

2008] EVOLUTION OF SAME-SEX MARRIAGE IN CANADA 181

206. Adams v. Howerton, 673 F.2d 1036, 1038 (9th Cir. 1982).
207. Adams, 673 F.2d at 1040.
208. Adams, 673 F.2d at 1042 (“We do know that where there is a rational basis for Congress’s exercise of its power, whether articulated or not, the Court will uphold the immigration laws that Congress enacts.” (emphasis added)).
riage.\textsuperscript{210} In line with some of the earlier decisions described above, the court acknowledged that the law in Pennsylvania did not explicitly define marriage as between a man and a woman, but declared that "the inference that marriage is so limited is strong."

In 1990 an attempt to expand the definition of "spouse" to include same-sex couples in the context of New York's inheritance laws failed in \textit{In re Estate of Cooper}.\textsuperscript{212} This case arose when the decedent left most of his estate to a former lover, and his same-sex partner at the time of his death sued to inherit as a surviving spouse under New York's inheritance law.\textsuperscript{213} The court in dicta stated that only a lawfully recognized husband or wife qualified as a spouse under that law and that "persons of the same sex have no constitutional rights to enter into a marriage with each other."\textsuperscript{214} That decision was upheld on appeal, the appellate court, quoting the Minnesota Supreme Court, held, "[t]he equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational or invidious discrimination."\textsuperscript{215}

The first real victory advocates of same-sex marriage obtained was the trial court's decision in \textit{Baehr v. Miike},\textsuperscript{216} a case decided in Hawaii. In that case, the trial court found that the requirement that marital partners be members of the opposite sex violated the right to equal protection under the state's constitution.\textsuperscript{217} The First Circuit Court of Appeals upheld the decision. The victory was short lived, however, because shortly after the ruling, Hawaiian voters approved an amendment to the state constitution to grant the legislature the power to reserve marriage to opposite-sex couples.\textsuperscript{218} Once the constitution was changed, the Supreme Court of Hawaii had no choice but to overrule the decision of the appellate court and dismiss the parties' claims.\textsuperscript{219} Despite the outcome of the case, during the nine years that transpired from the time of its filing until its dismissal, the case stimulated considerable discussion about the possibility of a state recognizing same-sex marriage.

\textsuperscript{211} De Santo, 476 A.2d at 954.
\textsuperscript{212} \textit{In re Estate of Cooper}, 564 N.Y.S.2d 684 (N.Y. Sup. Ct. 1990).
\textsuperscript{213} Cooper, 564 N.Y.S.2d at 685.
\textsuperscript{214} Cooper, 564 N.Y.S.2d at 685.
\textsuperscript{216} \textit{Baehr v. Miike}, No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999 (providing a thorough discussion of the case in the final ruling on it)).
\textsuperscript{217} \textit{Baehr}, 1999 Haw. LEXIS 391.
\textsuperscript{218} \textit{Baehr}, 1999 Haw. LEXIS 391.
\textsuperscript{219} \textit{Baehr}, 1999 Haw. LEXIS 391, at *6–7.
However, only eleven days after *Baehr* was dismissed, the Vermont Supreme Court ruled that same-sex couples must receive the same benefits as opposite-sex couples under Vermont's Constitution. For advocates of same-sex marriage, this ruling was the most important decision prior to *Goodridge*. Although many advocates of same-sex marriage hoped that the marriage statute would be altered to include same-sex couples, the state legislature passed the Vermont Civil Union Law. This law extended state rights and benefits available to opposite-sex couples to same-sex couples.

In Oregon in 2004, same-sex marriage advocates saw a repeat of the fight in Hawaii. In *Li v. State*, the trial judge found that the state's marriage law discriminated on the basis of sexual orientation. In November of 2005, the voters amended their constitution in response, defining marriage as a relationship between a man and a woman. The Supreme Court of Oregon overturned the trial judge's ruling on appeal because the amended state constitution limited marriage to opposite-sex couples. Soon after the trial court ruling in *Li*, a Washington superior court issued a similar ruling. The court found that, by denying marriage licenses to same-sex couples, the state of Washington unconstitutionally denied same-sex couples privileges to which all citizens were guaranteed equal access, in addition to unconstitutionally violating due process guarantees. Although the court said that issuing marriage licenses allowing the plaintiffs to become civilly married would be the sensible remedy, the court declined to make that order immediately because the issue was so critical that an appeal was certain; instead, the court certified the case for appeal.

On February 4, 2005, a New York trial court granted plaintiffs an injunction prohibiting the denial of marriage licenses to same-sex couples after it held that withholding marriage licenses to same-sex couples violated their right to due process and equal protection. On appeal to the Court of Appeals of New York (New York's highest court), the case

221. Id.
224. *Li*, 110 P.3d at 91.
228. *Hernandez v. Robles*, 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005). Interestingly enough, the parents of one of the plaintiffs were the plaintiffs in *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948), the first case that resulted in a state's anti-miscegenation statute being declared unconstitutional.
was joined with four other cases from New York lower courts. In a divided opinion on July 6, 2006, the New York Court of Appeals held that recognition of same-sex marriage was not compelled by the state constitution. The majority opinion, which was signed by three judges and joined by a concurring opinion, opined that social goals, such as the protection of welfare of children necessitated limiting the institution of marriage to opposite-sex couples. The Chief Justice, in writing the excoriating dissent, which was signed by a second judge, suggested that laws banning same-sex marriage would be seen in the same light as laws banning interracial marriage.

The two most recent state supreme court cases have reached very different conclusions regarding marriage rights of same-sex couples. In 2006, the New Jersey Supreme Court ruled that same-sex couples are guaranteed access to all the legal benefits of marriage. While this decision significantly advanced the right of same-sex couples in the state, the court failed to legalize same-sex marriage. On March 14, 2005, a California trial judge found that refusing to allow same-sex couples the right to marry violates California's equal protection clause by discriminating on the basis of gender and by infringing upon the fundamental right to marry. The judge also ruled that the “creation of a superstruc-

234. The court gave the legislature 180 days to design a measure that would equalize benefits between heterosexual and homosexual couples—whether the state would grant full marriage rights or merely recognize civil unions was left up to the legislature. Michael Powell & Robin Shulman, N.J. Ruling Mandates Rights for Gay Unions: State Court Does Not Specify "Marriage," WASH. POST, Oct. 26, 2006, at A1. The majority opinion stated, in part, “we do not consider whether committed same-sex couples should be allowed to marry, but only whether those couples are entitled to the same rights and benefits afforded to married heterosexual couples.” Lewis, 908 A.2d at 217.
235. Chief Justice Deborah Poritz dissented from the majority opinion for this reason, arguing that same-sex couples are entitled to the “fundamental right to participate in a state-sanctioned civil marriage.” Lewis, 908 A.2d at 225.
ture of marriage-like benefits for same-sex couples" did not correct the constitutional violation. The next year, however, the appellate court overturned the decision, thereby denying the expansion of marriage rights in the state. In December 2006, the state supreme court agreed to review all state-level cases related to marriage rights; as of January 8, 2007, the time for filing friend of the court briefs had closed, and thirty such briefs had been filed in the case. On October 12, 2007 Governor Arnold Schwarzenegger vetoed the Religious Freedom and Civil Marriage Protection Act, which would have given same-sex couples the ability to marry, overcoming the barrier created by the action of the California appellate court.

As this review makes clear, courts have gradually addressed the issue of same-sex marriage in states around the United States. The progress gay rights advocates have made at the state level has prompted well-organized opponents of same-sex marriage to focus their efforts on amending the federal and state constitutions. Indeed, state constitutional amendments have proven to be the primary mechanism to stop the recognition of same-sex partners' rights to marry. As opponents of same-sex marriage seek the strongest weapon against the growing trend of state-level judicial recognition of same-sex marriage rights, they have also increasingly sought to amend the U.S. Constitution, thereby limiting the expansion of marriage rights to same-sex couples at the federal level.

C. The Political Backlash in the United States

Recent successes at the state legislative and judicial level have motivated a strong and well-organized political backlash. Opponents of same-sex marriage rights have responded in two primary ways—"defense of marriage" statutes and constitutional amendments. In 1996,ironically, this was the same year that the Clinton Administration passed a welfare reform law, also known as The Personal Responsibility and Work Opportunity Act (PRWOA), Pub. L. No. 104-193, 110 Stat. 2105 (1996). In addition to moving welfare recipients from welfare to work, the stated objective of the welfare reform bill was to "encourage the formation and maintenance of two-parent families," § 401a(4),
then-President Clinton signed into law the Defense of Marriage Act (DOMA), which denied federal recognition of same-sex marriages performed in any state and upheld states' rights to ban same-sex marriage and to ignore marriages performed elsewhere.242

Constitutional challenges to the federal DOMA and the various state DOMAs have not yet been addressed by the Supreme Court,243 but the federal DOMA has been upheld in at least one district court.244 In January of 2005, three cases challenging the federal DOMA were filed; however, a federal judge in Tampa dismissed two of the cases, and the third suit pending in Miami was dropped by the couples.245

In November 2004, voters in thirteen states passed state constitutional amendments prohibiting the recognition of same-sex marriages.246 By mid-2005, a total of twenty states had adopted such constitutional amendments, and during the 2006 mid-term elections, eight states passed similar amendments.247 Some of these amendments were directly responding to court decisions ruling that the state constitution ensured the rights of same-sex couples.248 As of June 2006, forty-five states had taken some action to bar same-sex couples from the institution of mar-

---

242. See Vestal, supra note 25, for a timeline of this and similar decisions.
243. The federal DOMA is arguably unconstitutional without the MPA, so advocates of the MPA do not want the U.S. Supreme Court to hear a DOMA case before the amendment is passed.
248. Vestal, supra note 25. Unsurprisingly, as soon as the ruling of the Massachusetts Supreme Court led to legal same-sex marriages, a movement to amend the Massachusetts constitution strengthened. As noted above, a measure that would ban same-sex marriage was granted preliminary approval by the Massachusetts legislature in 2007. If the legislature approves the measure a second time, it will be put before the electorate in 2008. Id.
riage—nineteen states amended their constitutions, while twenty-six states addressed the matter through statutory law.  

Many of the state constitutional amendments face ongoing challenges in the courts, and the results are still in doubt. If any of the challenges to state amendments are successful, they will likely lead to a stronger push for a federal amendment to prohibit same-sex marriage. A federal district court, in 2005, held that Nebraska's constitutional amendment preventing same-sex marriage was in violation of the U.S. Constitution because it infringed the equal protection guaranteed in the Fourteenth Amendment and the right to participate equally in the political process guaranteed by the First Amendment. However, the decision was overruled by the Eighth Circuit Court of Appeals in July of 2006. The Eighth Circuit found that, instead of looking for the

249. Laurie Kellman, Gay Marriage Ban Falls Short of Majority, WASH. POST, June 7, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060700929.html. The strength of these statutes differs. According to Vestal, supra note 25, nine states simply define marriage as existing only between a man and a woman; fifteen states go further than limiting the institution of marriage and prohibit any type of spousal rights for same-sex couples; in two states (South Dakota and Nebraska), the amendment prohibits civil unions and domestic partnerships as well as marriage rights.

250. See, e.g., Anderson v. King County, 138 P.3d 963 (Wash. 2006) (upholding Washington’s DOMA). The trial court in Anderson had found the state Defense of Marriage Act passed in 1998 to be unconstitutional on its face because it violated the privileges and immunities and due process clauses of the Washington state constitution by prohibiting same-sex marriage. Id. at 970. The state supreme court, however, determined that same-sex couples were not members of a suspect class and, therefore, that the trial court did not need to apply strict scrutiny to the law but rather the rational basis test. Id. at 969. The supreme court found that the DOMA met the rational basis test and that the legislature had the power to limit marriage to opposite-sex couples. Id. The picture was more hopeful in Michigan for same-sex marriage advocates. A Michigan appeals court found that the constitutional ban on same-sex marriage barred state and local governments, as well as public universities, from exercising their right to provide benefits to same-sex domestic partners. See Nat'l Pride at Work, Inc. v. Governor, 274 Mich. App. 147 (Mich. Ct. App. 2007) appeal pending. A county court judge in Iowa struck down the Iowa DOMA in August 2007, writing, "Couples . . . who are otherwise qualified to marry one another may not be denied licenses to marry or certificates of marriage or in any other way prevented from entering into a civil marriage . . . by reason of the fact that both persons comprising such a couple are of the same sex." Varnum v. Brien, No. CV5965, Slip op. at 61 (Iowa Dist. Ct. 2007). Because the ruling was appealed to the Iowa Supreme Court, the judge issued a stay of his ruling. One same-sex couple, however, was able to marry during the four hours when the ruling was in effect. Monica Davey, Iowa Permits Same-Sex Marriage, for 4 Hours, Anyway, N.Y. TIMES, Sept. 1, 2007, at A9.


required rational basis for the state's action, the district court had applied an unnecessary heightened level of scrutiny to reach its conclusion. In applying the rational basis test, the court agreed with the state that defining marriage as between a man and a woman was "rationally related to the government interest in 'steering procreation into marriage'... [and that] affording legal recognition and a basket of rights and benefits to married heterosexual couples... 'encourage[s] procreation to take place within the socially recognized unit that is best situated for raising children.'"\(^{254}\)

With such uncertainty surrounding the future of same-sex marriage in the states, and contradictory signs coming from the state courts and legislatures, opponents of same-sex marriage are even more determined to pass a federal amendment. The goal of the amendment would be not to simply define marriage as between a man and a woman, but to also prevent states from offering marital benefits to same-sex couples.\(^{255}\)

D. The Federal Marriage Protection Act

On June 7, 2006, a constitutional amendment to ban same-sex marriage ("Amendment") was rejected by the United States Senate. The Amendment defined marriage as consisting only of the union of a man and a woman, and said that the U.S. Constitution and state constitutions should not be interpreted to give rights associated with marriage to any other type of union.\(^{256}\) If passed, the Amendment would have been a major setback to efforts to expand marriage rights to same-sex couples because much of the legislation giving rights to same-sex couples was a

---

253. *Citizens for Equal Prot.*, 455 F.3d at 866-67 (pointing out that the Supreme Court has never found sexual orientation to be the basis for strict scrutiny in an equal protection case).

254. *Citizens for Equal Prot.*, 455 F.3d at 867.

255. S.J. Res. 1, 109th Cong. (2005). The language of the proposed amendment reads in part: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." *Id.* at § 2. In his speech calling for a federal amendment, President Bush said a federal law was needed to reign in "activist judges and local officials" who have made an "aggressive attempt to redefine marriage." Press Release, Office of the White House Press Sec'y, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004) (on file with author). Indeed, a federal amendment would apply marriage standards to all state constitutions, and the impact of a federal amendment would be to allow states to ignore court mandate, and revoke any laws that provided such benefits to same-sex couples. S.J. Res. 1.

256. S.J. Res. 1.
result of the judicial interpretations of state constitutions. This Amendment would have potentially overturned those court decisions, which could have led state legislatures to reconsider legislation passed because of a state court decision.

Although opponents to the Amendment banning same-sex marriage knew that the Amendment would not receive the necessary two-thirds vote, they were disappointed with the 49–48 vote because there was only one more opponent of the ban than there were supporters of the ban. Despite their loss, supporters of the Amendment indicated that they would continue to push for its passage. During 2007, however, their efforts met with little success, as a new amendment never made it out of the subcommittee to which it was referred.

The first version of this Amendment was originally introduced in the House in 2002 as the Federal Marriage Amendment, sponsored by Representative Ronnie Shows, a Democrat from Mississippi. The proposed amendment made little progress in 2002 and 2003 before being defeated in the House and the Senate in 2004. The Senate did not defeat the amendment on a direct vote, but rather on a cloture vote to

---

257. See, e.g., William Yardley, Connecticut Approves Civil Unions for Gays, N.Y. TIMES, Apr. 21, 2005, at B5. The first state to grant civil unions without a mandate from a state court was Connecticut. Id. For an excellent review of the history of state court decisions motivating legislation granting rights to same-sex couples, see Julie L. Davies, State Regulation of Same-Sex Marriage, 7 GEO. J. GENDER & L. 1079 (2006).

258. Kellman, supra note 249.

259. H.R.J. Res. 22, 110th Cong. (2007). The new amendment was slightly different than the version that had come closest to passage. The new proposal, titled Proposing an amendment to the Constitution of the United States relating to marriage, states as follows:

Section 1. Marriage in the United States shall consist only of a legal union of one man and one woman.

Section 2. No court of the United States or of any State shall have jurisdiction to determine whether this Constitution or the constitution of any State requires that the legal incidents of marriage be conferred upon any union other than a legal union between one man and one woman.

Section 3. No State shall be required to give effect to any public act, record, or judicial proceeding of any other State concerning a union between persons of the same-sex that is treated as a marriage, or as having the legal incidents of marriage, under the laws of such other State.

Id.


end debate and move to an up or down vote. The bipartisan vote of 48–50 fell short of the sixty votes needed for cloture, which blocked the amendment from continuing.263 The House was forty-six votes away from the required two-thirds majority in their 227–186 bipartisan vote.264

The Marriage Protection Amendment265 is the most recent incarnation of the Amendment to actually be voted upon by the full Congress. Senator Wayne Allard of Colorado and several co-sponsors introduced the amendment in the Senate on January 24, 2005.266 The bill had two readings and was then sent to the Senate Judiciary Committee.267 The amendment was in stasis until it was approved by the committee on May 18, 2006.268

On March 17, 2005, Representative Daniel E. Lungren of California and co-sponsors introduced the complementary measure in the House, House Joint Resolution 39.269 Despite the amendment proposals’ clear losses in 2006,270 the proponents of this amendment are still de-

263. Id.
268. Id.

SECTION 1. Marriage in the United States shall consist only of a legal union of one man and one woman.

SECTION 2. No court of the United States or of any State shall have jurisdiction to determine whether this Constitution or the constitution of any State requires that the legal incidents of marriage be conferred upon any union other than a legal union between one man and one woman.

SECTION 3. No State shall be required to give effect to any public act, record, or judicial proceeding of any other State concerning a union between persons of the same-sex that is treated as a marriage, or as having the legal incidents of marriage, under the laws of such other State.

Id. This version of the bill was potentially of greater concern to those pressing for equal treatment of same-sex partners, as it explicitly attempted to remove from the courts constitutional questions related to the definition of partners in a marriage. For a complete list of the 29 eventual co-sponsors, see THOMAS (Library of Congress), Cosponsors for H.R.J. Res. 39, http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HJ00039:@@@P.
270. See THOMAS (Library of Congress), All Information for S.J. Res. 1, supra note 267; THOMAS (Library of Congress), All Information for H.R.J. Res. 39,
E. Post Script: Marriage as U.S. Anti-Poverty Policy

While a constitutional amendment to limit marriage rights in the United States is still a possibility, albeit an increasingly remote one, the government continues to promote marriage as a key component in its anti-poverty programs. To date, the Bush Administration’s rhetoric regarding same-sex marriage rights on the one hand, and marriage as anti-poverty policy on the other, exposes a deep inconsistency with regard to the U.S. government’s approach to marriage and marriage rights. During his re-election bid in 2004, President Bush endorsed the passage of a constitutional amendment to ban gay marriage, saying “The union of a man and a woman is the most enduring human institution, honored and encouraged in all cultures and by every religious faith.”

More recently, Bush made two speeches further reiterating his administration’s position in support of a constitutional ban on same-sex marriage. In anticipation of the vote in the Senate in 2006, Bush urged conservatives...

---

271. See, e.g., THOMAS (Library of Congress), All Information for H.R.J. Res. 22, 110th Cong. (2007), http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HJ00022:@@L&summ2=m&. At the printing of this article, the extent of activities for the proposal, in the form of a new 2007 House joint resolution, included only its introduction on February 6, 2007 by Daniel E. Lungren, and its referral to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties on March 1, 2007. Id. See also THOMAS (Library of Congress), All Information for H.R.J. Res. 74, 110th Cong. (2007), http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HJ00074:@@L&summ2=m&.

272. Bush Calls for Ban on Same-Sex Marriages, CNN, Feb. 25, 2004, http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage/. His endorsement was motivated by the decision of the Massachusetts Supreme Judicial Court’s ruling legalizing marriage rights in the state and San Francisco Mayor Gavin Newsom’s decision to grant marriage licenses to same-sex couples. Id. Echoing the strategy of anti-gay rights advocates, he further commented, “Activist courts have left the people with one recourse. If we’re to prevent the meaning of marriage from being changed forever, our nation must enact a constitutional amendment to protect marriage in America.” Id. Earlier the same week, he also criticized recent state court decisions expanding marriage rights to same-sex couples, arguing, “People need to be involved in this decision. Marriage ought to be defined by the people not by the courts . . . .” Bush “Troubled” by Same-Sex Marriages, CNN, Feb. 18, 2004, http://www.cnn.com/2004/ALLPOLITICS/02/18/bush.marriage.ap/index.html.
to support the measure. Remarking on the number of states in which voters have approved constitutional amendments or laws to ban same-sex marriage, Bush argued, "'The people have spoken. Unfortunately, this consensus is being undermined by activist judges and local officials.'"273

However, while the Bush Administration has been active in limiting access to marriage on moral, cultural, and religious grounds, the administration's approach to marriage in terms of poverty alleviation takes on a very different tone. In fact, marriage promotion has been explicitly stated as a primary goal in the Bush Administration's proposals for welfare reform and poverty reduction. Indeed, in 2002 his proposal included a $300 million budget for the implementation of marriage-promoting programs;274 by 2004 this figure had risen to $1.5 billion.275

At the same time, Bush's proposal called for cutting substantial resources available for welfare recipients, imposing ever stricter work requirements, and denying funds to help the working poor pay for childcare and other work-related costs.276

The empirical justification for marriage promotion policies comes from national poverty rates showing that two-parent families are less likely than single-female-headed households to fall below the poverty line.277 Policy makers have interpreted these data to suggest that by promoting marriage among poor women, poverty rates can be reduced with little spending by government.278 In other words, the current administration is well aware of the possible economic returns to marriage for Americans. Thus, the administration enthusiastically acknowledges the economic benefits of the marriage contract with regard to poverty policy, while actively denying access to these rights for same-sex couples.

276. See generally SHARON HAYS, FLAT BROKE WITH CHILDREN (2003) (providing an in-depth review of these cuts and the consequences for welfare recipients and their families).
277. JOSEPH DALAKER, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-214, POVERTY IN THE UNITED STATES: 2000 8 (2001). In 2000, almost twenty-five percent of all single-female headed households lived in poverty compared to just under five percent of two-parent families. Id. Furthermore, roughly forty percent of all children living in female-headed households were poor. Id. at 12.
This brief comparison in the rhetoric regarding marriage in these two policy contexts underscores the deep ambivalence toward the institution of marriage and marriage rights in the United States.

In the next section, we thoroughly analyze the two case histories detailed above in order to reveal important lessons the United States could learn from the Canadian experience. The last section highlights those lessons.

V. COMPARISON OF THE TWO NATIONS' STRUGGLES FOR THE ACCEPTANCE OF SAME-SEX MARRIAGE

When comparing the two nations' progress toward the acceptance of same-sex marriage, it is important to recognize that both started from essentially the same position. The concept of marriage as a union between a man and a woman had been a part of the legal tradition of Canada since its inception. Both statutory and common law in both countries recognized this opposite sex requirement. This requirement was accepted so uniformly across Canada that it was not actually stated in Canadian federal law.

In both countries, the key basis for challenging the limitation against same-sex marriage is their respective constitutions, the most important of a nation's governing documents. In both constitutions, it is their guarantees of equality that provide the basis for a claim that the denial of the right to marry to same-sex couples is unconstitutional, and therefore same-sex marriages should be allowed.

The precise wording and interpretations of these equality guarantees are somewhat different, although each is contained in a portion of their respective constitutions that was added to the document subsequent to its original adoption. Perhaps somewhat surprisingly, given the United States' lag behind Canada in treating same-sex partners equally, the constitutional provision guaranteeing equal protection was added to the U.S. Constitution in 1868, significantly earlier than the 1985 adoption of the relevant portion of the Canadian Constitution.

As explained in Section III, the basis for the claim that the same-sex prohibition is unconstitutional is the Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o state shall make or
enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."\textsuperscript{280}

As explained in Section IV, Section 15 of the Charter of Rights and Freedoms is the basis upon which the Canadian restrictions against same-sex marriage were struck down. The relevant portion reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."\textsuperscript{281}

In order to pursue a complaint under Section 15, a person must prove not only that a law or policy violates Section 15, but also that the discrimination he or she is seeking to rectify is not based on "reasonable limits prescribed by law," as Section 1 of the Charter demands.\textsuperscript{282}

Clearly, we have comparable equal protection guarantees under each nation’s constitution. However, in examining these two constitutional provisions, it is surprising that the United States has not moved more quickly to recognize same-sex marriage. Not only has the United States’ guarantee of equality been a part of this nation’s constitutional framework for a significantly longer time frame, but there is no restriction of this clause comparable to the “reasonable limit” provision of the Canadian Charter, so it would have made sense for the United States to interpret its equal protection clause to protect same-sex relationships even before Canada did.

If we examine the early struggle for equal treatment in both countries, we can see that in both nations, a form of “separate but equal” was advocated at some point with respect to marriage rights. In Canada, we saw this approach taken in the provinces of Alberta, British Columbia, Nova Scotia, and Quebec, as well as initially by the national government, whereas in the United States, it is the approach being taken in California, Maine, New Jersey, Oregon, Washington, and Vermont. This strategy, while certainly not granting full equality,\textsuperscript{283} may have been a good first step in allowing opponents an opportunity to recognize that

\textsuperscript{280}. U.S. CONST. amend. XIV, § 1.
\textsuperscript{282}. Id. at § 1 ("The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.").
\textsuperscript{283}. In some states we are just now learning how far from equality the benefits these couples are gaining can be. See, e.g., Tina Kelley, New Jersey Civil Union Law Has Fallen Short in its First Year, Commission is Told, N.Y. TIMES, Oct. 28, 2007, at A30 (discussing New Jersey’s experience with it civil union law).
extending rights to same-sex couples did not result in any significant negative consequences, and thus may have softened resistance to fully recognizing same-sex marriages.

In both countries, there was significant and vocal opposition from religious communities. Yet in both nations some religious groups have supported the recognition of same-sex couples' right to marry. However, at the time that gay marriage became legal in Canada, more religious leaders were opposed to gay marriage than supportive of it, just as in the United States today.

Finally, in both nations, there has been serious discussion and consideration of the issue of same-sex marriage by the national legislature, with very different outcomes. In Canada, the Parliament ultimately

284. Many opponents of same-sex marriage argue that extending marriage rights to same-sex couples would ultimately destroy the institution of marriage. For instance, following victories for same-sex couples in Massachusetts, Conservative leader James Dobson declared that the state was issuing "death certificates for the institution of marriage." M.V. Lee Badgett, Prenuptial Jitters: Did Gay Marriage Destroy Heterosexual Marriage in Scandinavia?, SLATE, May 20, 2004, http://www.slate.com/id/2100884. However, recent empirical research on the impacts of same-sex marriage rights on heterosexual marriage in Scandinavia—where same-sex couples have long enjoyed marriage rights—reveals that the extension of marriage rights has had little or no impact on the rate of heterosexual marriage. See id. In fact, in Denmark, Sweden, Norway and Iceland, heterosexual marriage rights are now higher than they were prior to the passage of same-sex partnership laws. Id.

285. For example, in Iowa, where the lower court decision finding that limiting marriage to opposite-sex couples violates gay couples equal protection rights, the state's four Roman Catholic dioceses called for a constitutional amendment that would define marriage as only between a man and a woman. Mary Rettig, Iowa Churches Pivotal in Same-Sex Marriage Debate, OneNewsNow.com, Nov. 4, 2007, http://www.onenewsnow.com/2007/11/iowa_churches_pivotal_same.php. Polls show that religiosity is a factor in the opposition to gay marriage. According to an August 2006 survey by the Pew Forum, Americans oppose gay marriage fifty-six to thirty-five percent, but those with a high level of religious commitment oppose it by a substantially wider margin of seventy-five to eighteen percent. See THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, PRAGMATIC AMERICANS LIBERAL and CONSERVATIVE on Social Issues: Most Want Middle Ground on Abortion 9 (2006), http://pewforum.org/publications/surveys/social-issues-06.pdf. Opposition among white evangelicals is even higher, at seventy-eight percent. Id. A majority of Catholics (fifty-three percent) and black Protestants (seventy-four percent), as well as a plurality of white mainline Protestants (forty-seven percent), also oppose gay marriage. Id.

286. Returning to the Iowa example, a Unitarian pastor married the only same-sex couple that was able to get a license and have their marriage ceremony before that ruling was stayed for the appeal to the state supreme court. Rettig, supra note 285.

287. Cf. Austin Cline, Canada: Religious Defenders of Same-Sex Marriage, AUSTIN CLINE'S AGNOSTICISM/ATHEISM BLOG, Apr. 12, 2005, http://atheism.about.com/b/a/161619.htm (reporting on religious defenders of same-sex marriage in Canada, but noting that religious leaders who support gay marriage are still in the minority).
passed legislation fully recognizing same-sex marriage in July of 2005, despite a long history of statutory codification of marriage as being limited to partners of the opposite sex.288 Then, in late 2006, a bill to reopen the same-sex marriage issue was defeated by an even greater margin.289

In the United States, the ultimate outcome of federal legislative action has been almost diametrically opposed to that in Canada, as evidenced by the United States passing the Defense of Marriage Act in 1996.290 However, when the legislature had a chance to re-examine the issue it failed to take as strong a stance against gay marriage. Congress failed to pass the Marriage Protection Amendment,291 an act that would have initiated a change in the U.S. Constitution to ensure that same-sex marriage would face an almost impossible barrier. Perhaps the failure of this bill to pass is an indication that the United States may follow the Canadian lead and ultimately change its position on this issue.

Another reason why an examination of the evolution of federal legislation affecting the definition of same-sex marriage in both countries may provide reason for optimism for same-sex marriage advocates in the United States is the fact that both the Canadian Parliament and the United States Congress took action to reassert the importance of marriage as an institution limited to a man and a woman during the past decade. As noted, the United States did so in 1996 with the passage of DOMA. However, in 2002 the Ontario government spoke in a similar voice when it initially responded to the Canadian court's ruling that the term "spouse," as it appeared in the Family Law Act, violated the Charter because it discriminated solely on the basis of sexual orientation.292 Rather than amend the Family Law Act to redefine spouse as a marital partner of either sex, the Ontario legislature chose to maintain the same definition of spouse, but amend the sixty-eight federal laws that provided benefits to spouses by extending benefits to a newly created category of individuals, same-sex partners.293 In fact, when debating how to respond to the court's decision, the Parliament actually approved a motion stating that "it is necessary to state that marriage is and should

288. See supra Part III.C.
289. See id.
290. See supra note 2 and accompanying text.
291. See supra Part IV.D.
292. (cite?)
293. Family Law Act, R.S.O., ch. F.3 (1990). The amendment to Section 29 of the Family Law Act provided the following additional definition of spouse: a same-sex partner meaning "either of two persons [of the same sex] who ... have cohabitated: ... (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child." Id. at § 29.
remain the union of one man and one woman to the exclusion of all others’ and that Parliament ‘will take all necessary steps’ within its jurisdiction ‘to preserve this definition of marriage in Canada.’ \(^{294}\) Hence, as recently as 2002, the attitudes of the two nations’ federally elected bodies were not all that different, which should give hope to those who believe that the United States can learn from the Canadian experience.

VI. Conclusion: Lessons the United States Can Learn from the Canadian Experience with Legalization of Same-Sex Marriage

One of the most important lessons the United States can learn from the Canadian experience is that there is a relatively simple solution to the problem of balancing equality with freedom of religion, constitutionally protected rights in both countries. As illustrated in Part III, a simple way to balance those two interests is to recognize same-sex civil marriage, yet not require any church to provide a religious ceremony for same-sex partners. In fact, the Canadian legislature did precisely that by ruling that no church would be forced to perform marriage ceremonies of same-sex couples. The church should be completely free to recognize whatever religious institutions it sees fit to recognize, including religious marriage.

Interestingly, however, the first modern legally recognized same-sex marriage ceremonies were performed in Ontario, Canada at the Metropolitan Community Church. \(^{295}\) Nonetheless, a clear lesson from the Canadian recognition of same-sex marriage is the need to clearly separate marriage as a civil institution from marriage as a religious institution. Religious acceptance of same-sex marriage is growing, but the focus must clearly be on changing the definition of civil marriage and allowing the churches to resolve questions about the religious institution. Much of the opposition to same-sex marriage in both nations has come from religious institutions, so any way to reduce their opposition should be considered.

Examining the Canadian experience should also teach advocates of same-sex marriage that they cannot expect success overnight. While it was ultimately the court’s interpretation of the Charter that led to the

---

294. See Cossman, supra note 102 (quoting 240 PARL. DEB., H.C. (1st session)(1999) 1020 (Can.)).

recognition of same-sex marriage in Canada, the early litigants were not met with success.296

Because the Constitution and the courts play such an important role in the debate over the legalization of same-sex marriage, in asking what lessons the United States can learn from the Canadian experience, we should also examine the constitutional foundation of the legalization of same-sex marriage. While there is currently a debate over the extent to which the courts in the United States should rely on the jurisprudence of foreign courts, respected current and former Supreme Court Justices have articulated the case for examining how other nations have addressed some of the fundamental constitutional issues with which this nation’s courts have struggled.297 For example, Sandra Day O’Conner predicted that Justices would some day look to foreign constitutional courts because “[t]hey have struggled with the same basic constitutional questions that we have: equal protection, due process, the rule of law in constitutional democracies” and “[a]ll . . . have something to teach us about the civilizing function of constitutional law.”298 She went on to say, “Other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit.”299 There seems no better example of a case from which the United States could benefit from analyzing another legal system’s innovative legal solution to a new legal problem than the case of same-sex marriage.

In a similar vein, in a speech in Atlanta to the Southern Center for International Studies, Justice O’Connor said, “I suspect that over time we will rely increasingly—or take notice, at least—increasingly on international and foreign courts in examining domestic issues.”300 Again, the constitutionality of same-sex marriage is a prime illustration of the type of domestic issue where the courts should take notice of how the foreign courts are reasoning.

296. See, e.g., Egan, 2 S.C.R. at 513; see also Layland, 14 O.R.3d at 658.
299. Id.
In a difficult decision involving the constitutionality of the use of capital punishment for the developmentally disabled, Justice Stevens wrote that, although comparative arguments "are by no means dispositive," they still lend "further support to our conclusion that there is a consensus among those who have addressed the issue" of capital punishment for the developmentally disabled.\textsuperscript{301} As the Justice says, comparative arguments are not dispositive; however, they can be useful in cases involving the interpretation of fundamental rights.

Former Chief Justice Rehnquist himself even said, "now that constitutional law is solidly grounded in so many countries . . . it's time the U.S. courts began looking to the decisions of other constitutional courts to aid in their own deliberative process."\textsuperscript{302} In 2003, Justice Ruth Bader Ginsburg used a virtually identical quote to open the Sherman J. Bellwood Lecture that she delivered at the University of Idaho.\textsuperscript{303} In that lecture, she stresses the importance of judges and lawyers looking beyond just American jurisprudence\textsuperscript{304} and becoming more receptive to international and comparative law.

Some scholars argue that when we are examining constitutional provisions that are based on "universal" values enshrined in many constitutions, it can be especially illuminating to examine how foreign jurisdictions interpret such provisions.\textsuperscript{305} Equality, the value at issue here, is certainly one of those universal values enshrined by many constitutions.

In writing the opinion for the majority in \textit{Lawrence v. Texas}, the case that overruled \textit{Bowers v. Hardwick} and brought the United States'
treatment of sodomy in line with its treatment by the Canadian courts. Justice Kennedy noted that the reasoning and holding in Bowers had been rejected by various courts outside the United States. Thus, in looking at laws affecting the constitutional right to privacy, the court at least considered the judgments of foreign courts. It should do the same in this case, but need only look as far as Canada.

The case for relying on Canadian constitutional interpretations seems especially strong in light of the reliance of Canada on the U.S. Constitution in the drafting of the Charter and in their willingness to cite U.S. authorities in interpreting their Charter. And, as has been noted by some scholars, there has been, since the adoption of the Charter of Rights and Freedoms by Canada, a significant convergence of Canadian and U.S. constitutional politics. This convergence is especially strong when we examine constitutional issues related to women's rights.

If American jurists would examine the key decisions in the cases that led to the Canadian acceptance of same-sex marriage, they would see that much of the justification for finding that limiting marriage to opposite-sex partners violates the equal treatment guaranteed by Section 15 of the Canadian Charter similarly supports a claim that so limiting marriage violates the Equal Protection Clause of the U.S. Constitution. And, in fact, if we look at the decision of the Massachusetts Supreme

308. Lawrence, 539 U.S. 572–73. Justice Kennedy wrote,

Of even more importance, almost five years before Bowers was decided the European Court of Human Rights considered a case with parallels to Bowers and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. Dudgeon v United Kingdom, 45 Eur. Ct. H. R. (1981) ¶ 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in Bowers that the claim put forward was insubstantial in our Western civilization.

Lawrence, 539 U.S. at 573.
Court in Goodridge, which found that the state had no rational basis for denying marriage licenses to same-sex couples,\textsuperscript{311} we find that the Massachusetts court cited the Canadian courts as being among those having recently considered the issue. The Massachusetts court then exercised its duty in a manner similar to that of the Canadian courts by carefully scrutinizing the statutory ban on same-sex marriages in light of relevant constitutional provisions.\textsuperscript{312}

One of the arguments frequently raised in the United States as to why marriage must remain only between a man and woman is that this has been the definition of marriage since the beginning of the nation. That has been true in both the United States and Canada, yet in Halpern, the Canadian Court of Appeals noted that "to freeze the definition of marriage to whatever meaning it had in 1867 is contrary to Canada's jurisprudence of progressive constitutional interpretation."\textsuperscript{313} The same notion could inform constitutional interpretation in the United States. While precedent is important in both countries, both constitutions are documents that change to reflect changes in societal mores and understandings.\textsuperscript{314} If there is not a strong reason for retaining old definitions, tradition alone is not a valid justification.

The Canadian court in Halpern reiterated,

\begin{quote}
[T]he purpose of section 15(1) of the Charter is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of
\end{quote}

\begin{itemize}
\item \textsuperscript{311} Goodridge, 798 N.E.2d at 948.
\item \textsuperscript{312} Goodridge, 798 N.E.2d at 966 n.31.
\item \textsuperscript{313} Halpern, 65 O.R.3d at 162.
\item \textsuperscript{314} Of course this issue is subject to a great deal of legal debate. According to Sunstein, judicial proponents of "originalism" advocate Constitutional interpretation strictly in line with the intentions of its original authors, thereby significantly reducing judicial discretion. \textit{See generally} Cass R. Sunstein, \textit{Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America} (2005). However, other legal scholars, especially many who belong to the American Constitutional Society, argue for the historic significance of progressively interpreting the constitution in a way relevant to contemporary society. \textit{See, e.g.}, William and Mary ACS, \textit{A Progressive Vision of Constitutional Interpretation}, http://www.wm.edu/sol/acs/?p=112 (last visited Jan. 8, 2008). Arguably, the post-war era of the Warren Court marks the watershed moment for progressive judicial action. Among other rulings, the Court under Warren's leadership overthrew racial segregation of public schools in \textit{Brown v. Board of Education}, 347 U.S. 483 (1954).
\end{itemize}
Canadian society, equally capable and equally deserving of concern, respect and consideration.  

This statement about the purpose of equal protection in Halpern is comparable to the characterization of the Equal Protection Clause made by the U.S. Supreme Court in Lawrence v. Texas, when it reaffirmed that the Constitution prohibits a state from wielding its formidable power to regulate conduct in a manner that demeans basic human dignity.  

Hence, the Canadian court’s analysis of the effect on human dignity of denying marriage to same-sex partners should be relevant to the courts in the United States. The language of the Canadian court’s ruling should lead U.S. courts to find that the denial of the right to marry to same-sex couples is a fundamental denial of their human dignity, and hence a denial of their right to equal protection. As the Canadian court wrote,  

Marriage is, without dispute, one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. . . . Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society’s approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual’s sense of self-worth and dignity.  

As the Canadian court stated, the heart of the question of whether same-sex marriage should be limited to opposite-sex couples is really a question of “whether excluding same-sex couples from another of the most basic elements of civic life—marriage—infringes human dignity and violates the Canadian Constitution.” It is the same question facing courts in the United States. The Canadian courts answered the question in the negative, as should the United States. Just as Canadian couples cannot constitutionally be denied this aspect of human dignity, nor can couples residing in the United States.  

316. Lawrence, 539 U.S. at 578.  
Section 1 of the Charter requires that there be proportionality and a rational connection between the objective of a law and the means selected to achieve it. This standard is comparable to the lowest level of scrutiny applied to a law passed by the federal government in the United States. Hence, because the Canadian Supreme Court finds that defining marriage as only between a man and a woman fails to live up to this test, then the same kind of prohibition should not meet any level of scrutiny by the U.S. Supreme Court.

In reaching its decision, the Canadian court addressed some of the justifications proffered in the United States to justify differential treatment. One such justification is that the purpose of marriage is procreation, and because same-sex couples cannot procreate, the government is justified in excluding them from marriage. The Canadian court quickly disposed of that justification, pointing out that while same-sex couples cannot biologically bear children together, the same applies to many opposite-sex couples. Many of the means by which opposite-sex couples avail themselves to have children can likewise be used by same-sex couples to have children. And, as the Halpern court went on to note, having children is clearly not the only reason people choose to marry.

Interestingly, when examining the distinction made between same-sex and opposite-sex couples, the Halpern court analogized the distinction to the distinction made between mixed-race and same-race couples, and noted that in Loving v. Virginia, such a distinction was

319. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.), § 1. ("The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.").

320. Some argue that the U.S. Supreme Court should apply heightened scrutiny to challenges to the opposite-sex requirement. See, e.g., Allyson Albert, Note, Irreconcilable Differences? A Constitutional Analysis as to Why the United States Should Follow Canada's Lead and Allow Same-Sex Marriage, 30 BROOK. L. J. INT'L. L. 547, 584–92 (2005). That approach is certainly one that some may wish to take, but in light of the fact that the classification should not even be found to meet the rational basis test, the authors find no need to fight to get the court to adopt this higher level of scrutiny.

321. Id. at 592.


325. Halpern, 65 O.R.3d at 187 (noting other reasons such as intimacy, companionship, societal recognition, and the economic benefits that come from the blending of two families).
deemed unconstitutional. The U.S. courts should likewise see the treatment of same-sex couples as analogous to the treatment of mixed-race couples, and follow the Canadian lead in declaring such treatment to be unconstitutional discrimination.

Discussing the Canadian legislation that established the legal recognition in Canada, the Canadian Justice Minister Martin Cauchon explained that the proposed law reflected Canada's evolution as a society in a manner encompassing a greater recognition of the equality and dignity of the human person. He stated, "Society is not static. It's in constant evolution. It's a question of dignity. It's a question of equality." His statement is as applicable to the United States as it is to Canada. Policymakers in the United States need to look to our northern neighbors and recognize that society in North America is not static, and it is evolving in a manner that recognizes the dignity and equality of every human being. The legal system must keep pace with that evolution and legally sanction civil marriage for same-sex couples.  

327. As noted above, interracial marriage was outlawed in the United States from the late seventeenth century until 1967. The landmark case that led to the overturning of anti-miscegenation laws in the United States was brought by Mildred Jeter and Richard Loving, an interracial couple arrested under Virginia's Racial Integrity Act. Loving, 388 U.S. at 2–3, 6. Their arrest was originally upheld by a trial court judge who opined, "[t]he fact that [God] separated the races shows that he did not intend for the races to mix." Id. at 3. The case was eventually appealed before the U.S. Supreme Court, which ruled that,

Marriage is one of the “basic civil rights of man”, fundamental to our very existence and survival . . . Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes . . . is surely to deprive all the State’s citizens of liberty without due process of law.

Id. at 12. As a result of this decision, all remaining state-level anti-miscegenation laws were deemed unconstitutional. Id.
329. Id.