

## CHARTING THE COURSE TO SAME SEX MARRIAGE

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### **Abstract**

Two adults living in the United States already have the right to form enduring relationships, to cohabit, and to identify themselves as married. The path towards full social and legal recognition of marriage for individuals of the same sex, however, must still be developed and will involve multiple steps requiring careful navigation. That path begins with broadening social acceptance, including extension of employment benefits, acceptance within progressive social and religious organizations, and support for children living with same-sex couples. Legal acceptance will inevitably follow these changes in society, but in a majority of states, significant road blocks will have to be overcome. In states with anti-marriage constitutional amendments, legal challenges will begin with interpretation of the texts that purport to limit same-sex relationships. Subsequent constitutional challenges will target both the constraints on political participation recently added to state constitutions, and eventual establishment of a fundamental right to marriage. This paper charts the path towards that future, and explains some of the arguments that will be made along the way.

### **I. Introduction**

When the California Supreme Court Justices struck down laws limiting the designation of marriage to a union between a man and a woman,<sup>1</sup> their decision marked another step along the path towards full recognition of the equal right to marry. When voters reversed course less than six months later,<sup>2</sup> they sent the clear message that the path to full recognition of same sex marriages would not be either simple or straight. For residents of other states, where state constitutions now block the path and large majorities appear aligned against the drive towards equality,<sup>3</sup> the future may now seem bleak.

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<sup>1</sup> *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008).

<sup>2</sup> See Jesse McKinley and Laurie Goodstein, *Bans in 3 States On Gay Marriage*, N.Y. TIMES, Nov. 6, 2008 at A1.

<sup>3</sup> See Matthew T. Cook and Jason E. Shelly, *Eighth Annual Review of Gender and Sexuality law: Family Law Chapter: Recognition of Same-Sex Marriage*, 8 GEO. J. GENDER & L. 683, 697-714 (2007) (summarizing state constitutional amendments with same-sex marriage bans).

In spite of the impediments to formal recognition of same sex marriages, two adults living in the United States have the right to form an enduring relationship, to cohabit, and to identify themselves as married. Justice Douglas recognized the cohabitation rights of unrelated individuals more than thirty years ago, basing his opinion for the Court on “the Nation’s experience, ideology and self-perception as an open, egalitarian, and integrated society.”<sup>4</sup> A generation later, the Supreme Court decision in *Lawrence v. Texas*<sup>5</sup> established that states have no right to interfere when two adults of the same sex form a union based upon love and physical intimacy. All couples, gay or straight, have a right to personal use of the term marriage; social acceptance of that label cannot be controlled by the state.<sup>6</sup> In this limited and literal sense, the “right to marry” has already been won. What remains is the need to secure universal recognition of that right, along with all of the privileges and benefits that governments throughout the United States confer on those who choose to marry.

This essay charts a course towards that recognition. The path described requires careful navigation, and details will vary from one state to another to reflect variations in legal and cultural contexts.<sup>7</sup> As discovered in California,<sup>8</sup> assertion of legal claims may trigger political backlashes that will take years or generations to unwind.<sup>9</sup> The pressure to move forward, however, will remain relentless; individual lives continue to be damaged as long as laws promote prejudice and bigotry towards those who form same sex unions.

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<sup>4</sup>Vill. of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974).

<sup>5</sup> 539 U.S. 558 (2003).

<sup>6</sup>See Joseph A. Pull, *Questioning the Fundamental Right to Marry*, 90 MARQ. L. REV. 21, 85 (2006) (identifying a “fundamental right to *personal-marriage*”) (emphasis added).

<sup>7</sup>Massachusetts, California and Connecticut have already recognized that same-sex couples have a right to marry. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *In re Marriage Cases*, *supra* note 1; *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008). Citizens in those states will continue to lack genuine equality, however, as long as federal benefits and protections are extended only to heterosexual marriages. In the vast majority of states, same-sex couples remain barred by state constitutional constraints from obtaining equal status, and many states even attempt to preclude same-sex couples from being treated equally even without the designation of marriage. See Joshua K. Baker, *Status, Substance, and Structure: An Interpretive Framework for Understanding the State Marriage Amendments*, 17 REGENT U.L. REV. 221, 221 (2005); Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, <http://www.stateline.org>. (Nov. 3, 2004).

<sup>8</sup> See *supra* note 2.

<sup>9</sup> See John G. Culane & Stacey L. Sobel, *The Gay Marriage Backlash and its Spillover Effects: Lessons from a (slightly) “Blue State”*, 40 TULSA L. REV. 443, 446 (2005) (describing the backlash effect as “real but overstated”). Note that Massachusetts appears to have weathered the backlash as a result of majority support within the state legislature. See Tonja Jacobi, *How Massachusetts Got Gay Marriage: The Intersection of Popular Opinion, Legislative Action, and Judicial Power*, 15 J. CONTEMP. LEGAL ISSUES 219, 219 (2006) (noting that the “anticipated [Massachusetts] backlash . . . failed to materialize.”). In California, the state legislature will be unable to stand in the way of an aggressive campaign to amend the state constitution through public referendum, and voters will therefore determine whether the Supreme Court in that state acted “prematurely.” See John Wildermuth, *State Loves to Change the Law of the Land*, S.F. CHRON., July 26, 2008, A1.

As a first step, marriage advocates must secure in public minds the rights that have already been established by the courts. Doing so means using the “m” word in a manner that is consistent with these beliefs. The public definition of marriage has been at odds with government definitions in the past; in the long term, public views prevail.<sup>10</sup> As a general principle, legal rights catch up with the people rather than the other way around,<sup>11</sup> and the movement of public attitudes towards acceptance of same sex relationships appears to be inexorable.<sup>12</sup>

A majority of states and innumerable politicians remain committed to the fight against same sex unions, and will continue to bar government extension of the “rights or incidents” of marriage to same sex couples. In the long term, that approach will prove futile; relatively few “rights or incidents” of marriage are reserved exclusively to “married” couples.<sup>13</sup> Tax benefits, many inheritance rights, testimonial privileges and dissolution protection all extend to relationships other than marriage.<sup>14</sup> Because contemporary legal and financial benefits of marriage are not uniquely tied to that relationship, state laws and constitutional amendments purporting to bar such rights to those in same sex relationships should be declared either meaningless or invalid. Limiting or erasing these anti-marriage state constitutional barriers will restore balance to the political process; failure to do so may leave the balance of political power in the hands of an intransigent minority.<sup>15</sup>

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<sup>10</sup>See, e.g., Rachel F. Moran, *INTERRACIAL INTIMACY: REGULATION OF RACE AND ROMANCE* (2001) (for a description of the complex history of miscegenation laws, including the vagaries of racial classifications, the role of “passing,” and eventual movements to end anti-miscegenation legislation).

<sup>11</sup>See, e.g., the evolution of marriage from an indissoluble union without possibility of judicial divorce, to acceptance of marital termination based upon “incompatibility” or “irreconcilable differences.” Adoption of “no fault” divorce legislation followed the time when couples engaged in “widespread deceit” in order to obtain divorces. Nancy F. Cott, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 196 (2000). See also Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243, 243 (2003) (noting “retreat[] from a . . . moral view of marriage.”).

<sup>12</sup>See Susan J. Becker, *Many are Chilled, but Few are Frozen: How Transformative Learning in Popular Culture, Christianity, and Science will Lead to the Eventual Demise of Legally Sanctioned Discrimination Against Sexual Minorities in the United States*, 14 AM. U. J. GENDER SOC. POL’Y & L. 177, 186-87 (2006) (noting shifts in public opinion).

<sup>13</sup>Unique spousal rights include constraints on disinheritance or on conveyance of real property. See Jennifer K. Robbennolt and Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417, 420-24 (1999) (describing steps that may be taken by unmarried couples to provide property and inheritance rights that offer protection comparable to that provided by marriage). These interests have limited scope, especially as compared to the multitude of benefits and privileges enjoyed by spouses but also shared with persons in other relationships. See *infra* text accompanying notes 82-83.

<sup>14</sup>See *infra* text accompanying notes 80-81.

<sup>15</sup>In California, it will be possible to reverse course by majority vote in a state referendum. In some states, however, amending state constitutions requires the vote of a super-majority, and

After restoring the political balance, much more work will remain to ensure that all individuals enjoy full and equal rights to establish committed, loving and enduring relationships with another person. Constitutional principles that provide grounding for such rights have already been identified.<sup>16</sup> Recognition of these rights will come with time. As society changes, legislatures and courts will follow.<sup>17</sup>

## **II. Defining Marriage**

### **A. Sources of Recognition**

When writing law journal articles about marriage, authors naturally look to the law to define terms. In doing so, we find that the institution of marriage is subject to change, with dramatic variations from one century to another, one nation to another, and even among the current fifty states.<sup>18</sup> Evolving legal definitions, however, only capture a portion of the picture. Major religions have defined marriage in their own terms, often in ways that vary significantly from the terms handed down by legislatures and courts.<sup>19</sup> In addition to legal and religious sources of marriage recognition, a long history of independent popular understanding and acceptance exists, often at odds with institutional standards and procedures.<sup>20</sup>

In prior centuries, legal recognition mattered most for determinations of legitimacy and inheritance, and those concerns only mattered to the propertied

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may therefore be blocked by a minority of voters. *See generally* G. Alan Tarr and Robert F. Williams, *Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075 (2005) (describing the range of procedures that may be used to amend state constitutions).

<sup>16</sup> In his dissenting opinions, Justice Scalia described the relationship between Supreme Court opinions in *Casey*, *Romer* and *Lawrence*, and a constitutional right to same sex marriage. *Lawrence*, 539 U.S. at 601 (Scalia, J., dissenting). Others have developed these arguments in detail. *See, e.g.*, William N. Eskridge, Jr., *THE CASE FOR SAME-SEX MARRIAGE* (1996).

<sup>17</sup> *See* Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1975 (2006) (describing stages of “move[ment] from one view of a social group’s constitutional rights to another . . .”).

<sup>18</sup> *See* American Bar Association Section 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, 349-354 (2004); Suzanne B. Goldberg, *A Historical Guide to the Future of Marriage for Same-Sex Couples*, 15 COLUM. J. GENDER & L. 249 (2006); Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87, 89-106 (2004).

<sup>19</sup> *See, e.g.*, John Witte, Jr., *FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION AND LAW IN WESTERN TRADITION* (1997).

<sup>20</sup> *See* Roscoe Pound, *Individual Interests in Domestic Relations*, 14 MICH. L. REV. 177, 177 (1916); Pull, *supra* note 6, at 23 (describing tension between state, religious and individual rights approach to marriage); Connie S. Rosati, *What is the “Meaning” of “Marriage”?*, 42 SAN DIEGO L. REV. 1003, 1007, 1019 (2005) (discussing “consequential” and “traditional” conceptions of marriage, and comparing the “ideal of appropriate and abiding valuing of another.”).

classes.<sup>21</sup> For others, there was no need for ceremony or record. The institution of required marriage licenses is of relatively recent origin, and common law marriages continue to be recognized in twelve jurisdictions when two people share the intent and express it publicly.<sup>22</sup> “Valid” common law marriages exist independently of either governmental or religious involvement, and retain their validity when the married couples move to states that would not have recognized such marriages at the time of their inception.<sup>23</sup>

Laws defining marriage have existed at least since the Code of Hammurabi from the eighteenth century B.C..<sup>24</sup> Linked to similar roots, religious doctrine has also incorporated constraints on who can marry and the consequences of doing so. Both the legal and religious constraints have often incorporated values that most would now reject as outrageous. William Blackstone’s description of marriage in the eighteenth century included the now infamous account that:

By marriage, the husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything.<sup>25</sup>

Marriage thus reflected the most invidious elements of patriarchy, which remained embedded in much of American law until well after the time when women achieved political independence in the twentieth century.<sup>26</sup> Racism

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<sup>21</sup>See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 648-649, nn.118-122 (1980).

<sup>22</sup>Eleven states and the District of Columbia continue to recognize common law marriage. See Sonya C. Garza, *Common Law marriage: A Proposal for the Revival of a Dying Doctrine*, 40 NEW ENG. L. REV. 541, 541 (2006). See also Cynthia Bowman, *A Feminist Proposal to Bring Back Common Law marriage*, 75 OR. L. REV. 709 (1996).

<sup>23</sup>See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (noting that “traditional conflicts rule determines the validity of a marriage by the law of the state where the marriage was contracted (*lex loci contractus*)”; see also *Randall v. Randall*, 345 N.W.2d 319, 321 (Neb. 1984) (elaborating upon the general rule of *lex loci contractus*).

<sup>24</sup>Code of Hammurabi ¶¶ 127-75.

<sup>25</sup>William Blackstone, COMMENTARIES ON ENGLISH LAW (1765-69).

<sup>26</sup>See Judith M. Bennett, HISTORY MATTERS: PATRIARCHY AND THE CHALLENGE OF FEMINISM 54 (2006); Steven M. Tipton & John Witte, FAMILY TRANSFORMED: RELIGION, VALUES AND SOCIETY IN AMERICAN LIFE 257 (2005); Joseph L. Warren, *Husband’s Right to Wife’s Services*, 38 HARV. L. REV. 421, 622 (1925).

similarly infected the legal dimensions of marriage.<sup>27</sup> Constraints based upon both race and gender were reinforced by religious as well as statutory norms.<sup>28</sup>

At various points in history, however, social norms have overtaken codified constraints. Consider, for example, the case of anti-miscegenation laws which remained on the books in numerous southern states in spite of long standing patterns of defiance.<sup>29</sup> Well before the Supreme Court decision in *Loving v. Virginia*,<sup>30</sup> many Americans had rejected legal barriers to inter-racial marriage.<sup>31</sup> For generations preceding *Loving*, inter-racial “marriages” occurred and were recognized by the public, often in spite of “legal” standards.<sup>32</sup>

Throughout recorded history, the definition and ingredients of marriage have evolved, reflecting a combination of governmental, religious and social forces, which have often been in conflict. Changes have affected both the rights of the parties and more fundamental questions about who can marry whom. There is no reason to believe that the evolution has stopped. Contrary evidence, especially in the context of same sex relationships, seems too obvious to require elaboration.<sup>33</sup> The more critical point, however, is that public acceptance of marriage may proceed independently of either church or state; there is no reason to wait for the government to rule on the validity of marriage relationships before individual members of a society express acceptance.

## B. Love and Procreation

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<sup>27</sup>*E.g.*, as long as slavery existed in the United States, governments refused to recognize marriages between slaves, and any children of such “marriages” were deemed property of the slave owners. At one point, forty states prohibited inter-racial marriage. ABA, *supra* note 18, 352-53. See Peter Wallenstein, TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE AND LAW – AN AMERICAN HISTORY (2002) (reviewing inter-racial marriage law in the United States).

<sup>28</sup>In upholding prosecution for violation of the Virginia law against inter-racial marriage, Justice Christian of the Virginia Supreme Court cited the “power of every country . . . to impose such restraints upon the relation as the laws of God, and the laws of propriety, morality and social order demand.” *Kinney v. Commonwealth*, 71 Va. 858, 862 (1878).

<sup>29</sup>Alabama did not repeal its anti-miscegenation statute until the year 2000. See Wallenstein, *supra* note 27 at 241.

<sup>30</sup>388 U.S. 1 (1967).

<sup>31</sup>See Wallenstein, *supra* note 27, at 202 (noting the rise of religious opposition to miscegenation laws).

<sup>32</sup>See Rachel F. Moran, INTERRACIAL INTIMACY: REGULATION OF RACE AND ROMANCE 60 (2001) (noting that “[o]fficials would turn a blind eye to circumvention of the law when the violation reinforced community beliefs about how the color line should be drawn.”). In Caroline County, Virginia, where Mildred Jeter and Richard Loving grew up together and eventually were prosecuted for their marriage, racial lines were considered “malleable;” Loving was not the first white person to join the Jeter family. *Id.* at 95.

<sup>33</sup>See Ian Curry-Sumner & Scott Curry-Sumner, *Is the Union Civil? Same-sex Marriages, Civil Unions, Domestic partnerships, and Reciprocal Benefits in the U.S.A.*, 4 UTRECHT L. REV.2(2008), available at <http://www.utrechtlawreview.org/publish/articles/000079/article.pdf>.

The conflict over recognition of marriage stems in significant part from different conceptions of the role of marriage in society. In traditional terms, the institution of marriage provides social stability especially in relationship to procreation. A stable marriage continues to be viewed as a socially desirable context for raising children, and many of those who argue most vehemently for limiting the definition of marriage to opposite sex couples do so to further this goal. Others, however, understand marriage in terms of a union between two people based upon expressions of love and a commitment to a sustained relationship, without reference to a larger family unit. When we view these conceptions of marriage independently of each other, those on either side of the debate end up failing to enlighten or change the views of their opponents. Both law and society have changed, however, in ways which harmonize traditional concern for protecting children with contemporary emphasis upon marriage as a loving commitment of two people.

Although legal and religious recognition of marriage have not required marital partners to “be in love,” “arranged marriages” and their counterparts have generally given way to the ideal of “marriage for love.”<sup>34</sup> In various ways, the law has changed to reinforce this conception. States have moved towards universal acceptance of “incompatibility” as grounds for divorce, rejecting the need to establish fault. With this change, spouses who are no longer in love with each other are not required to remain together “for the good of the children;” children are seen to benefit more from a good divorce than from a bad marriage.<sup>35</sup>

Legal “preference” for procreation within marriage was also challenged by judicial decisions limiting the advantages bestowed upon “legitimate” children.<sup>36</sup> In the context of awarding government benefits, the majority ruled that states could not limit assistance to “families of the working poor” to households “‘composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child . . . of both, the natural child of one and adopted by the other, or a child adopted by both . . . .’”<sup>37</sup> The state’s desire to “‘preserve and strengthen traditional family life’” did not justify penalizing illegitimate children.<sup>38</sup>

When the core of marriage is conceived of as the loving relationship of two people, then the illogical nature of discrimination against same-sex couples

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<sup>34</sup> See Linda S. Eckols, *The Marriage Mirage: The Personal and Social Identity Implications of Same-Gender Matrimony*, 5 MICH. J. GENDER & L. 353, 360 (1999).

<sup>35</sup> See Constance Ahrons, *THE GOOD DIVORCE, KEEPING YOUR FAMILY TOGETHER WHEN YOUR MARRIAGE COMES APART* (1994).

<sup>36</sup> See *Clark v. Jeter*, 486 U.S. 456, 456 (1988) (establishing intermediate scrutiny review of laws discriminating against illegitimate children).

<sup>37</sup> *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619, 619 (1973) (quoting N.J. STAT. ANN. § 44:13-3(a)).

<sup>38</sup> *Id.* at 620.

is easily demonstrated. The same should be true, however, when primary emphasis is placed upon the welfare of children. As noted by the Connecticut Supreme Court, same-sex couples “share the same interest in a committed and loving relationship as heterosexual persons who wish to marry, and they share the same interest in having a family and raising their children in a loving and supportive environment.”<sup>39</sup> Data from the 2000 United States Census shows that lesbian and gay couples are currently raising children in ninety-six percent of all counties in the United States, with the highest percentage of same sex couples raising children in the South and the Midwest.<sup>40</sup> Refusing to recognize same-sex marriage deprives these children of both the social approval accorded to marital status<sup>41</sup> and the wide range of public benefits that extend only to “married” couples and provide support for the family unit.<sup>42</sup>

### C. Outing Marriage

American history and culture should tell us that responsibility for defining marriage comes from within. The term represents something more than a legal status. We need not wait for “government” endorsement of a concept that arose out of our cultural and religious heritage, and we do not need consensus, or even majority support, to precede personal statements of values. If two people announce their love for each other and their commitment to each other, and if “in their hearts” they are married, then nothing should stop the rest of us from using that word and extending that recognition.

But there is the rub. First, we have to know that the couple seeks marital recognition. Conversations to establish that status may prove awkward. Public pronouncements about support for same sex marriage may not be easily translated into confirmation that a particular couple seeks that recognition. And, short of advertising their “marriage vacations” to Massachusetts<sup>43</sup> or Connecticut,<sup>44</sup> it may be just as difficult for couples themselves to initiate the recognition.

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<sup>39</sup> *Kerrigan*, 957 A.2d 424.

<sup>40</sup> See Lisa Bennett and Gary J. Gates, *The Cost of Marriage Inequality to Children and Their Same-Sex Parents, A Human Rights Campaign Foundation Report* 2-3 (April 13, 2004) (also noting that more than forty percent of lesbian couples in Mississippi, South Dakota and Texas are raising children).

<sup>41</sup> See *Kerrigan*, 957 A.2d 450-51; *In re Marriage Cases*, 183 P.3d at 433.

<sup>42</sup> As explained by the Massachusetts Supreme Court, “Excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of ‘a stable family structure in which the children will be reared, educated, and socialized.’” *Goodridge*, 798 N.E.2d 964.

<sup>43</sup> Four years after the Massachusetts Supreme Court established a right to same-sex marriages, the legislature overturned a 1913 law that prevented out-of-state couples from obtaining marriage licenses in that state. Acts 2008, 216, § 1 (repealing ALM GL ch. 207, § 11 (2008)).

<sup>44</sup> New York will recognize same-sex marriages from other states even though such marriages may not be initiated within that state. See *Martinez v. County of Monroe*, 50 A.D.3d 189, (N.Y.



When we extend invitations to social events, we invite individuals and their “significant others.”<sup>45</sup> That nomenclature arose in part to be sure that we were including same sex partners who felt excluded by language that focused upon the forbidden fruit of a marital relationship. As a result, we trained ourselves to avoid inquiring about marital status, suggesting that we didn’t really care, and that all were welcomed regardless of the status of their relationship. One result of that avoidance, however, is that it has now become difficult to reclaim ownership of the term marriage.

In several states and numerous cities, individuals are permitted to register as “domestic partners,”<sup>46</sup> and to receive some modicum of shared public or employee benefits as a result. Some registered domestic partners, however, may prefer to think of themselves as “married.”<sup>47</sup> Using that language may, over time, help to bring about social acceptance of same sex marriage. Within a more conservative culture, however, asking a same sex couple to self-identify as married compounds the social stigma that still attaches to homosexuality with an additional public defiance of societal norms. It may be asking too much to place individuals in the posture of assuming the emotional risks of public rejection.

The Massachusetts and Connecticut decisions make it possible for all same sex couples to obtain marriage licenses from those states.<sup>48</sup> We may argue about whether trip to those states should be necessary to secure the social use of the term marriage if the licenses provides nothing in the way of actual legal status or benefits. An official designation from one state, however, opens doors for social recognition elsewhere.<sup>49</sup>

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App. Div. 2008) (applying “marriage recognition rule” to out-of-state same-sex marriage). Californians may be in the next best position to make the trek to Massachusetts or Connecticut. They already reside in a state where registration as domestic partners secures equal treatment under state law. *See In re Marriage Cases*, 183 P.3d 384. Furthermore, there are already “married” gay couples living in California, so use of that term should not be questioned. Same-sex couples in California will still need to register as domestic partners in order to obtain equal rights under the laws of that state.

<sup>45</sup> See Eckols, *supra* note 34, at 380 (noting the “transformational” impact of naming one’s self).

<sup>46</sup> Partners Task Force for Gay and Lesbian Couples, *Registration for Domestic Partnership for the U.S. & Other Countries*, Jan. 21, 2008, <http://www.buddybuddy.com/d-p-reg.html>.

<sup>47</sup> Some may prefer civil union status to the traditional identification of marriage. *See* Greg Johnson, *Private law: Civil Union, a Reappraisal*, 30 VT. L. REV. 891, 906 (noting that civil unions may “become a symbol of pride, something to call our own”).

<sup>48</sup> In 2008, the Massachusetts legislature amended its laws to prohibit marriages of same-sex couples from other states. *See supra* note 43. Connecticut law does not contain such restrictions.

<sup>49</sup> Similar steps preceded the elimination of anti-miscegenation laws. Mildred and Richard Loving traveled to the District of Columbia for their marriage. In their case, a Virginia prosecutor then launched a criminal prosecution against them, and the state trial judge convicted them holding that “[t]he fact that [God] separated the races shows that He did not intend for the races to mix.” *Loving*, 388 U.S. at 3. *See supra* note 30.

As recognized through the common law, the real source of marriage is in the minds and hearts of the people seeking that relationship, demonstrated through their agreement, cohabitation, and public recognition. That observation, however, triggers additional concerns about the social and legal dynamics involved in changing the definition of marriage. Thus, many question the value of marriage and would prefer to avoid that label.<sup>50</sup> Such concerns are based in significant part on the historical baggage of marriage; the part that included “rights or privileges” based upon a patriarchal model that gave husbands dominion over their wives.<sup>51</sup> Recognizing the end of the rights or incidence of marriage corresponds with liberation from that patriarchy. What remains is, or at least should be, a relationship that embraces societal values and in which marital partners no longer control each other.

There are, of course, practical problems with restoring a “common law approach” to declarations of marriage, and extending the right to make such declarations to partners who fail to qualify under existing legal standards. When filling out forms that ask for marital status, or making claims with legal implications, allegations of fraud could be made against those who use terms in a manner that conflicts with statutory definitions. In the long term, the only sure cure for this problem is a change in the statutes. We therefore cannot ignore the need for official action, and it will be helpful to review the forces moving in that direction.

#### D. Sources of Change

Changes that reinforce the movement towards recognition of a broader right to marry are taking place in multiple ways with legal, economic and political dimensions. The most visible changes have taken place within the states, where both the highs and lows of a federal system of government are on display. At a time when conservative movements broadcast their anti-marriage agenda, with many states embracing their message, supreme courts in Massachusetts,<sup>52</sup> California,<sup>53</sup> and Connecticut<sup>54</sup> formally recognized the right to marry. Other states are moving more cautiously in that direction, recognizing an entitlement to equality while deferring to the political process to attach the label of marriage.<sup>55</sup> Progressive state actions parallel international acceptance of

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<sup>50</sup> See, e.g., Nancy D. Polikoff, *BEYOND STRAIGHT AND GAY MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008).

<sup>51</sup> See, e.g., Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 226 (2007) (noting that “a regime of private ordering between adults risks reinforcing forms of private power that are rooted in a history of patriarchy.”).

<sup>52</sup> *Goodridge*, 798 N.E. 2d 941.

<sup>53</sup> *In re Marriage Cases*, 183 P.3d 384.

<sup>54</sup> *Kerrigan*, 957 A.2d 407.

<sup>55</sup> See Alene Russell, *Domestic Partnership Benefits: Equality, Fairness, and Competitive Advantage*, A Higher Education Brief, Am. Assoc. of State Coll. and Univ. (2007), [http://www.aascu.org/media/pm/pdf/domestic\\_partners07.pdf](http://www.aascu.org/media/pm/pdf/domestic_partners07.pdf).

marriage by same sex couples in Canada, Spain, the Netherlands, Belgium, South Africa and Norway.<sup>56</sup> Changes in a group of states and nations will influence laws and culture elsewhere as judges look to external sources for authority, as myths are dispelled, and as migrating individuals seek protection for the relationships they have formed.<sup>57</sup>

A second major source of change within the United States is taking place as a result of corporate decisions. It should come as no surprise to students of constitutional law that changes in commerce trigger changes in societal treatment of same sex relationships. More than half of fortune five hundred corporations now offer benefits to same sex couples.<sup>58</sup> States which prohibit civil unions will nevertheless be reluctant to block recognition of domestic partnership relationships by these large corporate clients. Furthermore, in order to accommodate these corporations, cities throughout the United States have created domestic partner registries that permit couples to publicly identify their relationship in a manner that will yield benefits within the private work force.<sup>59</sup> Cities that do so express their tolerance in a manner that appeals to both small and large businesses seeking to be recognized as hospitable communities in which to recruit workers and establish offices. As more and more businesses offer benefits to domestic partners,<sup>60</sup> the demand for tools that facilitate such recognition grows. Domestic partnership registries, however, do not in and of themselves confer rights, and should be immune from challenge under even the most restrictive laws or state constitutional amendments limiting same sex marriage or civil union alternatives.<sup>61</sup>

Changes in the religious definition of marriage are also taking place. While politicians and the media have focused primarily upon opposition to recognizing same sex relationships by religious stalwarts, other religious groups

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<sup>56</sup> In Canada and South Africa, change came about through judicial decree. See *EGALE Canada, Inc. v. Canada*, 13 B.C.L.R.4th 1 (B.C. Ct. App. 2003); *Hapapern v. Canada*, 65 O.R.3d 161 (Ont. Ct. App. 2003); *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC) (S. Afr.). In the Netherlands, Belgium and Spain, legislatures recognized same sex marriage. See Netherlands Civ. Code art. 30 (as amended Dec. 21, 2000); Belgium Civ. Code, art. 143 (as amended Feb. 13, 2003); Spain Civ. Code, art. 44 (as amended July 1, 2005). The Norwegian Parliament granted marriage rights to same sex couples in June 2008. See *Norway passes law approving gay marriage*, L.A. TIMES, June 17, 2008, [www.latimes.com/news/local/la-on-norwaymarriage18-2008jun18,0,402614.story](http://www.latimes.com/news/local/la-on-norwaymarriage18-2008jun18,0,402614.story).

<sup>57</sup> See, e.g., Laura Spitz, *At the Intersection of North American Free Trade and Same-Sex Marriage*, 9 UCLA J. INT'L L. & FOREIGN AFF. 163 (2004) (explaining links between economic globalization and Canadian cultural norms on recognition of same-sex marriage in the United States).

<sup>58</sup> Human Rights Campaign Foundation, *The State of the Workplace for Gay, Lesbian, Bisexual and Transgender Americans* 22 (2006-2007).

<sup>59</sup> *Id.* at 14.

<sup>60</sup> More than fifty percent of Fortune 500 companies provide health benefits to same-sex partners of their employees. *Id.* at 22.

<sup>61</sup> See *Devlin v. City of Phila.*, 862 A.2d 1234, 1244 (Pa. 2004) (noting that such registries establish a "label," but not a "legal relationship").

have moved more quietly towards blessing those relationships, at times using the term marriage while doing so.<sup>62</sup> As with the case of anti-miscegenation laws,<sup>63</sup> religious groups will be found on both sides of this divide.<sup>64</sup>

Changes within businesses, religious groups and communities facilitate the social change that will, in turn, bring about acceptance of same sex relationships. Social change will, in turn, be the engine that drives changes in the law. A carefully measured judicial role, however, will be necessary in order for these changes to come about in an orderly manner. If asked to rule prematurely, courts and politicians are likely to come down on the side of constraint, and to impose barriers to long term social and legal change which may take generations to overcome.<sup>65</sup> As demonstrated by the United States Supreme Court opinions in *Romer* and *Lawrence*, however, timely actions will reinforce progressive change.

### **III. State Constitutional Barriers**

#### **A. Rights or Incidents of Marriage**

Within the last decade, states have chosen a variety of approaches to preserving “marriage” for heterosexuals. While a majority has taken the simple course of amending state constitutions in those terms,<sup>66</sup> several have gone beyond that step, attempting to block recognition of “civil unions” or other relationships of same sex couples. The language used to limit these alternative relationships varies from one state to the next. In Oklahoma and Louisiana, state constitutions now limit marriage “or the legal incidents thereof” to the “union between one man and one woman.”<sup>67</sup> Georgia denies “the benefits of marriage” to persons of the same sex.<sup>68</sup> In Kansas, “[n]o relationship, other than marriage,

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<sup>62</sup> See Josh Friedes, *Can Same-Sex Marriage Co-Exist with Religion?* 38 New Eng. L. Rev. 533, 534 (Spring 2004) (noting that “religious norms are changing very quickly on the issue of civil marriage rights.”).

<sup>63</sup> See *supra* text accompanying notes 29-32.

<sup>64</sup> See Friedes, *supra* note 62, at 49.

<sup>65</sup> Massachusetts may have been ready for judicial action by 2003 when a divided court in that state established a right to same sex marriage. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). The fact that other states were not ready, however, became evident with the flood of state anti-marriage constitutional amendments which followed. Twenty-two of these constitutional amendments were enacted in the two years after Massachusetts legalized gay marriage (2004-2006), a rate of almost one state constitutional amendment a month. See Anita Bernstein, *Subverting the Marriage Amendment Crusade with Law and Policy Reform*, 24 WASH. U. J. L. & POL’Y 79 (2007). The rejection of the California Supreme Court’s decision to recognize same-sex marriages also illustrates the tenuous balance between legal and political sources of change.

<sup>66</sup> See Joshua K. Baker, *Status, Substance, and Structure: An Interpretive Framework for Understanding the State Marriage Amendments*, 17 REGENT U. L. REV. 221, 221 (2005).

<sup>67</sup> OKLA. CONST. art. II, § 35; LA. CONST. art. XII, § 15.

<sup>68</sup> GA. CONST. art. I, § 4, ¶ I.

shall be recognized by the state as entitling the parties to the rights or incidents of marriage.”<sup>69</sup>

This range of alternatives, slamming the legislature’s door to those who seek legal protection for their relationships, begs for constitutional challenge. Before reaching those issues, however, initial interpretive questions warrant review. What are the “legal incidents of marriage”? An answer to this question will, in turn, guide subsequent constitutional challenges to the restrictive state laws.

Even outside of the context of constitutional challenges, answers to questions about the meaning and scope of state constitutional amendments will provide necessary clarification. Clauses like those described above are so ambiguous, and have such broad potential application, that they cast a shadow over any efforts to secure progressive amendments to the law. In addition to promoting the merits of extending equal treatment to an identifiable subgroup within the population, advocates for change must also convince decision-makers that the programs or improvements they seek will not run afoul of the uncertain law, and will not spur expensive litigation. Opponents of equal treatment will buttress their objections with a specter of legal challenges that may far exceed the legitimate scope of the restrictive laws. In other words, until these texts have been authoritatively construed, the ambiguity of their language creates a barrier to change.

There are a number of theoretical answers to the interpretive question. For example, it might be argued that whatever benefits were received by marriage partners at the time when the amendments were passed would henceforth be viewed as benefits of marriage, but that approach fails to accord with the reality that marital benefits, broadly defined, are vast in number<sup>70</sup> and in frequent flux. It seems unlikely that voters intended to freeze the benefits of marriage as of a particular moment,<sup>71</sup> and for reasons described below, it also seems unlikely that each and every statutory reference was meant to be treated as an “incident of marriage.”

As an alternative, because such interests normally change over time, it could be argued that the rights, benefits or incidents of marriage are subject to

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<sup>69</sup> KAN. CONST. art. XV, § 16.

<sup>70</sup> According to the General Accounting Office, there are more than 1,000 federal laws that treat married people differently than those who are single, and marriage fits primarily within the domain of state law. GAO-04-353R, 23 January 2004.

<sup>71</sup> Scott Rothschild, *Kline Says Marriage Ban Will Not Be Misconstrued*, LAWRENCE JOURNAL-WORLD, April 30, 2005, 1A, available at [http://www2.ljworld.com/news/2005/apr/30/kline\\_says\\_marriage/](http://www2.ljworld.com/news/2005/apr/30/kline_says_marriage/) (quoting Kansas Attorney General Phill Kline arguing that the Kansas Constitutional Amendment, part B, was intended to “prevent[] the Legislature from creating what is commonly referred to as a civil union[.] . . . The broad interpretation of clause B is faulty and not consistent with legislative intent.”).

legislative control. There are, however, flaws in this argument as well.<sup>72</sup> If legislatures are given genuine authority to define these terms, then the advantages of constitutional protection would appear to be lost. Legislatures could add or delete rights or benefits at will; by decreeing that a given benefit is not a right or benefit “of marriage,” legislators could award such benefits to those in other relationships. Deference to legislative judgments would be consistent with arguments that the purpose of the amendments was to assure that courts would not redefine marriage to include same sex unions, but that objective was met by state constitutional amendments defining marriage, and did not require the surplus verbiage. If the purpose was to block the courts from relying upon state equal protection principles to extend marital rights to same sex couples, that still begs the question about how those rights should be defined. Furthermore, this approach runs counter to customary separation of powers doctrine.<sup>73</sup> If such a change in authority was intended, it should have been accompanied by language empowering the legislature rather than mere declarations of limits.<sup>74</sup>

Instead of searching for the precise legal benefits that existed at the time when a given state constitutional amendment was passed, or giving state legislators carte blanche to define the rights or incidents of marriage, it may be possible to define a core set of rights and duties uniquely linked to marriage. More than a century ago, courts undertook this task with some success.<sup>75</sup> Husbands gained property rights and contracting rights, often as their wives surrendered their own rights of ownership and control. In a review of nineteenth century case law, courts that referred to “rights of marriage” or “incidents of marriage” were consistently describing property rights as examples of the former,<sup>76</sup> and assumption of debts the latter.<sup>77</sup> Most such rules, however, today belong on the scrap heap of patriarchy. Conjugal rights may have been seen as

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<sup>72</sup> See also Richard Cook, *Kansas's Defense of Marriage Amendment: The Problematic Consequences of a Blanket Nonrecognition Rule on Kansas Law*, 54 U. KAN. L. REV. 1165 (2006).

<sup>73</sup> See *Marbury v. Madison*, 5 U.S. 137 (1803) (defining the Supreme Court's constitutional duty to interpret the Constitution).

<sup>74</sup> Note that an advantage of legislative control is the door it opens to seek modification through legislative action. By opening this door, states avoid the *Romer* problems described below. See *infra* text accompanying notes 102-14.

<sup>75</sup> See *State v. Walker*, 13 P. 279, 287 (Kan. 1887) (reciting traditional elements of marriage, including a husband's right to control property and indebtedness, to sue and be sued, to control and have custody of children, and a wife's obligation to take her husband's name and to merge her legal identity with her husband, all of which had been rejected by the “very liberal” laws of Kansas).

<sup>76</sup> See, e.g., *United States v. Ritchie*, 58 U.S. 525, 530 (1854) (describing Native American property rights “including the rights of marriage and descent”); *Bonati v. Welsch*, 24 N.Y. 157, 161 (1861) (describing “incidents of marriage” in terms of contract and property rights in places of origin); *Keating v. Reynolds*, 1 S.C.L. 80, 3 (1 Bay) (S.C. Com. Pl. Gen. Sess. 1789) (noting that “rights of marriage” include a husband's right to property acquired by his wife).

<sup>77</sup> See, e.g., *Connor v. Berry*, 46 Ill. 370, 1 (1868) (noting that “incidents of marriage” include a husband's obligation to pay his wife's debts).

central to this body of “legal incidents,” but those rights may no longer be confined to marriage.<sup>78</sup> To the extent that “conjugal rights” included the right to “rape,” that day should again be viewed in the past tense.<sup>79</sup> In other words, the historical resonance of a phrase like “rights or incidence of marriage” has now lost most, if not all, of its traditional meaning.

### B. The Exclusivity Problem

These interpretive questions become most relevant in states like Kansas where “rights or incidents” of marriage cannot be shared by persons in any other relationship.<sup>80</sup> Taken at face value, it may be assumed that rights or benefits commonly recognized and attached to other relationships could not be included in the definition. State citizens who voted in favor of constitutional amendments presumably did not intend by doing so to limit the rights or benefits commonly accorded to those in other relationships. For example, any right recognized in the context of parental relationships could not be an *exclusive* right or incident of marriage, and therefore must be excluded from the sweep of the amendment. This exclusion applies to the broad spectrum of benefits that married couples *and people in other relationships* commonly enjoy. Thus, the mere fact that tax deductions extend to marriage partners would normally not preclude the legislature from also extending tax benefits to those in other relationships, including children, parents and employees. If tax benefits can be extended to those who are not in a marriage relationship, then it makes no sense to view them in restrictive terms as benefits of marriage. Similarly, employee benefits, and support rights must not be rights or incidents of marriage. Any other interpretation would mean that the state legislature or courts must now eliminate special rights or benefits attached to such relationships, a conclusion that would be quickly rejected as absurd.

The spousal privilege to limit adverse testimony provides a specific legal protection to people in a marital relationship. Once again, however, that privilege is not limited to married couples. Lawyers and clients, priests and penitents, doctors and patients, all are accorded privacy protection by the privilege accorded to their relationship. Therefore, the underlying privilege must not be included within the definition of rights or incidents of marriage that cannot be recognized for those in any relationship other than a heterosexual marriage.

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<sup>78</sup> See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Lawrence*, 539 U.S. 558.

<sup>79</sup> See *Lane v. State*, 703 A.2d 180 (Md. 1997) (authorizing rape charges against a husband); *Weishaupt v. Commonwealth*, 315 S.E.2d 847 (Va. 1984) (rejecting implied consent to marital intercourse).

<sup>80</sup> See, e.g., KAN. CONST. art. XV, § 16(b). “No relationship, other than marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.”

While this analysis applies with most obvious force to text that explicitly bars extending the “rights or incidents of marriage” to any relationship other than marriage, it opens the door to similar inquiries in states which adopted slightly different text. In Louisiana and Oklahoma, for example, state constitutions now restrict marriage or “legal incidents thereof” to heterosexual couples. This language would also seem to imply existence of an exclusive set of marital benefits.

The explanation for this argument begins with the simple logic that the phrase “legal incidents thereof” only applies when specifically attached to marriage relationships, and would not apply to comparable “legal incidents” if attached to other relationships. If, for example, the Oklahoma legislature (or any other governmental unit in Oklahoma) extends benefits to those registered as “domestic partners,” the benefits involved should be recognized as incidents of the domestic partnership rather than incidents of marriage. Any other interpretation requires a leap back into the exclusivity conundrum identified with the Kansas constitutional text. That is, if an Oklahoma court would rule that state employee benefits cannot be shared with domestic partners, the implication is that such benefits must be limited to those in a marital relationship, which also means that comparable benefits cannot be defined as incidents of other relationships such as that between parents and children.<sup>81</sup> In different words, the mere link between a “privilege” or “benefit” and marriage should not be deemed as a barrier to extending comparable privileges and benefits to those in other relationships that may, either at present or at some future date, be identified and defined by the government.

For the reasons just described, constitutional barriers to same sex relationships other than marriage may not be as restrictive as some may assume. Other than restrictions on disinheritance or property transfers,<sup>82</sup> most meaningful “legal incidents” of marriage occur in the context of divorce. Even within those contexts, comparable substitute protections may be created through contract.<sup>83</sup> Enactment of anti-discrimination laws, equalization of employee benefits, and recognition of dependent relationships should not be affected by most anti-marriage amendments, and will help to stimulate broader cultural change and social acceptance. There will, of course, be counter arguments supporting claims for restricting the rights of same-sex couples.<sup>84</sup> Given that debate regarding

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<sup>81</sup> Note that this logic fails if courts rule that states like Oklahoma and Louisiana prohibit recognition of “domestic partner” legislation. Such decisions, however, would be subject to constitutional attack as described below.

<sup>82</sup> See *supra* note 13.

<sup>83</sup> See Twila L. Perry, *The “Essentials of Marriage”: Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 46 (2003) (noting that “cohabitation contracts may govern the very limited issue of the distribution of property, but they generally do not provide for ongoing financial support after a relationship ends.”).

<sup>84</sup> See, e.g., George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419 (2004).



interpretation of text, courts should consider additional reasons for supporting one construction rather than another.

### C. Constitutional Doubt

The need for interpretive clarity will affect, and therefore should logically precede, related constitutional questions. At the same time, lurking constitutional questions should help to steer the interpretive debate. Proponents of the constitutional constraints discussed above will undoubtedly muster arguments for broader interpretations of the language constraining recognition of civil unions or domestic partnerships. Those arguments, however, must overcome the “doctrine of constitutional doubt.”<sup>85</sup>

For reasons described in more detail below,<sup>86</sup> the Supreme Court decision in *Romer v. Evans*<sup>87</sup> limits state imposed barriers to participation in the political process by disfavored groups. Justice Kennedy’s opinion for the Court tells us that the broader the barrier, the more questionable its constitutionality. In *Romer*, Colorado barred all homosexuals from seeking equal protection from any political entity within the state. As Kennedy explained, “[the Amendment’s] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects.” The same argument could be made to other state constitutional amendments targeting sexual minorities. If giving wide scope to the “incidents” of marriage means taking away political recourse for corresponding legal advantages sought by all persons in “other” relationships, then the constitutionality of such provisions is placed in doubt. In recent years the Supreme Court has repeatedly construed statutes narrowly in order to eliminate such doubts.<sup>88</sup> In the context of construing state constitutional amendments, state courts should similarly seek to narrow their interpretation of phrases such as “incidents of marriage.”<sup>89</sup>

A conclusion based upon this analysis either sharply limits or arguably eliminates all content from state constitutional references to the “rights” or

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<sup>85</sup> See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 335-36 (2001) (noting that “where an alternative interpretation of the statute is ‘fairly possible,’ . . . we are obligated to construe the statute to avoid [serious constitutional] problems.”). *Id.* at 300.

<sup>86</sup> See *infra* text accompanying notes 102-14.

<sup>87</sup> 517 U.S. 620 (1996).

<sup>88</sup> See, e.g., *Clark v. Martinez*, 543 U.S. 371 (2005) (limiting period for detention of “inadmissible aliens”); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng’rs*, 531 U.S. 159 (2001) (narrowly interpreting the phrase “navigable waters” in the Clean Water Act to avoid doubts as to the scope of congressional power).

<sup>89</sup> The Ohio Supreme Court applied this analysis, upholding prosecution for domestic violence by an abusive same-sex partner who was “living as a spouse” with the victim. *State v. Carswell*, 871 N.E.2d 547, 550 (Ohio 2007) (noting that before declaring a statute unconstitutional, “it must be appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.”).

“incidents” of marriage. The meaningful limitation that survives this analysis involves official use of the terms marriage and divorce. Even if all agree that the state constitutional constraints described above do not impose practical limits on rights or benefits that may be accorded to registered domestic partners, the language still prevents government authorities in such states from using the word marriage for all couples who seek that status. That central core includes the right to obtain a marriage license and certificate of registry, solemnized as such by authorized individuals, and registered with the county or state where the marriage takes place.<sup>90</sup> Equality necessitates finding an approach which overcomes these constraints.

#### D. Substantial Equivalence of Marriage

Several states have taken an alternative route towards limiting same sex relationships. Instead of barring “benefits” of marriage, they have chosen instead to prohibit a benefit package that approximates marriage. Ohio, for example, now bans recognition of a “legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.”<sup>91</sup> North Dakota and Utah forbid recognition of a domestic union between persons of the same sex “given the same or substantially equivalent legal effect.”<sup>92</sup> In these states, it is the package that counts, and as a result the analysis is somewhat different.

Presumably, states with such restrictions will not face the same range of questions described above regarding the content of marital rights or benefits. They also will not face the argument that only rights reserved exclusively for marriage are included within the ban. These states should be able to enact laws that recognize domestic partnerships, and constraints only apply when that recognition rises to the level of *substantial equivalence* to marriage.<sup>93</sup> For example, establishment of domestic partnership registries, which are often made accessible for both same sex couples and unmarried couples of opposite sex, should not raise questions given the lack of correlated tax advantages, inheritance rights, and other public benefits. At some point, however, courts will be called upon to draw a line to conclude that equal treatment exceeds state constitutional boundaries.

Again in this context, courts should understand the need to establish meaning of the phrase “substantial equivalence,” because ambiguity will

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<sup>90</sup>Even in Massachusetts and Connecticut, where marriage rights have been established by court order, the landscape is clouded by statutory inequality imposed by the federal government and by constraints on movement to other states where same sex marital relationships will be respected.

<sup>91</sup> OHIO CONST. art. XV, § 11.

<sup>92</sup> N.D. CONST. art. XI, § 28; UTAH CONST. art. I, § 29.

<sup>93</sup> The Ohio Supreme Court explained that the language quoted above “means the state cannot create or recognize a legal status for unmarried persons that bears all of the attributes of marriage – a marriage substitute.” *Carswell*, 871 N.E.2d at 551.

otherwise tend to be construed against the parties seeking equal treatment. Opponents of creating domestic partner registries or extending employee benefits to same-sex couples will use the mere threat of litigation as an argument against adopting such laws, and they will continue to do so until the courts have acted.<sup>94</sup>

As with the interpretive issues previously described,<sup>95</sup> judges will be well advised to draw such lines in a manner which tolerates as much in the way of equal rights as possible in order to minimize the constitutional doubt that surrounds such decisions. Thus, tax benefits or health insurance benefits should not be enough independently to trigger the constitutional ban. Following the lead of Pennsylvania's Supreme Court, only laws that contain attributes of marriage such as divorce and alimony should be considered the "functional equivalent" of marriage.<sup>96</sup>

Language in Michigan's anti-marriage amendment prohibits government recognition of same-sex "marriage or similar union for any purpose,"<sup>97</sup> and as such creates a more difficult barrier to over-come. Emphasizing uniqueness of this text,<sup>98</sup> the Michigan Supreme Court decided in 2008 that this amendment precluded recognition of domestic partnerships for the purpose of awarding employee medical benefits.<sup>99</sup> The justices reasoned that standards for establishing a domestic partnership, including elements of two persons, lacking close blood connections, forming preconditioned obligations of mutual support, with minimum age requirements, indefinite duration and a common residence, made that "union" *similar* to marriage.<sup>100</sup> The Court also concluded that the ban on recognition "for any purpose" included the legal purpose of securing employee benefits.<sup>101</sup> The Michigan Court did not consider questions about constitutionality, and short of amending the Michigan Constitution, that becomes the only recourse for those denied the right to equal employee benefits in that state.

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<sup>94</sup> Note that analogous issues arise in states that have adopted "civil union" laws, and now face the problem of recognizing "substantially equivalent" relationships for couples moving from other states. *See generally* Ian Curry-Sumner and Nancy G. Maxwell, *Same-sex, different status?* (unpublished manuscript).

<sup>95</sup> *See supra* text accompanying notes 85-90.

<sup>96</sup> *See* Devlin v. City of Phila., 862 A.2d 1234, 1243-44 (Pa. 2004) (noting that "life partner" designation is "merely . . . another unmarried 'marital status,' and not the functional equivalent of marriage"). The Pennsylvania Supreme Court included child custody and child support as additional, fundamental elements of marriage. Those legal rights and constraints also apply outside of marriage, and may be better understood as attributes of parental relationships rather than as attributes of marriage. *See also* Tyma v. Montgomery County, 801 A.2d 148 (Md. 2002) (finding that county employment benefits for domestic partners did not conflict with state laws limiting marriage to opposite sex couples).

<sup>97</sup> MICH. CONST. art. I, § 25.

<sup>98</sup> Nat'l Pride at Work, Inc. v. Governor of Michigan, 748 N.W.2d 524, 542 (Mich. 2008).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 534-35.

<sup>101</sup> *Id.* at 538.

### E. The Romer Issue

Regardless of where the line is drawn, all states seeking to impose state constitutional bans on same sex marriage will be subject to challenge under the United States Constitution. They will first need to pass the political process hurdle identified in *Romer*. In some respects, *Romer* dealt with broader restrictions than those now under discussion; Justice Kennedy described them as “protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.”<sup>102</sup> In other respects, however, *Romer* analysis applies directly: “If the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.”<sup>103</sup> Rather than limiting protective legislation, bans on civil unions directly impose inequality on the affected group. As in *Romer*, civil union bans embedded in a state constitution make it “more difficult for one group of citizens than for all others to seek aid from the government [which] is itself a denial of equal protection of the laws in the most literal sense.”<sup>104</sup> “[L]aws of this kind . . . raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”<sup>105</sup>

Justice Kennedy concluded his opinion in *Romer* by citing the familiar refrain that “a law must bear a rational relationship to a legitimate governmental purpose.”<sup>106</sup> While this reference to a rational relationship may appear as weak constitutional protection, emphasis upon that singular point of reference would be misleading. Justice Kennedy began his opinion by quoting from Justice Harlan’s dissent in *Plessy v. Ferguson*,<sup>107</sup> rejecting division of society into classes. The full context of the majority ruling, especially when coupled with Justice Kennedy’s obvious recognition of social animosity towards homosexuals demonstrated in *Lawrence v. Texas*,<sup>108</sup> provides a more accurate guide to judicial thought regarding these issues. State constitutional provisions barring same sex unions share in common with *Romer* the bare desire of a current majority to prevent an identifiable, unpopular group from seeking equal treatment under the law. Placement in state constitutions results in a constraint on future generations as well as the current political community. As Justice Kennedy noted, laws with

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<sup>102</sup> *Romer*, 517 U.S. at 631.

<sup>103</sup> *Id.* at 633

<sup>104</sup> *Id.* at 634.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 635 (citing *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462 (1988)).

<sup>107</sup> *Romer*, 517 U.S. at 623 (quoting *Plessy*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting with the statement that “the Constitution ‘neither knows nor tolerates classes among citizens.’”).

<sup>108</sup> 539 U.S. 558, 575 (2003) (explaining that “[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”).

this “unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.”<sup>109</sup>

The only federal circuit court to have applied *Romer* to state constitutional restrictions on same sex unions ignored much of the language used by Justice Kennedy, emphasizing only the conclusion that Colorado’s amendment failed to pass a rational basis test.<sup>110</sup> That panel of judges referred instead to *Romer* and related precedent as “murky,” limited their standard of review to the most deferential rational basis test, and then turned to Justice Scalia’s dissenting opinion in *Romer* for guidance.<sup>111</sup>

During oral arguments, judges on the Eighth Circuit panel attempted to distinguish between “benefits” of marriage and “protections” secured by the Equal Protection Clause.<sup>112</sup> Neither law nor logic will support such a distinction. The Fourteenth Amendment assures equal treatment, regardless of the nature of government action. Surely, arguments that whites may receive a superior, segregated education because public education could be defined as a “benefit” would never be tolerated. Because they are barred from marriage, same sex couples lose out on approximately 1,400 government “benefits” extended by state and federal government authorities to married couples.<sup>113</sup> The fact remains that states using their own constitutions to prohibit same sex couples from going to their legislatures in order to secure equality impose comparable constraints to those imposed by Colorado.

This political process rationale for striking down state constitutional bars to same-sex unions does not begin to address underlying questions about whether the definition of marriage must be expanded. After the courts strike down state constitutional barriers, opponents to gay marriage could still amend their constitutions to block judicial promulgation of a definition of marriage with an amendment giving that responsibility to the state legislature. They should not be allowed, however, to amend state constitutions in order to block an unpopular minority group from seeking legislative protection.

The Supreme Court decision in *Romer* establishes this line, and with it a foundation for challenging the full range of state constitutional amendments limiting same sex couples from seeking equal treatment through “civil unions,”

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<sup>109</sup> *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

<sup>110</sup> *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006).

<sup>111</sup> *Id.*

<sup>112</sup> <http://www.ca8.uscourts.gov/oralargs/oaFrame.html> (Case no. 05-2604).

<sup>113</sup> See James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31 (2003); Tiffany C. Graham, *Exploring the Impact of the Marriage Amendments: Can Public Employers Offer Domestic Partner Benefits to Their Gay and Lesbian Employees?*, VILLANOVA U. SCH. OF LAW WORKING PAPER SERIES, Paper No. 114 (2008), available at <http://law.bepress.com/villanovawps/papers/art114>.

“domestic partnerships,” or comparable legislative measures.<sup>114</sup> The same constitutional argument applies when challenging state constitutional bans on application of the term marriage. The focus remains on the unique and discriminatory nature of state constitutional limits; no legitimate purpose is served by erecting institutional barriers to establishment of this status.

Realistically, this path will only be cleared through federal action or judicial decree. Where use of the term marriage is restricted by state constitutional provisions, reversal through the political process will only take place by overcoming the heightened barriers created by state constitutional amendment procedures. In those states where opposition to any deviation from heterosexual identity dominates the political landscape, individuals in same sex relationships thus face severe legislative hurdles blocking their path towards securing meaningful equality; because of those hurdles, litigation remains as the viable and appropriate alternative.

#### **IV. National Recognition**

##### **A. Congressional Action**

Strategies described above aim towards removing state constitutional barriers to recognition of same sex marriage. Removal of those barriers, however, only begins the process of establishing equality. While several states have already recognized the “right” to equality in state constitutional terms, even those states remain handicapped as long as the federal government bans same sex marriages from receiving the status and benefits afforded to heterosexual relationships.<sup>115</sup>

Mustering the political strength needed to overcome discrimination at the federal level poses an obvious and substantial challenge. In the long term, courts may be called upon to resolve the issue, relying upon the equal protection analysis described below.<sup>116</sup> A direct challenge will undoubtedly be raised by those whose marriages have been recognized as such in Massachusetts, California, or Connecticut, and who nevertheless must still file tax returns and benefit claims as if they were single. The grim reality, however, is that success will be more likely if political change precedes such a constitutional challenge.

At present, a majority of politicians refuse the risk of attaching the word marriage to same sex relationships. Nevertheless, a growing number appear to accept arguments for “equal treatment,” and there is plenty of room within federal law to lay ground work for claims of equality. Enactment of the

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<sup>114</sup> See *Baker v. State*, 744 A.2d 864 (Vt. 1999); 15 VT. STAT. ANN. §1202 (2000) (establishing Vermont civil union status).

<sup>115</sup> Federal Defense of Marriage Act, 110 Stat. 2419 (1996).

<sup>116</sup> See *infra* text accompanying notes 123-63.

Employment Non-Discrimination Act<sup>117</sup> or amendments of Title VII to provide federal protection against employment discrimination based upon sexual orientation would be indicative of broader support for such policies. Similarly movements to reform public employee benefits, social security laws, or tax laws in order to establish levels of substantive equality would be comparably helpful. Even unsuccessful efforts are likely to help with the establishment of a record illustrating the pure animosity that underlies opposition.

The need for federal legislation, if only for the purpose of providing uniform language for regulatory treatment, will continue to grow with time. Currently, the few states that formally recognize same sex unions do so with a range of definitions and restrictions defying either administrative needs or simple logic. For example, Washington will only recognize civil unions from other states that are “substantially equivalent to a [Washington] domestic partnership,” and they will not extend domestic partnership status to a same sex marriage from another state.<sup>118</sup>

Congressional taxing and spending powers provide authority for establishing a common set of definitions for such relationships, potentially extending to the point of mandating that all states allow for recognition of civil unions or same sex marriage.<sup>119</sup> As an additional source of federal power, Congress could also turn to the Treaty Clause. The United Nations Human Rights Committee in charge of enforcing the International Covenant on Civil and Political Rights has already ruled that the non-discrimination and equal protection provisions of that document should be interpreted so that references to “sex” are “to be taken as including sexual orientation.”<sup>120</sup> The same Covenant also recognizes the right “to marry and to found a family” as a basic human right.<sup>121</sup> Although the United States is not a party to the optional protocol providing for direct, individual enforcement of those provisions, the status of this treaty provides a basis for congressional action mandating recognition of equal status for same sex couples, including recognition of marriages.<sup>122</sup>

## B. The Equal Protection Issue

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<sup>117</sup> See Employment Non-Discrimination Act (ENDA) of 1999, H.R. 2355, 106<sup>th</sup> Cong. (1999).

<sup>118</sup> WASH. REV. CODE § 26.60.090 (2008). See generally Curry-Sumner and Maxwell, *supra* note 94.

<sup>119</sup> Congress already uses its taxing power to define “marriage” in order to exclude same-sex couples from marital benefits regardless of state definitions. 1 U.S.C. §7 (2008).

<sup>120</sup> Toonen v. Australia, U.N. Hum. Rts. Comm., No. 488, U.N. Doc. CCPR/c/50/D/488/1992, 11 (1994) (upholding a challenge to Tasmania’s anti-sodomy laws).

<sup>121</sup> Int’l. Covenant on Civil and Political Rights, art. 23.

<sup>122</sup> See John Henry Stone, *The International Covenant on Civil and Political Rights and the United States Reservations: The American Conception of International Human Rights*, 7 U.C. DAVIS J. INT’L L. & POL’Y 1 (2001).

The final step towards recognizing same sex marriages will almost certainly require some level of judicial ratification. The most likely basis for such a challenge will be the Fourteenth Amendment Equal Protection Clause, and the foundation for that challenge already exists.

An equal protection challenge to constraints upon same sex marriage may be measured first by reference to arguments made in opposition. Many of those arguments, including those identified in terms of history, tradition, or simple definitions, are either tautological, i.e., same sex marriage isn't valid because "marriage" does not include two people of the same sex, or they are based upon mirror images of societal prejudice. Anti-miscegenation laws reflected generations of deeply entrenched racism, leading to laws against inter-racial marriage passed by forty state legislatures; in similar fashion, centuries of anti-homosexual animus became a common component of American law.<sup>123</sup>

So-called "defense of marriage" laws symbolize this antipathy. Marriage between two people of the same sex threatens no one and harms no one. Broadening the commitment to marriage will only have a positive impact upon institutional and social stability.<sup>124</sup> Arguments such as those based upon based upon "health", i.e., the goal of combating AIDS,<sup>125</sup> are either silly or insulting: commitment to a single sexual partner cannot possibly threaten public health. Belief that barriers to "marriage" will reduce sexual activity outside of marriage is the same sort of twisted logic that the Supreme Court has already rejected.<sup>126</sup> As noted by Chief Judge Judith Kaye in her dissenting opinion in *Hernandez v. Rolles*, "there are enough marriage licenses to go around for everyone."<sup>127</sup>

The Eighth Circuit, rejecting equal protection arguments against Nebraska's anti-marriage amendment, found a rational basis for such laws in

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<sup>123</sup>The New York Court of Appeals distinguished the historical background of *Loving*, preceded by centuries of racism, from the "serious injustice in the treatment of homosexuals" based on arguments that the latter "has been recognized only in the relatively recent past." *Hernandez v. Robles*, 855 N.E.2d 1, 5, 8 (N.Y. 2006) (denying marriage licenses to same-sex couples). Although arriving at the opposite conclusion, the California Supreme Court avoided the argument that "current marriage provisions were enacted with an invidious intent or purpose." *In re Marriage Cases*, 183 P.3d at 856 n. 73 (Cal. 2008). Justice Kennedy also addressed the history of discrimination against homosexuals in his opinion for the Court in *Lawrence*, noting that "laws targeting same sex couples did not develop until the last third of the 20th century." *Lawrence*, 539 U.S. at 570. Emphasis upon the recent origin of intense hostility against homosexuals, however, should not be seen as a persuasive reason for tolerating such discrimination.

<sup>124</sup>See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 109-118 (1996).

<sup>125</sup>See Lynn D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, 56 DEPAUL L. REV. 997 (2007).

<sup>126</sup>See *Eisenstadt*, 405 U.S. at 448 (1972) (noting that it "would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication").

<sup>127</sup>855 N.E.2d 1, 30 (N.Y. 2006) (Kaye, C.J., dissenting).



government's interest in "steering procreation into marriage."<sup>128</sup> That argument also fails to pass a test for reasonableness. The idea that government can effectively limit procreation to marriage has long since been recognized as folly.<sup>129</sup> Furthermore, "steering" towards heterosexual rather than homosexual marriage reflects a preference that has everything to do with societal prejudice, and nothing to do with the health and welfare of children. The California Supreme Court made this point by noting the harm to children resulting from refusal to apply the term marriage to a union of same sex parents.<sup>130</sup>

The folly of arguments based upon government interest in steering government support towards procreation may be illustrated by imagining a more narrowly tailored law limiting marriage licenses to those capable of procreation. No women over a certain age need apply, and all men would be subject to tests of virility. Of course such a law would be rejected in an instant. The fact that a narrowly tailored law focusing upon the purported government interest would be rejected by the courts, however, illustrates the more basic point that the fundamental nature of marriage is not in fact limited to procreation.

A counterpart to the Eighth Circuit reliance upon beliefs that married heterosexual couples constitute the "socially recognized unit that is best situated for raising children[.]"<sup>131</sup> can be traced to the case of *Palmore v. Sidoti*<sup>132</sup> and to the state judge's views in that case that a child would suffer social stigmatization if she lived in the home of a racially mixed marriage.<sup>133</sup> Official state preferences for heterosexual marriage, reflecting state preferences for "traditional" families, are based upon underlying fears of social prejudice,<sup>134</sup> and should not be given the stature of official endorsement.

References to "family values" by opponents of same-sex marriage may be boiled down to arguments for a privileged status for one class of families, and a lower status for disfavored families with same sex partners. One such opponent refers to marital families as "'mediating structures' that stand between the naked individual and the overwhelming, alienating power of the government[.]"<sup>135</sup> arguing that "[s]ociety needs a critical mass of married two-heterosexual-parent families, both to raise their own children well and to serve as

<sup>128</sup> *Citizens for Equal Protection*, 455 F.3d at 867.

<sup>129</sup> *See Eisenstadt*, 405 U.S. 438.

<sup>130</sup> *In re Marriage Cases*, 183 P.3d at 401 (noting that disparagement of same-sex unions imposes "appreciable harm on same-sex couples and their children" by depriving them of the socially favored designation of marriage).

<sup>131</sup> *Citizens for Equal Protection*, 455 F.3d at 867.

<sup>132</sup> 466 U.S. 429 (1984) (rejecting fears of social prejudice as basis for child custody determination).

<sup>133</sup> *Id.* at 431.

<sup>134</sup> *See* John M. Finnis, *Law, Morality, and Sexual Orientation*, 69 NOTRE DAME L. REV. 1049 (1994).

<sup>135</sup> Lynn D. Wardle, Symposium: *Tyranny, Federalism and the Federal Marriage Amendment*, 17 YALE J. L. & FEMINISM 221, 253 (2005).

models for children growing up in alternative family structures.”<sup>136</sup> But no explanation is offered for believing that only heterosexual couples need such protection, or why recognition of same sex marriages would threaten the “critical mass” of heterosexual couples. Such arguments may reflect an underlying fear that changes in the law would reshape individuals, changing feelings of sexual attraction to comply with legal norms. Short of such phobias, however, there is no reason to believe that unmarried homosexual unions are either more virtuous or better role models than married couples of the same sex who have made both private and public commitments to each other.<sup>137</sup>

At least four different approaches to the Equal Protection Clause could be relied upon to challenge state discrimination against same sex marriage. The first builds upon the Supreme Court’s decision in *Romer*, and demands that states have legitimate grounds for discrimination rather than a facade covering ignorance, prejudice, or hostility. Three cases arising in other contexts illustrate the primary elements of this argument. In *City of Cleburne v. Cleburne Living Center*,<sup>138</sup> the Court protected a “group home for the developmentally disabled” from discriminatory zoning regulations. While the City Council expressed concern about the negative attitudes of prospective group home neighbors, the Justices reiterated the principle that “[p]rivate biases may be outside of the law, but the law cannot, directly or indirectly, give them effect.”<sup>139</sup> Similarly, fears that occupants of the group home might be harassed did not constitute a valid justification for the city’s permit denial: “vague, undifferentiated fears” should not be allowed to permit “some portion of the community to validate what would otherwise be an equal protection violation.”<sup>140</sup> While members of the City Council undoubtedly held genuine concerns about the size of the group home and the number of people who would occupy it, that legitimate interest did not explain the difference of treatment between the group home and boarding houses, nursing homes or fraternities which were not similarly restricted.<sup>141</sup>

In *United States Dep’t of Agriculture v. Moreno*,<sup>142</sup> the Court struck down a federal law designed to prevent “hippie communes” from taking advantage of the food stamp program. While the restriction on assistance to households containing one or more unrelated persons could have been justified on grounds that it lowered costs of the program and steered aid towards

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<sup>136</sup> *Id.* at 255.

<sup>137</sup> WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 1-13 (1996) (noting the potential “civilizing” effects of same-sex marriage).

<sup>138</sup> 473 U.S. 432 (1985).

<sup>139</sup> *Id.* at 448 (quoting *Palmore v. Sidoti*, 466 U.S. at 429).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 450.

<sup>142</sup> 413 U.S. 528 (1973).

traditional families, those justifications could not be used to legitimize “a bare congressional desire to harm a politically unpopular group.”<sup>143</sup>

The case of *Plyler v. Doe*,<sup>144</sup> provides a third example of use of the rational basis test in a manner that looked behind superficial government rationales to consider the harm caused by illegitimate government action. Texas denied public school attendance to undocumented children of Mexican ancestry. Although “illegal aliens” do not constitute a “suspect category,” and education is not a “fundamental right,” penalizing the children by denying them access to education was seen as both “unjust” and “ineffectual.”<sup>145</sup>

In all three of these cases, government authorities could manufacture arguments to support their actions, and in all three cases the Supreme Court refused to allow superficial arguments to cover up the harm to politically powerless individuals that would result. The biases and fears described in *Cleburne* have clear counterparts in the homophobia that motivates anti-marriage promoters of so-called “family values.” Arguments that procreation should be steered towards heterosexual couples by only legitimizing their relationships provide no more cover than the congressional efforts to steer food stamps to “traditional families” in *Moreno*. And the harm to “helpless” children in *Plyler* is magnified by the harm to the stigmatized children in gay and lesbian households who are denied much of the support that society offers to children of married, heterosexual couples.<sup>146</sup>

A second approach to equal protection analysis builds upon law pertaining to gender or legitimacy discrimination, concluding that, at a minimum, intermediate scrutiny should be applied to such classifications. Several judicial opinions have taken this path, noting that gender identification could be found at the root of all discrimination based upon sexual orientation,

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<sup>143</sup> *Id.* at 534. Note that Justice Kennedy’s opinion for the Court in *Romer* relied in part upon this holding from *Moreno*. *Romer*, 517 U.S. at 634.

<sup>144</sup> 457 U.S. 202 (1982).

<sup>145</sup> *Id.* at 220 (quoting *Weber v. Aetna Casualty & Surety Co.* 406 U.S. 164, 175 (1972)). In reaching this conclusion, *Plyler* also stands for the broader point that plaintiffs need not show that underlying motives were necessarily tinged with bigotry in order to prevail in their challenge to restrictions on same sex marriage. Irrational harm to an unpopular or unrepresented minority group should be enough to meet this standard. Justice Kennedy reinforced this assessment as he concluded his opinion for the Supreme Court in *Lawrence* with the explanation that “times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” *Lawrence*, 539 U.S. at 579.

<sup>146</sup> *See, e.g., In re Marriage Cases*, 183 P.3d at 433 (noting that “a stable two-parent family relationship, supported by the state’s official recognition and protection, is equally as important for the numerous children in California who are being raised by same-sex couples as for those children being raised by opposite-sex couples.”).

and that the prohibitions of gender discrimination applied with equal force to discrimination based upon sexual orientation.<sup>147</sup>

When the California Supreme Court rejected arguments that discrimination based upon sexual orientation should be treated as a form of sex discrimination, they did so in a context of ruling that strict scrutiny should be applied to either of those classifications,<sup>148</sup> and arguments for strict scrutiny of sexual orientation classifications should remain on the table even though the United States Supreme Court relied upon a rational basis test in *Romer*.<sup>149</sup> Because the California legislature had addressed the issue by separately prohibiting both gender discrimination and sexual orientation discrimination, the justices could not easily conflate those concepts.<sup>150</sup>

The Connecticut Supreme Court adopted a variant of this approach; without specifically equating gender discrimination and discrimination based upon sexual orientation, the majority systematically analyzed arguments for establishing “quasi-suspect” status to cases of sex discrimination, and explained that the same arguments applied with equal or greater force to current claims of discrimination against homosexuals.<sup>151</sup> In support of this approach, the Justices found “no question . . . that gay persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation.”<sup>152</sup> They determined that “gay persons . . . have less political power than women possessed in 1973” when intermediate scrutiny was first applied.<sup>153</sup> They also found that, although federal cases law generally rejected use of intermediate scrutiny in cases involving discrimination based upon sexual

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<sup>147</sup> See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993); *Goodridge*, 798 N.E.2d at 971-72 (Bridge, J., concurring); *Hernandez*, 855 N.E.2d at 29-30 (Kaye, C.J., dissenting). Note, however, that the United States Supreme Court refused to conflate sex discrimination with discrimination based upon sexual orientation in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998) (addressing a case of same sex harassment in the context of a Title VII complaint), and the California Supreme Court also decided that, given that state’s separate statutory protection for sex discrimination and discrimination based upon sexual orientation, the two claims could not be equated. *In re Marriage Cases*, 183 P.3d at 439.

<sup>148</sup> *Id.* at 436-44.

<sup>149</sup> *Romer*, 517 U.S. at 635. The fact that Colorado’s law failed to pass a rational basis test does not preclude use of a more demanding level of judicial scrutiny if there are reasons for doing so. By not relying upon a more searching level of scrutiny in those cases, Justice Kennedy followed the traditional maxim that Supreme Court opinions should not address unnecessary issues. Language used throughout Kennedy’s opinion reinforces this interpretation.

<sup>150</sup> *In re Marriage Cases*, 183 P.3d at 439.

<sup>151</sup> *Kerrigan*, 957 A.2d at 462 (concluding that “gay persons meet each of the four factors identified by the United States Supreme Court for determining whether a group is entitled to heightened judicial scrutiny as a quasi-suspect class”).

<sup>152</sup> *Id.* at 434.

<sup>153</sup> *Id.* at 455.

orientation, most such cases relied heavily upon *Bowers v. Hardwick*,<sup>154</sup> which was overruled by the Supreme Court's decision in *Lawrence v. Texas*.<sup>155</sup>

There are a number of reasons why discrimination based upon sexual orientation should trigger a higher level of scrutiny than that applied to instances of gender or legitimacy discrimination. The most cogent reason for permitting a level of intermediate scrutiny in such cases is the argument that there are some acceptable reasons for distinguishing between men and women<sup>156</sup> or limiting the inheritance rights of children who were not acknowledged as such during the lifetime of their fathers.<sup>157</sup> In contrast, it is hard to identify any instances justifying different government treatment of individuals because of their sexual orientation.<sup>158</sup> In keeping with this observation, the California court concluded that sexual orientation (1) "bears no relation to a person's ability to perform or contribute to society," (2) "is associated with a stigma of inferiority and second-class citizenship," and (3) is based upon a trait that "is so integral an aspect of one's identity [that] it is not appropriate to require a person to repudiate or change . . . in order to avoid discriminatory treatment."<sup>159</sup>

In yet another approach, courts could apply strict scrutiny to discrimination affecting the right to marry based upon the fundamental nature of that relationship. In *Meyer v. Nebraska*,<sup>160</sup> the United States Supreme Court characterized the "liberty" protected by the Due Process Clause to include rights of individuals "to marry, establish a home and bring up children . . . ." In *Loving v. Virginia*,<sup>161</sup> the Court found that "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men." And in *Turner v. Safley*,<sup>162</sup> the Court explicitly rejected argument that the right to marry only applies to the context of possible procreation, extending the right to individuals confined in state prison even if prisoners have no right to conjugal visits with their would be spouses. By extending the designation of marriage to same sex couples, the California Supreme Court held

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<sup>154</sup> 478 U.S. 186 (1986).

<sup>155</sup> 539 U.S. 578 (2003).

<sup>156</sup> E.g., because of different physical attribute, there may be valid reasons for holding athletic competitions that allow women to compete against each other.

<sup>157</sup> See *Lalli v. Lalli*, 439 U.S. 259 (1978).

<sup>158</sup> This observation obviously rejects the military's differential treatment of gays and lesbians. For support, see *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008); *Watkins v. United States Army*, 847 F.2d 1329, *vacated en banc*, 872 F.2d 699 (9th Cir. 1989) (finding that exclusion of bisexuals, gay men and lesbians from the armed forces violated the Equal Protection Clause).

<sup>159</sup> *In re Marriage Cases*, 183 P.3d at 442.

<sup>160</sup> 262 U.S. 390, 399 (1923).

<sup>161</sup> 388 U.S. 1, 12 (1967).

<sup>162</sup> 482 U.S. 78, 95-96 (1987) (finding remaining attributes of marriage, including expressions of emotional support and public commitment, spiritual significance, rights to consummation if released, and receipt of government benefits are "sufficient to form a constitutionally protected marital relationship").

that differential treatment would “significantly impinge upon the fundamental interests of same-sex couples” and therefore should “properly be evaluated under the strict scrutiny standard of review.”<sup>163</sup>

## V. Conclusion

The path towards recognition of same sex marriages will involve multiple issues, predictable diversions, and risks that false steps will jeopardize progress for future generations. Most critical is the social dimension; fostering understanding that same sex marriage partners pose no threats, and that society will emerge stronger when we overcome outcast labels for those who don't fit within traditional heterosexual norms. Individuals, businesses, religious organizations and others who share this belief will create the change, and legal recognition will follow.

A primary barrier to change already exists within those states that have amended their laws and their constitutions to impede recognition of same sex unions. Judicial construction of such laws is needed so that the express limitations will not be given broader scope than necessitated by specific language. Text limiting the benefits, rights or incidents of marriage to heterosexual couples should only apply to legal elements that do not exist outside of marital relationships, and few if any publicly recognized benefits fit that definition. To erase state constitutional barriers, however, advocates will have to turn to federal judges, who should in turn rule that efforts to target the disfavored class of same sex couples fail to survive federal constitutional scrutiny.

Arriving at genuine equality will take a combination of time, political leadership and judicial resolve. Without using the term marriage, Congress can play a leading role by expanding the scope of legal protection provided by existing civil rights legislation. Although Congress also has the power to transform the landscape by mandating recognition of same-sex marriages, that decision is more likely to come from a decision by the United States Supreme Court. The foundation exists for such a ruling when the time and the will to resolve this issue arrive.

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<sup>163</sup>*In re Marriage Cases*, 183 P.3d at 446.