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A work in progress. Comments invited.

The Marriage Debate in Historical Perspective: Changing Norms and the Evolution Of Civil Marriage¹

Charles P. Kindregan, Jr.²

Introduction:

For many decades the matter of defining marriage lay at the backwater of family law analysis. This began to change in the a little over a decade ago when the Supreme Court of Hawaii ruled favorably on an attempt by same-sex couples to obtain marriage licenses³ and the Congress of the United States responded by enacting the Defense of Marriage Act.⁴ Some states by legislation conferred the benefits of marriage on same-sex couples entering civil unions⁵ or registered domestic partnerships.⁶ Canada, a common law country, redefined marriage to include same-sex couples⁷ and several other countries did the same.⁸ As discussed below one American state, Massachusetts, by judicial decision, rewrote the common law definition of marriage.

Also noteworthy is that the American Law Institute developed a proposal which effectively equates the relationship of unmarried domestic partners who maintain a common household, have a common child, and meet other requirements with marriage, including property rights which historically have been associated with marriage.⁹ This means that if adopted this idea would require qualifying individuals in such a “marriage-like” cohabitation to specifically opt out of the legal consequences of their relationship if they wish not to be bound by the law. These and other developments such as civil

¹ An earlier version of this article was originally published in the Family Law Quarterly. See Charles P. Kindregan, Jr., *Same Sex Marriage: The Cultural Wars and the Lessons of Legal History*, 38 FAM. L. Q. 427 (2004). This version contains further reflections and considers developments since that publication.

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³ Baehr v. Lweir, 852 P.2d 44 (Haw. 1993)[denial of marriage licenses to same-sex applicants constituted prima facie denial of equal protection under state’s constitutional equal protection clause].

⁴ Defense of Marriage Act. 1 U.S.C. § 7 [defining marriage for purposes of federal law as a union of a man and woman]; 28 U.S.C. § 1738C [providing that no state need recognize a same-sex marriage authorized by another state].

⁵ Vt. Stat. Ann., Tit. 15, §§ 1202-1206 (2005); Conn. Act 05-10 (Reg. Sess.) (2006).

⁶ Haw. Rev. Stat. § 572C-1 (2005); Cal. Fam. Code, § 297.5 (West Supp. 2005); N.J. Stat. §§ 26:8A-1 - 26:8A-13 (2006).

⁷ Civil Marriage Act, 2005 S.C. ch. 33 (Can.) (July 20, 2005).

⁸ Belgium, Spain, South Africa, The Netherlands.

⁹ A.L.I. PRINCIPLES OF THE LAW OF FAM. DISSOLUTION, § 6.03 (2002).

unions and domestic partnerships have put marriage and its would-be imitators back on the public and political agenda.

In the United States the public debate over same-sex marriage has in a special way focused public attention on the question of the nature of marriage. When the Supreme Judicial Court of Massachusetts ruled that same-sex couples have the right to obtain civil marriage licenses under the state constitution in *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003) the majority opinion contained numerous historical references. Chief Justice Marshall, writing the majority opinion, aptly commented that “[o]ur concern . . . is whether historical, cultural, religious or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry.”¹⁰

The *Goodridge* decision, the first by the highest court in any American state, recognized the right of same-gender persons to marry. In that ruling the Massachusetts court brought an edge to the national debate about the nature of marriage. This debate touched on the “historical, cultural [and] religious”¹¹ themes which are inherent in the way people think about marriage. This article examines these historical, cultural and religious aspects of marriage in the light of the continuing debate over the law governing marriage in the United States and elsewhere..

The decision by one state to recognize a form of marriage different from the traditional definition of marriage as “a legal union between one man and one woman as husband and wife”¹² was bound to encounter widespread controversy. So intense has been this debate that it ultimately led to the President of the United States actually supporting an amendment to the Constitution to limit marriage to the traditional definition.¹³ It reflects a debate among legal scholars about the issues that implicitly underlie the very concept of marriage even to the point where the American Law Institute suggests that the obligations of marriage might justly be imposed on persons living in non-marital cohabitation relationships unless they choose to contract out of such duties.¹⁴

This article attempts to provide some historical perspective which will assist in understanding the marriage debate. To those who argue that the nature of marriage is not subject to debate because it has forever been fixed since the evolution of human society I suggest that such a proposition is simply historically inaccurate. To those who argue religious belief is incompatible with tampering with the definition of marriage, I suggest

¹⁰ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 965, n. 29 (Mass. 2003) [Marshall, C.J.].

¹¹ *Id.*

¹² 1 U.S.C.A. § 7.

¹³ President George W. Bush, Radio Address, July 10, 2004, available at <http://whitehouse.gov/news/releases/2004/07/20040710.html> [urging an amendment to the United States Constitution]. See also, Mae Kuykendall, *The President, Gay Marriage, and the Constitution: A Tangled Web*, 13 WIDENER L. J. 799 (2004) [examining the views of President Bush on same-sex marriage]; 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 (2004) [critical of the responses of Massachusetts Governor Romney and President Bush to same-sex marriage].

¹⁴ A.L.I. PRINCIPLES OF THE LAW OF FAM. DISSOLUTION (2002), § 6:02.

that the lesson of history is that legal marriage has evolved into a civil union which is independent of its religious origins.

The Personal and Cultural View of Marriage:

When people live in a particular culture and in a particular period of time they often assume that marriage and family have always been identical to what they experience. For many individuals their own family life, their schooling and their religious beliefs often reinforce this construct. It is also difficult for some to acknowledge that marriage has changed throughout history or to acknowledge a view of marriage which differs from their own moral or religious convictions. Many believe that the state's definition of civil marriage should conform to their own personal experience of family life. For such people marriage and family life have remained static for centuries and cannot change.¹⁵ This is especially true when issues such as same-sex unions, polygamy, longterm cohabitation or domestic partnerships are raised..

Each human being has a photograph of what marriage means in his or her mind. It is understandably difficult for many to see any image as proper other than the one they developed in their own experiences. In this Article I ask the reader to consider whether his or her mental photograph which may be perfectly valid as a religious, moral or personal concept, is also necessarily relevant to the state definition of civil marriage.¹⁶ It may be easier for the reader to form an opinion on this question by considering whether throughout history marriage has actually changed, or whether it has remained static.

In some respects attempting to understand the meaning of marriage through history may be a retro-study. Today much of the academic study of family law has moved far beyond the concern about the form of the marital union. Instead of concerns about the technical form of a relationship, legal issues involving the family have today come to focus on substantive issues of personal partnerships, caregivers, implied and express contractual arrangements, wealth distribution, parentage and matters other than the legal status of adult couples.

A review of the literature of involving family law of a half century ago will demonstrate that modern scholarship represents an infusion of reality into current thinking. But as the debate over same-sex marriage has demonstrated the matter of marital status remains important. I don't suggest that it is even the most important issue confronting scholars of the family, but it has and will continue to have significant relevance for many and for society.¹⁷ But for many people the choice of living in a

¹⁵ See Stephanie Coontz, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* (2nd 2000) [political leaders continue to distort memories of family life and changes through historical mythologizing, giving specific examples].

¹⁶ See Charles P. Kindregan, Jr., *The Year of Same-sex Marriage: How it Happened*, in *2005 FAMILY LAW UPDATE* Chapter 1 (Laura Morgan, ed 2005) [discussing the various historical factors which impacted the development of civil marriage].

¹⁷ Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal*, *RONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE* 305 (Robin

marital status offers the advantage of commitment in a legally fostered and protected institution. For this reason alone consideration of the nature of marriage is important. I believe that the history of marriage has important lessons to teach us in how the law can evolve in regulating the family.

Is Marriage a Static Institution?

When the Supreme Judicial Court of Massachusetts announced that the state could not exclude same-sex couples from access to the license needed to enter a valid civil marriage¹⁸ in violation of the Massachusetts Constitution,¹⁹ it produced a political firestorm. Massachusetts Governor Mitt Romney denounced the decision by saying that it overturned “three thousand years of recorded history.”²⁰ Apparently the Governor, himself a Mormon, was oblivious to the fact that just a little more than a century earlier this nation was so intensely divided on the definition of marriage that it actually resulted in a small civil war.²¹ This struggle occurred because the Church of the Latter Day Saints initially refused to accept the majority view of marriage as restricted to a union between two people. It was only after decades of conflict that the Mormon Church finally accepted the majority idea that marriage must be a monogamous union, and then only after intense conflict with the federal government.

Fretwell Wilson, ed. (2006) (rejecting the argument that cohabitation should be legally treated as the equivalent of marriage on ground of practicality) and sources cited therein.

¹⁸ *Goodridge*, note 10, *supra*. The defendant Department of Public Health is charged by statute with enforcing the issuance of marriage licenses and keeping marriage records. See Mass.Gen.L. c. 17, § 4 (2003).

¹⁹ The decision was based on Articles 1, 6, 7 and 10 of the Massachusetts Constitution, providing for free and equal rights and liberties, the denial of title to community or public advantages by some over others, the need for government to protect the safety, prosperity and happiness of all and not for the private interest of one man, family or class of men, and the right of each individual to be protected in life, liberty and property according to law. The plaintiffs also asserted other provisions in the state constitution, but the defendant claimed they had been waived and the court did not consider them. Chief Justice Marshall wrote for the court, joined by Justices Ireland and Cowin. Justice Greaney concurred on the basis of the Equal Rights Amendment to the state constitution. The three dissenting judges, Justices Spina, Sosman and Cordy, all joined the dissenting opinions written by each of them, arguing that among other things the common law definition of marriage was not irrational, the decision has so extended due process that the meaning of due process has been distorted and that the majority has intruded into the legislative function of government by this decision.

²⁰ Frank Phillips and Rick Klein, *Lawmakers are divided on response*, THE BOSTON GLOBE, Nov. 19, 2003, p. A1, col. 5 [quoting Governor Romney]. The question of whether legal recognition of same-sex unions will harm traditional ideas about marriage quickly became a post-*Goodridge* element in the marriage debate; see Robert Justin Lipkin, *The Harm of Same-sex Marriage: Real or Imagined?* 11 WIDENER L. REV. 277 (2005) [while stating that same-sex couples should be allowed to marry as part of a compassionate normative environment the author also believes that legal recognition of same-sex marriage will do some harm to individuals who are committed to traditional male -female marriage].

²¹ In 1857 the United States Army was sent into the Utah Territory to end the Mormon government which was openly promulgating bigamous marriage, a view of marriage which the majority of Americans found objectionable. This started a dispute between the Church and the federal government which lasted almost a half century, and resulted in criminal convictions of Mormon leaders.

The early Republican Party argued that Congress had a duty to enforce the majority view of marriage through federal legislation.²² It took a Supreme Court decision enforcing the concept of monogamous marriage,²³ a congressional enactment revoking the charter of the Church of the Latter-day Saints,²⁴ and a federally mandated state constitutional prohibition on polygamy as a condition of the admission of Utah to the Union to finally compel the acceptance of monogamy as the legal form of state-sanctioned civil marriage.²⁵ The intense controversy over polygamy demonstrates that civil marriage has been the subject of disagreement and religious conflict,²⁶ throughout American history. No doubt it will also continue to be in the future.

Religion and Marriage:

The Western concept of marriage has been influenced by Judeo-Christian theology. However, over the course of legal history the civil construct of marriage has changed in significant ways and not always in conformity with its religious origins. Supreme Court Justice Sandra Day O'Connor has noted that "many religions recognize marriage as having spiritual significance."²⁷ Diverse religions have different concepts of marriage. Since for many people marriage is in part a religious institution it is important to distinguish between religious concepts and the law governing civil marriage. This is especially important in a democracy, where different religious beliefs flourish but one law governs all.

In the light of the criticism of the *Goodridge* decision²⁸ on same-sex marriage by many religious leaders the historical connection between religion and marriage has some relevance in understanding the evolution of modern civil marriage. Massachusetts Chief Justice Margaret Marshall acknowledged that "[m]any people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man

²² The first platform of the Republican Party urged that Congress had a duty to outlaw the "twin relics of Barbarism-Polygamy and Slavery" in the territories. See Don Fehrenbacher, *DRED SCOTT: ITS SIGNIFICANCE TO AMERICAN LAW AND POLITICS* 202 (1978).

²³ *Reynolds v. United States of America*, 98 U.S. 145 (1878) [affirming conviction of a man who had taken two wives in conformity with the teachings of his religion].

²⁴ *The Late Corporation of Jesus Christ of the Church of the Latter-day Saints v. United States of America*, 136 U.S. 1 (1890) [Court upheld legislation revoking the 1851 charter of the Church on grounds that a primary purpose of the Church was the promotion of polygamy].

²⁵ Utah Const., Art. III, § 1, providing "polygamous or plural marriages are forever prohibited."

²⁶ See Sarah Barringer Gordon, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA* 206 (2002) [noting the identification of Mormon and Roman Catholic "despotism," in the minds of many 19th Century Protestants]. As to the Mormon advocacy of polygamy Professor Gordon suggests that this rejection of the majority view is similar to the Catholic rejection of Protestant-dominated public schools, and that by instituting plural marriage the Mormons were challenging the "prevailing Protestant theories of child-rearing and education." *Id.* at 198.

²⁷ *Turner v. Safley*, 482 U.S. 78 at 95 (1986) [right of prisoners to marry].

²⁸ Jenna Russell, *Bishops call SJC decision "tragedy,"* BOSTON SUNDAY GLOBE, November 30, 2003, p. B1, col. 1 [Catholic Bishops call for mobilization against same-sex marriage ruling and urge support for constitutional amendment to reaffirm marriage as a union between one man and one woman]. See also, Michael Paulson, *Protestants weigh same-sex marriage,* BOSTON SUNDAY GLOBE, November 30, 2003, p. B10, col. 5 [describing internal debate in various denominations over the same-sex court decision].

and one woman, and that homosexual conduct is immoral.”²⁹ Given the historical evolution of marriage as a religious institution one must ask how contemporary ideas of marriage as a state licensed civil institution came about.

The origins of marriage at the dawn of civilization are obscure. Marriage may have evolved as a way of binding a male to a female and children, giving him a stake in the family unit. Maybe the family was also a means of dividing labor or providing protection against hostile enemies. But whatever the social reasons that marriage evolved as a form of family life it also took on religious meaning at a relatively early historical period.

The oldest extant religious text dealing with marriage is the Torah, the Five Books of Moses. “The LORD GOD said, ‘It is not good for man to be alone; I will make a fitting helper for him . . . Hence a man leaves his father and mother and clings to his wife, so that they become one flesh.’”³⁰ In time the institution of marriage came to be institutionalized in Jewish law, including prohibitions on incest³¹ and having “carnal relations with your neighbor’s wife”.³² It was also prohibited for a man to “lie with a male as one lies with a woman.”³³ No doubt these legal prohibitions had a practical civil function, but they were primarily religious in nature since they were attributed to “the LORD” who “spoke to Moses.”³⁴

While the texts quoted above suggest that marriage was viewed in ancient Hebrew society as something like modern monogamous marriage, the texts also cite other models of family life. For example, Jacob was married to Leah, and later also took Rachel as his wife, and later both women gave Jacob their maids as concubines.³⁵ However over centuries Jewish law evolved and in time monogamous marriage became the norm.

Christianity built on the Jewish concept of marriage, and viewed marriage as a religious act. In the Christian scriptures when Jesus is asked to explain marriage he quoted Genesis 2.24 and then added “so they are no longer two, but one. What therefore God has joined together, let no man put asunder”³⁶ Since Christian theology sees marriage as originating in God, it logically followed that eventually the church mandated the solemnization of marriage in a church and blessed by a priest before it attained validity. Tertullian, an early Father of the Christian Church, wrote in the second century that marriage not solemnized in a church was almost as bad as fornication.³⁷ The Christian churches taught that God is the author of marriage.³⁸ In 1215 Pope Innocent

²⁹ Goodridge, note 10, supra.

³⁰ Genesis, 2.18 and 2.24, from Jaroslav Pelikan (ed.), Sacred Writings-Judaism: The Tanakh [English translation] Genesis, 2.18 and 2.24 (1985).

³¹ Id., Leviticus, 18.6 to 18.18.

³² Id., Leviticus, 18.20. See also, Ezekiel, 16.38, referring to the “punishment of women who commit adultery.”

³³ Id., Leviticus, 18.22.

³⁴ Id., Leviticus, 18.1.

³⁵ The story is told in Genesis, chapters 29-30.

³⁶ Matthew 19.5 Revised Standard Version.

³⁷ Cited in Otto E. Koegel, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES, 11 (1922).

³⁸ For a modern formulation of this concept see the Second Vatican Council *Pastoral Constitution on the Church in the Modern World*, § 48, quoted in Austin Flannery (ed.), VATICAN COUNCIL II, 950 (1975)

III ordered that throughout the Christian world marriage banns must be published in church, and in 1563 the Council of Trent ordered that marriages had to solemnized in the presence of a priest.³⁹

Influenced by the established Church of England, Lord Hardwicke's Act⁴⁰ affirmed the religious nature of marriage by requiring that solemnization take place in a church.⁴¹ The English example is especially important since that legal system was imported into the American colonies. The Norman Conquest resulted in the evolution of both common law civil courts and separate ecclesiastical courts. While civil courts enforced the king's justice the ecclesiastical courts enforced the canon law, which included many matters affecting marriage. However, it was not until 1857, long after the American Revolution, that jurisdiction over marriage cases was transferred from the English ecclesiastical courts to the civil courts. While the many colonies were established by religious dissenters,⁴² and ecclesiastical courts based on the Church of England model were rare, the substantive law of marriage which had evolved in the ecclesiastical courts was imported into what later became the United States.

The civil law came to reflect the religious English view of marriage as a permanent monogamous union of one man and one woman. Under English law the wife was subject to her husband, i.e. under the disabilities of coverture; judicial divorce not sanctioned.⁴³ But Colonial society, influenced by Protestant religious dissenters,⁴⁴ considered marriage as a "civil thing"⁴⁵ rather than a purely religious relationship notwithstanding that marriage in America had religious roots in the Judeo-Christian tradition.

Over time this common law view of marriage gradually evolved further away from its religious roots. This evolution included the adoption of the Married Women's Property Acts which abolished common law disabilities of the married women.⁴⁶ In ecclesiastical

["God is the author of marriage"]. While the Protestant reformers did not accept the Roman Catholic doctrine of sacramental marriage, they did teach that marriage is from God. This Judeo-Christian view of marriage as divinely inspired influenced the law of marriage in the United States. "Anywhere on the side and shifting spectrum of Protestantism in the early republic, from deism to Anglicanism, the basic Christian beliefs about marriage were in place." Nancy F. Cott, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION*, 11 (2000).

³⁹ Koegel, note 37 supra. at 11-13.

⁴⁰ 26 Geo. II, c 33.

⁴¹ Homer H. Clark, Jr., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*-2ND ed., Vol. 1, § 2.1(1987).

⁴² The Pilgrims in the Plymouth Bay Colony, the Puritans in the Massachusetts Bay Colony, Catholics in Maryland, Swedish Lutherans in Delaware and later Methodists and Baptists in Georgia are examples of American areas populated by people who did not accept the authority of the Church of England.

⁴³ Charles P. Kindregan, Jr. and Monroe L. Inker, *FAMILY LAW AND PRACTICE*-3RD ed., § 1:3 (2003) and authorities cited therein.

⁴⁴ For a summary of Protestant views on same-sex marriage see *Protestant Formulations* in Lynn D. Wardle et al. (eds.) *MARRIAGE AND SAME SEX UNIONS*, 52-55 (2003).

⁴⁵ Charters and General Laws of the Colony and Province of Massachusetts Bay, 152 (1814).

⁴⁶ Massachusetts became the first state to enact a true Married Women's Property Act, which today is Mass.Gen.L. c. 209, §§ 1-13 (2003). The original statute was modest in its effect judged by modern standards; see Joseph L. Warren, *Husband's Right to Wife's Services*, 38 HARV. L. REV. 421, 622 (1925) [legislation governing rights of married women were only enacted piecemeal]. The common law

law the disability of a married woman was based on the Biblical concept that husband and wife are “one flesh”⁴⁷ The English religious tradition was that marriage was permanent, i.e. not dissolvable by divorce,⁴⁸ but this was abandoned in America before divorce was legally permitted in England. Massachusetts by its Constitution provided for divorce in 1780⁴⁹ whereas it was not until three quarters of century later that English law authorized divorce.⁵⁰

Attempts to overturn the traditional Christian tradition of monogamous marriage took place in the last half of the 19th Century. Although such attempts produced much friction and political debate they were unsuccessful.⁵¹ It was the religious teaching of the Mormon founder Joseph Smith,⁵² which brought on this conflict. It ended only after the imprisonment of polygamous Mormon leaders and the dissolution of the Church’s charter by federal legislation on the grounds that the Church was a criminal enterprise promoting polygamy.⁵³

The Sunni Muslim religious tradition allowing polygamous marriage had so little influence in the United States that the Supreme Court of the United States denounced it as “almost exclusively a feature of the life of Asiatic and African people.”⁵⁴ Apparently the views of such “foreign” people were not to be considered because they differed from the predominant Judeo-Christian teachings on marriage which existed among the Euro-American majority. Equally unknown among Americans is the Muslim Shi’i allowance

disabilities of married woman included her husband’s right to own her personal property, his right to use and control her real estate, inability of a married woman to contract with others or with her husband, to sue her husband in tort, to sue others in tort or contract without joining her husband etc. For a 19th Century legal criticism of these disabilities see George O. Ernst, *THE LAW OF MARRIED WOMEN IN MASSACHUSETTS*-2nd ed. (1897). As to repeal of these disabilities see Clark, note 41, supra, at § 8.2.

⁴⁷ Genesis, 2.24.

⁴⁸ Civil divorce was not made legal in England until the enactment of the Matrimonial Causes Act of 1857, 20 and 21 Vict. C. 85.

⁴⁹ Mass. Const. Pt. 2, Ch. 3, Art. V [providing for causes of divorce to be heard by the governor and the council until the legislature would authorize grant of divorce by the judiciary].

⁵⁰ See Clark, note 41, supra.

⁵¹ The best modern account of these events is found in Gordon, note 26, supra.

⁵² Joseph Smith’s asserted divine revelation was contained in the *Revelation on Celestial Marriage*, which was based in part on the bigamous example of Abraham (who of course is revered alike by Jews, Christians and Muslims). Brigham Young actively promoted the practice of polygamy. While the polygamy debate constituted the most famous debate involving religious beliefs and marriage, the issue sometimes still arises in the courts. See, for example, *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) in which the court upheld the right of a state attorney general to revoke a job offer which had been made to a female attorney when the official learned that she had married another woman in a Reconstructionist Jewish ceremony. The court rejected the woman’s argument that this interfered with her freedom of religion. See also, Mark Strasser, *Same-sex Marriage and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees*, 33 LOY. U. CHI. L. REV. 597 at 616-619 (2002) [discussing the implications of the *Shahar* decision].

⁵³ See Gordon, note 26, supra.

⁵⁴ *Reynolds v. United States*, 98 U.S. 145 at 164 (1878). The Court also noted that the marriage laws of England were formed and enforced in the church courts. *Id.* at 164-165.

of temporary marriage.⁵⁵ However, the Islamic Koran forbids homosexuality expressly,⁵⁶ making it very unlikely that Muslims would approve same-sex relationships. Other religious concepts of marriage, such as those of Hinduism, also developed independently of western influences and unlike Christianity had no impact on the development of civil law in the United States.⁵⁷

Reflecting on these historical considerations I have concluded that in a religiously diverse society such as the United States we must be careful not to allow religious views to be incorporated into the law of civil marriage. In part this is because of the extreme divergence of deeply felt values by those who see traditional marriage as bedrock religious belief which makes it almost impossible for religion to interact with purely civil concepts of the family. Certainly in a democracy religious people must be allowed to participate in the process by which laws are made. One possible solution may be for law to withdraw from the determination of what constitutes a marriage and to leave that to the churches and individuals.⁵⁸ My conclusion is the opposite, i.e., marriage should be defined solely as a civil institution whose rights, liabilities and status should be defined by law except that solemnization of marriage in a religious ceremony should continue to be available for those who wish that option. Stated simply, in defining civil marriage and its providing for its legal consequences, the role of law should not only be paramount, it should be free from the dictates of religion except to the extent that individual spouses choose to live by religious dictates.

The Common Law Marriage Challenge to Formal Recorded Ceremonial Marriage:

Marriage gradually evolved over the centuries from a religious status to a civil status in English and American law. But this movement was uneven, and near the end of the century the Supreme Court of the United States was still equating marriage with Christian doctrine. In the *Davis* case in 1890 Justice Field wrote that there had been “sects which denied as part of their religious tenants that there should be any religious tie, and advocated promiscuous intercourse” and upheld the government’s “punitive power” to compel marriage conformity to the view of “the Christian world in modern times.”⁵⁹

But while the Supreme Court was promulgating the Christian view of marriage it was at the same time undermining a traditional religious concept promulgated both by the Council of Trent and the Church of England, i.e. that valid marriage depends on solemnization. In 1877 the Court entered a remarkable judgment recognizing informal or

⁵⁵ Shahla Haeri, *LAW OF DESIRE-TEMPORARY MARRIAGE IN SHI’I IRAN* (1989) [explaining the Shi’i doctrine of temporary marriage, which is still legal in Iran].

⁵⁶ Koran, 7:80-81, 26:165.

⁵⁷ See, for example, *Sharma v. Sharma*, 667 P.2d 395 (Kan.App. 1983) [in husband’s divorce action the court declined to entertain wife’s argument that a marriage cannot be dissolved by civil divorce if it would contravene Hindu law and religious belief].

⁵⁸ Patricia A. Cain, *Imagine There is No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996).

⁵⁹ *Davis v. Beason*, 133 U.S. 333, 343 (1890). Professor Gordon, note 26, supra, at 232, wrote that the antipolygamists believed that constitutional doctrine had to be based on a “Christian foundation.”

so-called common law marriage.⁶⁰ Common law marriage means that the union is not solemnized and recorded in a church or government record but is instead created by the consent and cohabitation of the marrying couple.⁶¹

The practice of solemnizing marriage in England originated in ecclesiastical law. Massachusetts, like most states, never required a religious solemnization.⁶² But it also true that Massachusetts, unlike some states, has always rejected legal recognition of informal unions.⁶³ However, the 1877 U.S. Supreme Court decision affirming the right of people to legally create informal marriages moved the concept of marriage away from one of its religiously-based premises. The Court's ruling marked a substantially new interpretation of marriage. Certainly it was a change from the prior law which in many states held that compliance with marriage licensing and formalities was the only way to create a valid marriage.⁶⁴ While most (but not all) states did eventually expressly prohibit common law informal marriages, the Supreme Court by its ruling took a significant step away from identification of civil marriage with its historical origins in religious theory.

From Mandate for to Rejection of Bans on Interracial Marriage:

Most American colonies had laws prohibiting marriages between persons of different races, and after the Declaration of Independence many states continued to ban such unions.⁶⁵ Stated simply, American law for many decades accepted the proposition that legal marriage between persons of different races was not possible.⁶⁶ Some saw the prohibition on interracial marriage as an essential element of marriage, mandated by

⁶⁰ *Meister v. Moore*, 96 U.S. (6 Otto) 76 (1877) [ruling that the Michigan statute governing formalities of marriage was merely directory and did not invalidate an informal marriage to which the parties consented].

⁶¹ See Koegel, note 37, *supra* [explaining common law informal marriage] and Stuart J. Stein, *Common Law Marriage: Its History and Certain Contemporary Problems*, 9 **J. Fam. L.** 271 (1970) [development of the common law marriage doctrine].

⁶² *Commonwealth v. Munson*, 127 Mass. 459, 460-466 (1879).

⁶³ *Milford v. Inhabitants of Worcester*, 7 Mass. 48 (1810) [consent marriage exchanged by a couple in a tavern without other solemnization was not a valid marriage]. The Massachusetts Bay Colony had earlier by statute prohibited non-solemnized marriages; Mass.Col.Laws 68 (ed. 1660).

⁶⁴ Informal marriage appears to have first been recognized by the New York court in *Fenton v. Reed*, 4 Johns 52 (N.Y. 1809) and thereafter in a few state decisions until the Supreme Court decided *Meister*, note 60, *supra*, in 1877.

⁶⁵ See Peter Wallenstein, *TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE AND LAW-AN AMERICAN HISTORY* (2002) for an extensive review of the statutes governing inter-racial marriage in the United States from the enactment of the first miscegenation statute in colonial Maryland to the repeal of the last such statute in Alabama in the year 2000.

⁶⁶ Races were classified in many different ways including American Indian, Asian and Whites and Blacks and various degrees of mixed races. The practical difficulty with such classifications is illustrated by the dilemma which Virginia faced in enacting a miscegenation statute in 1924 to exempt the socially prominent descendants of the interracial marriage of the Caucasian John Rolfe and the Native American Pocahontas by declaring them to be legal as long as there was no mixture of African blood. *Id.* at 139.

God.⁶⁷ Abraham Lincoln rejected interracial marriage in the famous Lincoln-Douglas debates,⁶⁸ and in this he reflected the then-current view about marriage.

However over a century after the Civil War the legal ban on interracial marriage as integral part of marriage law was abolished by judicial mandate. The Supreme Court of the United States in 1967 ruled that a state could no longer prohibit interracial marriages.⁶⁹ That does not seem remarkable today, but in the light of the prior history of marriage in the United States it was a remarkable development. When the Supreme Court in *Loving* ended legal miscegenation it also opened the door for consideration of state bans on other kinds of unions, including potentially even same-sex marriage. If a court on a constitutional basis could overturn a state's choice to outlaw interracial marriage commentators began to ask whether a court could also overturn a state's ban on a person's choice to marry another of the same gender.⁷⁰

In the *Loving* decision Chief Justice Earl Warren wrote that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. "Marriage is one of the 'basic civil rights of man' fundamental to our very existence and survival."⁷¹ While written in the context of interracial marriage, this concept has relevance to the issue of whether the state can prohibit a person from marrying another person because he or she is of the same gender.

In both the Massachusetts court's opinion upholding a state constitutional right of same-gender couples to marry⁷² and the concurring opinion⁷³ the judges approvingly cite and quote Warren's language. Noting that "history must yield to a more fully developed understanding of the invidious quality of the discrimination" the court drew a parallel between the state's denying marriage to a couple based on "skin color" and doing so based on "sexual orientation."⁷⁴

Evolution of the Non-traditional Family:

There will always be discord between civil and religious views of marriage in a democratic society which must accommodate people with numerous religious differences. Many Americans today continue to accept and support the traditional Judeo-Christian view of marriage. But many others live in alternative non-traditional families.

⁶⁷ The Supreme Court of Virginia declared that interracial marriages are "so unnatural that God and nature seem to forbid them." *Kinney v. Commonwealth*, 30 Grattan (71 Va.) 858 at 869 (1878).

⁶⁸ Wallenstein, note 65, *supra*, at 54-57.

⁶⁹ *Loving v. Virginia*, 388 U.S. 1 (1967).

⁷⁰ See, for example, the arguments advanced in Mark Strasser, *LEGALLY WED: SAME SEX MARRIAGE AND THE CONSTITUTION* (1997); James Trosino, *American Wedding: Same Sex Marriage and the Miscegenation Analogy*, 73 *BOSTON U. L. REV.* 93 (1993) [the same arguments which were used against interracial marriage are now being used against same-sex marriage].

⁷¹ *Loving v. Virginia*, note 69, *supra*, at 12.

⁷² *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 948-970 (Mass. 2003) [Marshall, C.J.].

⁷³ *Id.*, 798 N.E.2d at 970-974 [Greaney, J.].

⁷⁴ *Id.*, 798 N.E.2d at 958. See also, Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 *HARV. C.R.-C.L. L. REV.* 255 (2002) [drawing parallel between opposition to legalization of interracial marriage and same-sex marriage].

The latter include various kinds of alternative family structures which exist outside of traditional marriage, and have achieved legal recognition in varying degrees. While the existence of alternative forms of non-marital life may seem irrelevant to the same-sex-marriage issue they actually are closely related.

Some have seen the legal recognition of non-marital unions based on contract or equitable theories as subversive of marriage itself.⁷⁵ Still others have argued that since many forms of family life have been widely accepted in society it makes no sense for the law to refuse to provide any standards except those which evolved to govern the traditional marital nuclear family.⁷⁶ These alternatives to the marital nuclear family are so common today that they may be properly called “the new family.”⁷⁷ Yale historian Nancy Cott has observed that today American state courts focus primarily on family support issues, and as a result the “formality and conformity of marriage-like arrangements matter far less in the law now than in the past, because support can be traced through cohabitation and biological parenthood.”⁷⁸

Massachusetts acknowledged the growth of alternative non-traditional families a decade before the court’s decision on same-sex marriage. A decade before *Goodridge* Massachusetts courts interpreted the adoption statute to permit the adoption of a child by a same-sex couple. In doing so the Court recognized a non-traditional family based on the need of the child not to be left a “legal limbo for years while their future is disputed in the courts.”⁷⁹

Five years before the same-sex marriage decision in *Goodridge* the Supreme Judicial Court recognized the right of non-married cohabiting couples to enter into binding legally-enforceable contracts respecting their property and financial interests.⁸⁰ In the *E.N.O.* case the Massachusetts Court ruled that under its equity jurisdiction a non-parent former domestic partner of the biological mother had standing to seek visitation with a child who was not her own:

⁷⁵ See, for example, the decision of the Supreme Court of Illinois in *Hewitt v. Hewitt*, 394 N.E.2d 1204 (1979) refusing to enforce a domestic partnership contract between an unmarried man and woman because to do so would confer a legal status on unmarried cohabitation].

⁷⁶ For example, in allowing visitation to a non-parent former same-sex domestic partner of the mother a Pennsylvania court noted that “[i]n today’s society, where increased mobility, changes in social mores, and increased individual freedom have created a wide spectrum of arrangements filling the role of the traditional nuclear family, flexibility in the application of standing principles is required in order to adapt those principles to the interests of each particular child.” *J.A.L. v. E.P.H.*, 682 A.2d 1314 at 1320 (Pa.Super. 1996).

⁷⁷ The phrase “new family” was coined by Professor Mary Ann Glendon of Harvard Law School. See Glendon, *THE NEW FAMILY AND THE NEW PROPERTY* (1981).

⁷⁸ Nancy F. Cott, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION*, 213 (2000). See also, Symposium, *Unmarried Partners and the Legacy of Marvin v. Marvin*, 76 NOTRE DAME L. REV. 1261 (2001) [exploring various legal remedies applied to issues involving unmarried cohabitation over the last three decades].

⁷⁹ *Adoption of Tammy*, 619 N.E.2d 315 at 320 (Mass. 1993).

⁸⁰ *Wilcox v. Trautz*, 693 N.E.2d 141 (Mass. 1998) [enforcing property agreement made by a cohabiting man and woman].

A child may be a member of a nontraditional family in which he is parented by a legal parent and a de facto parent. The recognition of de facto parents is in accord with notions of the modern family. An increasing number of same gender couples, like the plaintiff and the defendant, are deciding to have children. It is to be expected that children of nontraditional families, like other children, form relationships with both persons who function as parents.⁸¹

Dissenting in *E.N.O.*, Justice Charles Fried, a former Harvard law professor and Solicitor General of the United States, correctly predicted that by this decision the Massachusetts Court had opened the door to the recognition of same-sex marriage:

What the court must be saying is that a contract of union between a same-sex couple creating expectations of mutual care for a child stands on a special footing. The subject of same-sex unions is difficult, controversial, and important. The court's decision is a clear step in granting legal force to such unions. If that is what the court intends, it should say so directly.⁸²

The Changing Law of Marriage:

That marriage was not a static institution gradually became clear over the century preceding the controversy over same-sex marriage. While it may be distressing to those who believe that religion should structure civil society, the reality is that in modern American society civil state-sanctioned marriage has long been detached from its religious origins. Laws which criminalized such "sinful" conduct as abortion, contraception and sodomy have been declared unconstitutional. Laws prohibiting other "sins" such as blasphemy, adultery and fornication have either been repealed or are not enforced. Laws governing marital dissolution have changed in every generation over the last century, shifting the focus from marital fault to the resolution of the practical economic, social and child-centered issues.

Churches and religious leaders opposed the enactment or liberalization of civil divorce laws as being destructive of marriage.⁸³ The religious aspect of this argument was based on the theological premise of the permanence and indissolubility of marriage. But over the course of a century and a half the legislatures of each state enacted divorce laws, and then gradually liberalized them.⁸⁴ Professor Clark, the leading family law scholar noted that during the last half of the 20th Century marriage and divorce law had undergone a remarkable change even between the first and second edition of his treatise.

⁸¹ *E.N.O. v L.M.M.*, 711 N.E.2d 886 at 891 (Mass. 1999).

⁸² *Id.*, at 898 [Field, J., dissenting].

⁸³ See Gordon, note 26, *supra*, at 172-181 for an excellent discussion of the anti-divorce movement in 19th Century America. So strong was the anti-divorce movement that some political leaders advocated a federal marriage law restricting marital termination. With the onset of the Civil War Presidents Buchanan and Lincoln both argued that the federal union was like a marriage, i.e. not dissolvable by the parties. *Id.* at 178.

⁸⁴ For an analysis of legislation changing the divorce laws between the adoption of the Massachusetts Constitution in 1780 and the present see Charles P. Kindregan, Jr. and Monroe L. Inker, *FAMILY LAW AND PRACTICE*, 3RD ed. (2003), § 1:6-1:8.

These changes he acknowledged reflected radical changes in social attitudes about marriage and divorce.⁸⁵ Divorce was made easier for people to obtain by the enactment of no-fault divorce laws in most states,⁸⁶ abolition of the common law prohibition on husband-wife contracts, the introduction of equitable property division, increased enactment of uniform state and federal laws governing child custody and child support, and other statutes which revolutionized family law in America.

The very nature of marriage seems to be up for debate today. It has been said that in the United States today different visions of marriage are in competition with each other.⁸⁷ Some have proposed that individual couples should be given greater freedom of choice to define the law that will apply to their marriage.⁸⁸ The debate over the availability of easy divorce is seen by some as negatively affecting marriage and has given birth to the idea of “covenant marriage” which would make divorce more difficult to obtain if the marrying couple commit to such a marital union.⁸⁹ Where such a concept is embodied in law it would recognize two different and competing concepts of marriage in a state enacting such a law, although its recognition in other states may cause legal issues of recognition.⁹⁰ Even advocates of legalization of same-sex marriage have expressed concern about the “dominance of narrowly focused marriage advocates”⁹¹ in the long run.

The Legalization of Same-sex Marriage in One American State:

When the same-sex marriage issue came before the Supreme Judicial Court of Massachusetts these remarkable changes in civil marriage law which had taken place over more than a century of American legal history played a significant role in the court’s analysis. The Court noted that a quarter century earlier Massachusetts had abrogated the “doctrine immunizing a husband against certain suits because the common-law rule was

⁸⁵ Clark, note 41, supra, Vol. I, § 13.1 at 699.

⁸⁶ See Herbie DiFonzo, *No Fault Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519 (1994) [changing divorce from fault based grounds to no fault grounds created a culture of divorce on demand]. So alarmed are some people about the liberalization of divorce laws that they have supported proposed changes in the law of marriage. These proposed changes would enact an alternative form of marriage called covenant marriage. See Elizabeth S. Scott, *The Social Norms and the Legal Regulation of Marriage*, 86 VA L. REV. 1901 at 1959 (2000) [discussion of covenant marriage as an alternative to now extant civil marriage in order to reduce the potential for divorce].

⁸⁷ Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773 (2002) [conflict between the view that marriage is intended to promote a private relationship and the view that marriage is a normative social institution].

⁸⁸ See Brian H. Bix, *Choice of Law and Marriage: A Proposal*, 36 FAM. L. Q. 255 (2002) [suggesting that marriage applicants be given a choice of applicable law from a legal menu].

⁸⁹ Katherine Shaw Spaht, *Whats Become of Louisiana’s Covenant Marriage Through the Eyes of Social Scientists*, 47 LOY. L. REV. 709 (2001) [although there has been some criticism of covenant marriage in Louisiana it has generally been successful in giving couples the choice of conventional marriage or covenant marriage].

⁹⁰ Peter Hay, *The American Covenant Marriage in the Conflict of Laws*, 64 LA. L. REV. 43 (2003) [questioning the application of divorce laws in application to a couple who entered a covenant marriage in another state].

⁹¹ Julie Shariro, 8 N.Y. CITY L. REV. 657, 678 (2005) [expressing concern about the impact of efforts to legal same-sex marriage could have on the lesbian community].

predicated on ‘antediluvian assumptions concerning the role and status of women in marriage and in society.’”⁹²

The *Goodridge* opinion also noted the changes which have taken place in domestic relations law “since at least the middle of the Nineteenth Century,” including “the expansion of the rights of married women and the introduction of ‘no fault’ divorce.”⁹³ And Chief Justice Marshall added optimistically that [m]arriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution”⁹⁴ after the advent of same-sex marriage. These comments clearly reflect the majority’s conviction that civil marriage is not unchangeable, but has in fact frequently changed throughout the ages. This in turn led the court to the crucial issue at hand, namely whether the common law definition of marriage can be challenged based on the state constitutional mandate of equality before the law, liberty and due process of law.

Pre-Goodridge Challenges to the Law Prohibiting Issuance of Marriage Licenses to Same-sex Couples:

Massachusetts was not the first state to confront the question of whether a state can be required to issue marriage licenses to persons of the same-sex. Early cases in Kentucky⁹⁵ and Washington⁹⁶ ruled that marriage is a union of a man and woman and therefore the state had no constitutional mandate to issue licenses to same-sex couples.

In 1993 the Supreme Court of Hawaii ruled that under the state constitution’s equal protection clause a denial of a marriage license to a same-sex couple was presumably unconstitutional unless the state established a compelling reason for doing so.⁹⁷ The lawsuit was later dismissed⁹⁸ after the Hawaiian Constitution was amended to allow the legislature to define marriage as between a man and woman.⁹⁹ However, for the first time in American law the legislature of Hawaii enacted a statute which gave domestic partners many of the benefits which the law accorded to married couples.¹⁰⁰

On the last day of the 20th Century the Supreme Court of Vermont ruled that the common benefits clause of the state constitution¹⁰¹ required the state to provide qualified same-sex couples with the same legal benefits accorded in marriage to opposite-sex

⁹² *Goodridge*, note 72, *supra*, at 967, citing and quoting in part *Lewis v. Lewis*, 351 N.E.2d 526 (Mass. 1976).

⁹³ *Goodridge*, *id.* at 967.

⁹⁴ *Id.*

⁹⁵ *Jones v. Halliahhan*, 501 S.W.2d 588 (Ky.Ct.App. 1973) [two women denied a license].

⁹⁶ *Singer v. Hara*, 522 P.2d 1187 (Wash.App. 1974) [two men denied a license].

⁹⁷ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

⁹⁸ *Baehr v. Miike*, 994 P.2d 566 (1999).

⁹⁹ Haw. Const., Art. 1, § 23. See also, Symposium, *Same-sex Marriage: The Debate in Hawaii and the Nation*, 22 U. HAWAII L. REV. 1 (2000) [discussing constitutional and legislative developments in Hawaii relating to same-sex unions].

¹⁰⁰ Haw. Rev. Stat. § 572C-1 (2003) [creating same-sex domestic partnerships].

¹⁰¹ Vt. Const. ch. I, art 7.

couples.¹⁰² The Vermont legislature responded by authorizing same-sex couples to enter civil unions, the partners in which will enjoy a lengthy list of benefits which previously were only available to married couples.¹⁰³

The Hawaii and Vermont decisions were based on principles of equal treatment under law. However, an Alaskan trial court went further and in 1998 ruled that the right of privacy guaranteed in the state constitution gave same-sex couples the right to choose life partners.¹⁰⁴ Thereafter the Constitution of Alaska was amended to define marriage as a relationship between a man and a woman.¹⁰⁵

The various lawsuits challenging the exclusion of same-sex couples from marriage, especially the Hawaii decision, created a national debate about the issue. Proponents of “traditional” marriage argued that some form of national legislation was needed before some state actually legalized same-sex marriage which might be entitled to full faith and credit under the United States Constitution.¹⁰⁶ In response to these concerns Congress enacted the Defense of Marriage Act, which provides that no State, territory, possession or Indian tribe “shall be required to give effect to an public act, record or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as marriage under the laws of such State, territory, possession or tribe, or to a right or claim arising from such relationship.”¹⁰⁷ Many states enacted state legislation exempting themselves from the need to give recognition to same-sex marriages recognized elsewhere. It is highly probable in the coming years that constitutional challenges to the federal and state laws of these kinds will take place.¹⁰⁸

As of the time of the writing of this article Massachusetts still stands alone among American states in recognizing same-sex marriage. This is not to say that there is no ferment over the issue. Major decisions by divided panels in the New York Court of Appeals¹⁰⁹ and the Supreme Court of Washington¹¹⁰ have declined to mandate state recognition between persons of the same gender.

¹⁰² Baker v. State, 744 A.2d 864 (Vt. 1999). See also, Robert F. Williams, *Old Constitution and New Issues: National Lessons from Vermont’s State Constitutional Case on Same-Sex Couples*, 43 B.C. L. REV. 73 (2001) [under the federal system Baker decision is model for other state courts].

¹⁰³ Vt. Stat. Ann., Tit.15, §§ 1202-1206 (2003).

¹⁰⁴ Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Super 1998).

¹⁰⁵ Alaska Const., Art. I, § 25.

¹⁰⁶ U.S. Const. Art. 4, § 1.

¹⁰⁷ Defense of Marriage Act, 28 U.S.C. § 1738C (2003). Congress also enacted into law a definition of marriage as “between one man and one woman as husband and wife” for purposes of interpreting the words marriage or spouse in the federal statutes; 1 U.S.C. § 7 (2003).

¹⁰⁸ For discussion of potential challenges to the Defense of Marriage Act see Mark Strasser, *Some Observations about DOMA, Marriages, Civil Unions and Domestic Partnerships*, 30 CAP. U. L. REV. 363 (2002); Patricia A. Cain, *Federal Tax Consequences of Civil Unions*, 30 CAP. U. L. REV. 387 (2002); Veronica C. Abreu, *The Malleable Use of History in Substantive Due Process Jurisprudence: How the “Deeply Rooted” Test Should Not be a Barrier to Finding the Defense of Marriage Act Unconstitutional under the Fifth Amendment Due Process Clause*, 44 B.C. L. REV. 177 (2002).

¹⁰⁹ Hernandez v. Robles, 2006 Slip Op. 05239 (N.Y. 2006).

¹¹⁰ Anderson v. King County, 138 P.2d 963 (Wash. 2006).

While the *Goodridge* model failed to find widespread acceptance in the years following that decision, some states moved toward accepting the premise that the advantages of marriage ought to be available to same-sex couples. The Connecticut legislature enacted a bill conferring the rights of same-sex couples to enter a civil union¹¹¹ and California recognized registered domestic partnerships,¹¹² both of which treat qualifying non-marital partnerships as the practical equivalent of marriage. In addition to same-sex partners California permits different-sex couples over the age of 62 to choose a registered domestic partnership as an alternative to formal marriage. New Jersey also recognizes domestic partnerships for both same-sex and opposite-sex couples.¹¹³ It may be expected that in time different state experiments with marriage and its equivalent will gradually evolve in the United States and other Western countries.¹¹⁴

The Canadian Experience:

The debate over the nature of marriage became intense in Canada when in 1999 the House of Commons adopted a resolution defining marriage as “the union of one man and one woman to the exclusion of all others.”¹¹⁵ The Province of Alberta amended its law to define marriage in accord with the traditional concept as a union of a male and female.¹¹⁶ But the issue continued to be the subject of debate in Canada, while the focus shifted to the courts. Canada, like the United States, follows the common law. It also has a constitutional scheme which like both the United States and Massachusetts embodies principles of equality. Thus developments in Canada regarding constitutional interpretations of marriage law held considerable interest for American lawyers and judges. The Massachusetts court in *Goodridge* noted that “Canada, like the United States, adopted the common law of England that civil marriage is ‘the voluntary union for life of one man with one woman, to the exclusion of all others.’”¹¹⁷ The Massachusetts Court then cited a Canadian precedent holding that same-sex couples cannot be excluded from marriage.

The Court of Appeal for Ontario had ruled that the common law definition of civil marriage violated § 15.1 of the Canadian Charter of Rights and Freedoms¹¹⁸ because it

¹¹¹ Conn. Acts, 05-10 (Reg. Sess.) (2005).

¹¹² Cal. Fam. Code, § 297.5 (2006). It is noteworthy that the California legislature became the first state legislature to approve a bill legalizing same-sex marriage, but it was vetoed by the governor.

¹¹³ N.J. Stat. §§ 26:8A-1 - 26:8A-13 (2006) [recognition of domestic partnerships]. § 26:8A-2 (2006) provides that domestic partners have the same rights and benefits accorded married couples, except that certain health and pension benefits are available only to same-sex couples who are not able to marry.

¹¹⁴ See, Note, *Developments in the Law-Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004 (2003).

¹¹⁵ Canadian House of Commons Resolution of June 8, 1999.

¹¹⁶ Alberta Marriage Act R.S.A. 2000 c. M-5, at

<http://www.canlii.org/ab/laws/sta/m5/20060115/whole.html> (last visited September 2, 2006).

¹¹⁷ *Goodridge*, note 72 at 953-954. This definition was formulated in an English decision, *Hyde v. Hyde* [1861-1873] All E.R. 175 (1866).

¹¹⁸ Can. Const. (Constitution Act 1982) pt. I (Canadian Charter of Rights and Freedom) § 15.1 provides that “[e]very individual is equal before and under the law and has the right to equal protection and equal benefit based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

discriminates by excluding same-sex couples from marriage.¹¹⁹ A similar ruling from the British Columbia Court of Appeal¹²⁰ also decided that the Charter invalidates the same-sex marriage prohibition inherent in the common law rule of marriage.

A trial court decision in Quebec ruled in favor of same-sex marriage notwithstanding that the legislature had enacted a civil union bill giving same-sex couples the benefits of marriage but without conferring the right to enter the marital state.¹²¹ The Quebec Court of Appeals upheld the ruling, and ordered that same-sex partners be able to marry immediately.¹²² Other Canadian courts soon reached similar results. The Yukon Territorial Supreme Court entered a novel ruling that since a number of other courts had ruled in favor of opening marriage to same-sex couples on constitutional grounds, and the Attorney General had declined to appeal those decisions, for Yukon to not accept the rulings would result in an unacceptable result that same-sex couples could be married in some parts of Canada and not in others.¹²³ Litigation followed in Nova Scotia, Saskatchewan, Newfoundland and Labrador, New Brunswick and the Northwest Territories, but action in Parliament soon made further court proceedings unnecessary.

A bill authorizing same-sex marriage throughout Canada passed both the House of Commons and the Senate and became law after receiving Royal Assent by the Deputy Governor General on July 20, 2005.¹²⁴ This effectively changed the common law definition of marriage which has been recognized in Canada for centuries to a civil marriage definition as a union of two persons.

Changing Norms in a Few Other Countries:

While developments affecting the definition of marriage in Canada would be most significant to Americans, given the similarity of our legal family law traditions, the evolution of same-sex marriage in other countries has taken place. In South Africa the Supreme Court of Appeal declared that under the Constitution the common law definition of marriage as between a man and woman must be revised to allow same-gender couples to marry, and this was affirmed in May 2005 in a ruling by the nation's highest court, the Constitutional Court.¹²⁵

¹¹⁹ *Goodridge*, note 72, supra, at 969 (Mass. 2003), citing *Halpern v. Toronto (City)*, 172 O.A.C. 276 (6/10/03) [exclusion of same-sex couples from marriage under the common law definition violates the Charter].

¹²⁰ *EGALE Canada, Inc. v. Canada (Attorney General)* (2003) B.C.J. No. 994, BC.C. LEXIS 2711 (May 1, 2003) [ruling that the common law definition of marriage which bars same-sex marriage violates § 15 of the Canadian Charter of Rights and Freedoms].

¹²¹ A trial court decision in the Superior Court of Quebec ruled that offering marriage benefits to same-sex partners under the civil union bill adopted unanimously by the L'assemble Nationale du Quebec (Bill 84) in 2002 under a scheme different from that afforded by marriage to heterosexual partners is a form of separate but equal which cannot be justified under the Charter. *Hendricks v. Quebec (Procureur General)* [Quebec Super. Ct., Dist. of Montreal] (No. 500-05-059656-007) [French] (Sept. 5, 2002).

¹²² *Catholic Civil Rights League v. Hendricks*, Quebec Ct. App., 19 March 2004, available in French at <http://www.canlii.org/qc/jug/qcca/2004/2004qcca10289.html> (last visited July 18, 2006).

¹²³ *Dunbar & Edge v. Yukon and Canada*, 2004 YKSC 54 (July 14, 2004).

¹²⁴ *Civil Marriage Act*, 2005 S.C. ch. 33 (Can.) (July 20, 2005).

¹²⁵ Michael Wines, *Same-Sex Unions to Become Legal in South Africa*, N.Y. TIMES, Dec. 2, 2005, A6.

The marriage debate has also flowed in Europe. Three European non-common law countries have also legalized same-sex civil marriage, notwithstanding that they have a religious tradition based on Calvinist or Catholic doctrine. They are Belgium,¹²⁶ the Netherlands¹²⁷ and Spain.¹²⁸ Other European and Latin American countries have joined in the debate about marriage, and chosen to confer some of the legal protections of marriage to non-married persons while continuing to reserve marriage as a special category. While legal recognition of polygamous marriage exists only in countries with a strong Islamic tradition it is likely that some western nations may begin to explore that possibility. While polygamous marriage is not recognized by Dutch law, a civil union cohabitation contract¹²⁹ among one man and two women was registered and the Minister of Justice rejected a request by a legislator that he challenge the legality of the union.¹³⁰ This ferment over the meaning of marriage and civil unions in various parts of the world shows little sign of abating and promises to continue to evolve in future years.

Massachusetts Changes the Definition of Marriage:

In *Goodridge* the Massachusetts court noted that the marriage-licensing statute¹³¹ does not define marriage. However, the legislative failure to specifically define marriage as a relationship between a man and woman did not support the plaintiff's argument that the judges could interpret the statute to include same-sex unions. In accord with common statutory interpretation the court ruled that the legislature in enacting a compulsory marriage-licensing law incorporated the common law definition of marriage as a union between persons of different genders.¹³² However, the court noted that a quarter century earlier the Massachusetts courts had abrogated a common law doctrine immunizing a husband from suit by his wife which had long been considered an inherent part of established marriage law.¹³³

The common law definition of marriage as a union between a man and woman was directly challenged by the plaintiffs in *Goodridge*. The Massachusetts Court was squarely faced with the question of whether the common law rule could be sustained consistent with the state constitution. Unlike some of the earlier cases in *Goodridge* the plaintiffs were not seeking equal benefits with those who enjoyed the benefits of legal

¹²⁶ The law was enacted effective January 30, 2003, and subsequent legislation in October 2004 allowed foreign nationals to enter same-sex marriages if one of the couple lived in Belgium for at least three months. <http://www.365gay.com/newscon04/10/1011045belgWed.htm> (last visited Sept. 21, 2006).

¹²⁷ Same-sex marriage became legal in the Netherlands on April 1, 2001 by an amendment to the Civil Code to allow marriage to take place between two different persons of the same sex.

¹²⁸ The Spanish Cortes Generales approved the legislation permitted persons of the same gender to marry each other on June 30, 2005, and the law was published with the assent of the King on July 2, 2005. See also, Jennifer Green, *Spain Legalizes Same-Sex Marriage*, WASH. POST, July 1, 2005, A14.

¹²⁹ Samenlevingscontract. See Paul Bellien, *First Trio "Married" in the Netherlands*, BRUSSELS J., Sept. 27, 2005, <http://www.brusselsjournal.com/node/301> (last visited Sept. 20, 2006).

¹³⁰ Paul Bellien, *Dutch Minister Not to Prevent Polygamy*, BRUSSELS J., Nov. 1, 2005, <http://www.brusselsjournal.com/node/421> (last visited Sept. 20, 2006).

¹³¹ Mass.Gen.L. c. 207 (2003).

¹³² *Goodridge*, note 72, supra, at 953-954.

¹³³ *Id.*, at 967.

marriage; they were seeking the right to marry itself. The majority ruled that restricting access to civil marriage only to opposite-gender couples offends the guarantee of equality before the law. Such a restriction was also held to offend the liberty and due process provisions of the state constitution.

The Massachusetts Court's constitutional analysis was anticipated in part by the United States Supreme Court decision in *Lawrence v. Texas*,¹³⁴ decided a few months before the *Goodridge*. In *Lawrence* the Court declared unconstitutional a Texas statute which criminalized sodomy even if taking place in private between competent consenting adults. Two men were arrested and charged with "deviate sexual intercourse, namely anal sex, with a member of the same sex (man)"¹³⁵ The Supreme Court granted certiorari to consider the defendant's challenges to their conviction on equal protection and due process grounds,¹³⁶ and to reconsider its earlier decision in *Bowers*¹³⁷ which had upheld a state's power to criminalize sodomy.

Justice Kennedy, writing for the majority in *Lawrence*, stated that the defendant's "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."¹³⁸ In reaching that conclusion Kennedy provided an historical analysis of the evolution of the legal history of privacy over the prior decades. "These references show an emerging awareness that liberty gives substantial protection to adult person in deciding how to conduct their private lives in matters pertaining to sex. '[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'"¹³⁹ In language which foreshadowed Marshall's due process analysis in *Goodridge*, Kennedy commented that the drafters of the due process clause "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."¹⁴⁰

Just as Justice Greaney concurred in *Goodridge* on equality grounds, so also in *Lawrence* Justice O'Connor concurred on grounds that the Texas sodomy statute discriminates against homosexuals. "Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'"¹⁴¹

¹³⁴ *Lawrence v. Texas*, 123 S.Ct. 2472(2003). See also, Cass R. Sunstein, What did Lawrence Hold? Of *Autonomy, Desuetude, Sexuality and Marriage*, U. Chicago Law and Economics, Olin Working Paper No. 196, SSRN: http://papers.ssrn.com/so13/papers.cfm?abstract_id=450160.

¹³⁵ *Id.*, at 2476

¹³⁶ *Lawrence v. Texas*, 537 U.S. 1044 (2002) [*cert. granted*].

¹³⁷ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹³⁸ *Lawrence v. Texas*, note 134, *supra*, 123 S.Ct. at 2484.

¹³⁹ *Id.*, at 2480, quoting in part *County of Sacramento v. Lewis*, 523 U.S. 833 at 837 (1998).

¹⁴⁰ *Id.*, at 2484.

¹⁴¹ *Id.*, at 2486, quoting in part *Romer v. Evans*, 517 U.S. 620 at 633 (1996) [O'Connor, J., concurring].

In dissenting in *Lawrence* Justice Scalia argued that the decision is not “deeply rooted in this Nations history and tradition”¹⁴² and that “Court has taken sides in the culture war, departing from its rule of assuring, as neutral observer, that the democratic rules of engagement are observed.”¹⁴³ Anticipating a future ruling such as *Goodridge*, Scalia wrote that [t]oday’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned....” and in the light of the majority opinion “what justification can there possibly be for denying the benefits of marriage to homosexual couples” . . .¹⁴⁴

Due Process, Liberty and Equality Under the Law:

Writing that “history cannot and does not foreclose the constitutional question”¹⁴⁵ Chief Justice Marshall expressed a central idea in *Goodridge* that marriage is not static and must be viewed in the light of evolved constitutional principles. Both the liberty and equality provisions of the state constitution prohibit unwarranted government interference into the private life of its citizens. They also protect the freedom to share in the benefits which the government creates for the common good. However, the Massachusetts Court declined to apply a strict scrutiny standard in reaching the decision that restricting marriage to different-sex couples violated the state constitution. Instead it ruled that the common law definition of marriage does not even meet a rational standard of review under the due process or equal protection tests, so that there was no need to apply judicial strict scrutiny.¹⁴⁶

The Procreation Argument:

The Court reached the irrationality conclusion by reviewing the positions advanced by the defendant Department of Public Health and finding them wanting. At trial the Superior Court found the ban on same-sex marriage was on the proposition that the goal of marriage is the promotion of procreation of children.¹⁴⁷ Even though modern Christian theology has moved beyond the idea that the sole or primary purpose of marriage is to conceive and raise children¹⁴⁸ the earlier theological theory that marriage is

¹⁴² Id.,. at 2492 [Scalia, J., dissenting].

¹⁴³ Id. at 2497

¹⁴⁴ Id. at 2498

¹⁴⁵ *Goodridge*, note 72, supra, at 953. The view that the primary purpose of marriage is procreation influenced the federal Congress in its enactment of the Defense of Marriage Act, P.L. 104-199, §§ 2-3, 110 Stat. 2419 (1996), as discussed in the House Report, H.R. 104-664, 12-13 [citing procreation as the purpose of marriage].

¹⁴⁶ *Goodridge*, note 72 at 960-961.

¹⁴⁷ *Goodridge v. Dept. of Public Health*, Supreme Judicial Court docket 08860, Record Appendix 115-116 (Superior Court judgment).

¹⁴⁸ For example, the Second Vatican Council of the Roman Catholic Church abandoned the “primary purpose/secondary purpose” taught by many earlier theologians and joined the companionate/procreative purposes by defining marriage as a sacrament involving matrimony and conjugal love for the procreation and education of children. *Pastoral Constitution on the Church in the Modern World*, Art. 48 (English translation) Walter Abbott and Joseph Gallagher (eds.), THE DOCUMENTS OF VATICAN II.

intended primarily for the procreation of children has persisted among many who have read it into their understanding of civil marriage.

The problem with the theory of procreation is that it had no basis in Massachusetts law. Fertility of the partners is not and never was a basis for recognizing the validity of marriage.¹⁴⁹ At no point in history did the marriage licensing statute ever require that applicants have either the ability or the intent to have children. Chief Justice Marshall explained this by noting that “it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”¹⁵⁰

Another problem with the state tying its procreation theory to different-gender marriage is that modern Massachusetts law provides for equality of treatment of all children, regardless of whether they are born to a married couple or not.¹⁵¹ Massachusetts law also permits same-sex couples to adopt children.¹⁵² The law also has recognized under some circumstances a form of *de facto* parenthood of a person who lives in a same sex relationship with a biological parent and who co-parents that child.¹⁵³

Massachusetts has many clinics providing alternative reproductive technology research and services and its law has been generally favorable to the use of medical services to procreate.¹⁵⁴ Many same-sex couples have children by alternative reproductive technology methods.¹⁵⁵ Massachusetts does not treat children conceived by non-sexual alternative methods any differently from children conceived by coitus.¹⁵⁶ By statute the law treats a husband who consents to his spouse’s insemination using the sperm of a third party donor as the father of her child as long as he consents to the

¹⁴⁹ *Goodridge v. Dept. of Public Health*, Supreme Judicial Court docket 08860, Brief of Monroe Inker and Charles Kindregan, Amici Curiae (2003) [the state never required fertility or an intent to have children in order to marry]. *But see*, the contrary argument in Justice Cordy’s dissent that “[a]s long as marriage is limited to opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively) necessary part of their procreative endeavor.” *Goodridge*, note 72, *supra*, at 1002 [Cordy, J., dissenting].

¹⁵⁰ *Goodridge*, note 72, *supra* at 961 [Marshall, C.J.].

¹⁵¹ “Children born to parents who are not married to each other shall be entitled to the same rights and protections of the law as all other children.” Mass.Gen.L. c. 209C, § 1, added by St.1986, c. 310, § 16 (2003).

¹⁵² *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993).

¹⁵³ *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999). The concept of *de facto* parenthood is supported by the American Law Institute’s PRINCIPLES OF THE LAW OF FAM. DISSOLUTION, § 2.03(1)(c) (2002).

¹⁵⁴ See generally, Charles P. Kindregan, Jr. and Maureen McBrien, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER’S GUIDE TO THE EMERGING LAW AND SCIENCE (2006) [methods of asexual reproduction].

¹⁵⁵ *E.N.O. v. L.L.M.*, note 153, *supra* [mother conceived child by intrauterine insemination by donor sperm and executed a co-parenting agreement with her same-sex partner]. “An increasing number of same gender couples, like the plaintiff and the defendant, are deciding to have children.” *Id* at 891 [Abrams, J.].

¹⁵⁶ See, for example, *Woodward v. Comm’r. of Social Security*, 760 N.E.2d 257 (Mass. 2002) [children conceived by intrauterine insemination using husband’s cryopreserved sperm after his death are treated as his legal heirs].

procedure.¹⁵⁷ Courts have approved agreements regarding use of donor gametes to have children by use of a surrogate birth mother.¹⁵⁸ Clearly Massachusetts law prior to the Goodridge decision treated alternative reproductive methods of procreation favorably, even though not achieved by sexual intercourse. Certainly it made the state's argument equating marriage with sexual reproduction difficult to justify, and in *Goodridge* the court rejected it.

The Derogation of Marriage and Interstate Conflict Arguments:

The *Goodridge* court also rejected the argument of the Department of Health that allowing same-sex marriage would trivialize or destroy marriage. In the view of the majority, "extending marriage to same-sex couples reinforces the importance of marriage . . . [t]hat same sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit."¹⁵⁹

The Massachusetts court could not deny the state's argument that approval of same-sex marriage would likely lead to interstate conflict. It acknowledged that Massachusetts could not presume to dictate to other states how they should respond to the *Goodridge* decision. But Chief Justice Marshall's opinion stressed regardless of what other states do under our federal system "each State is free to address difficult issues of individual liberty in the manner its own Constitution demands."¹⁶⁰ However, any impartial commentator must acknowledge that conflicts between the Massachusetts law and that of other states, and between Massachusetts and joint federal-state programs, will likely present courts with many difficult issues in the future.

Massachusetts is one of the few states to have enacted the now-obsolete Uniform Marriage Evasion Act,¹⁶¹ and this has the practical effect of preventing non-resident same-sex couples from obtaining marriage licenses if their own state prohibits same-sex marriage. The Massachusetts courts have upheld the application of the statute against constitutional challenge.¹⁶² This may reduce the potential for intra-state conflict over the validity of same-sex marriages, but the potential for conflict still exists when a resident same-sex couple marry in Massachusetts and then relocate to another state.

¹⁵⁷ Mass.Gen.L. c. 46, § 4B.

¹⁵⁸ See *Culliton v. Beth Israel Deaconness Medical Center*, 756 N.E.2d 1133 (Mass. 2001) [declaratory judgment could be granted to approve uncontested pre-birth order when surrogate mother not genetically related to child she with which she was pregnant by intrauterine conception should have the genetic intended parents listed on the birth certificate].

¹⁵⁹ *Goodridge*, note 72, *supra*, at 965.

¹⁶⁰ *Id.*, at 967

¹⁶¹ Mass. Gen. L. c. 207, §§ 11-13 (2006).

¹⁶² *Cote-Whitacre v. Dept. of Public Health*, 844 N.E.2d 623 (2006) [plaintiffs who were residents of states which prohibit same-sex marriage are not entitled to obtain a Massachusetts Certificate to Marry]. On remand to the Superior Court a judgment was entered allowing a same-sex Rhode Island couple to obtain a Massachusetts Certificate to Marry on a finding that no evidence had been introduced showing that Rhode Island law explicitly voided or prohibited same-sex marriage; Michael Levenson, *Gay Couple from R.I. Wins Mass. Ruling*, THE BOSTON GLOBE, Sept. 30, 2006, at A1.

The constitutionality of both the Federal Defense of Marriage Act and various similar legislation enacted in the majority of states in regard to the Full Faith and Credit Clause and same-sex marriage will be litigated over the coming years.¹⁶³ The United States Supreme Court decision in *Romer*¹⁶⁴ has at least some potential for invalidating a state constitutional amendment which singles out homosexuals for disparate treatment. There may also be other constitutional theories which could endanger any political efforts to overturn a court decision which recognizes the right of same-sex couples to enjoy the right of marriage equally with heterosexual couples.¹⁶⁵ However, whatever the potential for interstate conflict, or for political conflict within the state, the Massachusetts court said it could not avoid interpreting the state constitution merely because laws in other states might be different or that political differences exist on the question of what constitutes marriage.

Conclusion:

To understand why the nature of marriage is so disputed today one must understand the evolution of civil marriage. The debate over marriage must be open to the lessons of history, which were argued passionately by the judges in the U.S. Supreme Court in *Lawrence v. Texas*, just as they were by the Massachusetts judges in *Goodridge*. It requires everyone concerned to ask themselves what is essence of our legal history and tradition and how far we must go back to retain the best of the past in order to be true to our tradition of a flexible legal response to the reality of today's society.

Is the debate over the status of marriage merely a footnote in the development of family law? Or is it a landmark on the long history of the evolution of marriage which is likely to have long-lasting consequences? We know that earlier court decisions involving marriage created great public controversy when made but which came to be accepted as basic law over time? Are decisions such as those of the courts in Hawaii, Vermont and Massachusetts, and the legislatures of other states and nations, which were discussed in

¹⁶³ See, for example, Julie L.B. Johnson, *The Meaning of General Laws: The Extent of Congress's Power Under the Full Faith and Credit Clause and Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611 (1997) [Defense of Marriage Act is not consistent with the dual system of government established by the Constitution]; Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v Evans*, 32 NEW ENG. L. REV. 265 (1997) [review of the various constitutional issues surrounding the Defense of Marriage Act]; Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, SSRN:

http://papers.ssrn.com/sol13/papers.cfm?abstract_id=697862 [questioning the power of Congress to empower a state to refuse to give recognition to same-sex marriage sanctioned in another state].

¹⁶⁴ *Romer v. Evans*, 517 U.S. 620 (1996) [under the Equal Protection Clause of the 14th Amendment a state may not amend its constitution to single out homosexuals as not being entitled to any special legislative protections].

¹⁶⁵ Equal protection and due process remain the most obvious constitutional theories which could preclude legislative efforts to deny marriage to persons based on sexual orientation. Non-compliance with the full faith and credit clause to interstate bars on recognition is also a possible theory as to the Defense of Marriage Act.

this article refining the concept of marriage destined to be legal dead-ends? It is likely that in the future different states and nations will simply learn to live with radically different views of marriage?

Only when the legal history of our time is studied in the future will scholars and commentators be able to answer these questions. In the midst of the political, social and religious controversy which now rages over the nature of marriage it is difficult for many to take the long view of history. If the brief analysis in this article stands for anything I hope it is lawyers above all should appreciate the lessons which our legal history teaches about the evolution of modern civil marriage and the need to accommodate the reality that the law will change from time-to-time and in different places.