Conflicting Approaches: Legalizing Same-Sex Marriage Through Conflicts of Law

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"When great changes occur in history, when great principles are involved, as a rule the majority are wrong. The minority are right."

—Eugene V. Debs[1]

I. INTRODUCTION

On June 29, 2008, Governor David Paterson proceeded down Fifth Avenue in New York City to the enthusiastic cheers of onlookers.[2] The last day of New York Pride 2008, Governor Paterson was being honored as a notable participant in the annual gay pride parade.[3] The Governor's role as a leader in the gay rights movement emerged almost immediately after he took office.[4] Two months after the resignation of his disgraced predecessor, Eliot Spitzer, Governor Paterson issued an executive directive requiring state agencies to recognize out-of-state same-sex marriages.[5] Hailing the decision as a major step toward legalizing same-sex marriage in New York, advocates praised Paterson's vision and compassion.[6] Yet, much like the resistance same-sex marriage is meeting across the country,

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[1] Wisdom Quotes, Minorities Quotes, http://www.wisdomquotes.com/cat_minorities.html (last visited Apr. 14, 2009).

[2] Jeremy W. Peters, *Celebrating Gay Pride, and Its Friend in Albany*, N.Y. TIMES, June 30, 2008, at B3.

[3] *Id.*

[4] *Id.*

[5] *Id. See generally* Danny Hakim & William K. Rashbaum, *Spitzer, Linked to a Sex Ring as a Client, Gives an Apology*, N.Y. TIMES, Mar. 11, 2008, at A1 (providing details on the prostitution scandal that ultimately forced Governor Eliot Spitzer to resign).

[6] Jeremy W. Peters, *New York Backs Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2008, at A1. *See also* Press Release, Task Force Applauds New York Governor David Paterson's Leadership in Honoring and Recognizing Same-Sex Marriages (May 29, 2008), http://www.commondreams.org/news2008/0529-13.htm; John Nichols, *David Paterson: Activist, Progressive…Governor*, THE NATION, Mar. 12, 2008, *available at* http://www.thenation.com/blogs/thebeat/297128 (recognizing Governor Paterson's "strong track record of taking bold positions on civil rights issues—especially gay rights").

clouds cast shadows over the thousands gathered for the Pride parade and distant rumblings of thunder could be heard. A storm was brewing in the West that would eventually overtake the city and the celebration. The symbolism was lost on the participants of the Pride March, but over the following months the debate over same-sex marriage would once again reach the national political spotlight, culminating in the protests of Proposition 8.[7]

Since the Stonewall Riots of 1969,[8] gay rights have been regarded as a full-fledged civil rights movement.[9] In the early 1990s, the movement appeared on the brink of achieving its first significant equal protection victory—the right to marry—when the Supreme Court of Hawaii, in *Baehr v. Lewin*, ruled that the strict scrutiny standard must be satisfied when addressing same-sex marriage.[10] But fifteen years later, even with the 2003 holding of *Lawrence v. Texas*,[11] gay rights advocates are arguably no closer to their goal of same-sex marriage than they were when Hawaii's Supreme Court first addressed the issue in 1993.[12]

In fact, the federal government's passage of the Defense of Marriage Act ("DOMA") in 1996 imposed a severe obstacle for those who would extend equal rights to gay couples through the legalization of same-sex marriage.[13] Under the federal DOMA:

> [n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a

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[7] *See infra* Part III.B.2.

[8] *See generally* David Bianco, Stonewall Riots, http://www.planetout.com/news/history/ archive/06211999.html (last visited Apr. 14, 2009) (discussing the impact of the Stonewall Riots on the Gay Rights Movement); Vern Bullough, When Did the Gay Rights Movement Begin? (Apr. 18, 2005), http://hnn.us/articles/11316.html (stating that Stonewall was "not the beginning of a movement, but the recognition of one").

[9] Kevin J. Mumford, *The Miscegenation Analogy Revisited: Same-Sex Marriage as a Civil Rights Story*, 57 AM. Q. 523, 528 (2005); Jon W. Davidson, Celebrating Recent LGBT Legislative Advances (May 30, 2007), http://www.lambdalegal.org/our-work/publications/facts-backgrounds/recent-lgbt-advances.html (discussing recent advances in the gay rights movement); Jesse McKinley, *Marriage Ban Inspires New Wave of Gay Rights Activists*, N.Y. TIMES, Dec. 10, 2008, at A23 (discussing how Proposition 8 rekindled the gay rights movement). It is interesting to note that some are hesitant to acknowledge gay rights as civil rights due to the history of the Civil Rights Movement and the suppression of black Americans. Jeninne Lee-St. John, *Viewpoint: Civil Rights and Gay Rights*, TIME, Oct. 25, 2005, *available at* http://www.time.com/time/nation/article/0,8599,1121811,00.html.

[10] 852 P.2d 44, 68 (Haw. 1993). *See also* Carey Goldberg, *Couple Who Stirred Issue of Same-Sex Marriage Still Hopeful*, N.Y. TIMES, July 28, 1996, at A12 (reflecting on *Baehr v. Lewin* three years later).

[11] Lawrence v. Texas, 539 U.S. 558 (2003) (holding that Texas's Homosexual Conduct law, which prohibited two persons of the same-sex from engaging in certain intimate sexual conduct, violated the Fourteenth Amendment Due Process Clause).

[12] *See infra* Part II.

[13] 28 U.S.C. § 1738C (1996).

> relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[14]

At once, Congress effectively gave those states that desired to prevent same-sex marriage a means to achieve that end. Today, while a small but growing number of states formally acknowledge same-sex relationships, others have amended state constitutional language to define marriage as between a man and a woman, creating what have become known as "mini-DOMAs."[15]

Due to the advocacy of many same-sex marriage proponents—who believe equal marriage rights is an issue of constitutional significance[16]—the marriage debate draws on the language of the Equal Protection Clause, rather than the more mundane issue of conflicts of law.[17] Specifically, same-sex marriage proponents argue that by denying homosexual couples the right to marry, the state is legislating unequal treatment and approving a denial of equal protection.[18] The argument draws on the successful equal protection challenge to anti-miscegenation laws in *Loving v. Virginia*,

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[14] *Id.*

[15] Lambda Legal, Status of Same-Sex Relationships Nationwide, http://www.lambdalegal.org/publications/articles/nationwide-status-same-sex-relationships.html (last visited Apr. 14, 2009) [hereinafter Status of Same-Sex Relationships Nationwide]. Lambda Legal reports:

> In 1996 after the United States Congress passed the so-called Defense of Marriage Act, many state legislatures followed suit and passed new statutes barring marriage for same-sex couples that only emphasized the discrimination that already existed in their states.
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> Likewise, in several other states like New York and Washington, which did not pass new discriminatory statutes to reinforce old ones, the high courts nonetheless issued opinions upholding the old law. In other states, like New Mexico, the Attorney General interpreted old state law to bar clerks from giving marriage licenses to same-sex couples.

Id.

[16] *See* Michael M. Grynbaum, *Gay Marriage, a Touchy Issue, Touches Legislators' Emotions,* N.Y. TIMES, June 21, 2007, at B5; McKinley, *supra* note 9, at A23. Emotions also run high on the conservative side of the issue. David D. Kirkpatrick, *Christian Conservatives Look to Re-Energize Base,* N.Y. TIMES, Sept. 25, 2006, at A16.

[17] The Fourteenth Amendment Equal Protection Clause provides that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the law." U.S. CONST. amend. XIV, § 1. *See generally* Shannon Pare, *Legalization of Same-Sex Marriage in the United States and Canada: The Unequal Application of Equal Protection,* 11 SW. J. L. & TRADE AM. 363 (2005).

[18] *See* Human Rights Campaign, Marriage & Relationship Recognition, http://www.hrc.org/issues/marriage.asp (last visited Apr. 14, 2009) (stating the goal of the Human Rights Campaign's involvement in same-sex marriage is to ensure equal protection to same-sex couples) [hereinafter Marriage & Relationship Recognition]; Lambda Legal, Marriage, Relationships and Family Law, http://www.lambdalegal.org/our-work/issues/marriage-relationships-family/ (last visited Apr. 14, 2009) (stating "it is crucial for those in same-sex relationships and for all parents and children to be treated equally under the law") [hereinafter Marriage, Relationships and Family Law].

which ultimately ended all race-based legal restrictions on marriages in the United States.[19] While an equal protection challenge offers potentially fertile legal ground for proponents of gay marriage, the passage of the federal DOMA and mini-DOMAs yields an opportunity to recognize same-sex marriage through conflicts of law.[20] Under this analysis, the question becomes what law should apply when addressing same-sex marriage and domestic partnerships in states that either do not recognize such unions or prohibit them outright?

Before exploring the conflict that exits between same-sex marriage and choice of law, it is important to consider the range of rights that states afford same-sex couples. Currently, four states allow same-sex marriage,[21] while four provide equal marriage rights under the title of "civil unions."[22] Ten states and the District of Columbia provide for "domestic partnerships," but the benefits that come with those partnerships vary in scope.[23]

Massachusetts, Connecticut, Iowa, and Vermont are the only states that allow same-sex marriage.[24] In 2004, one hundred and eighty days after the Massachusetts Supreme Judicial Court held that the state had "no constitutionally adequate reason" for denying marriage to same-sex couples in *Goodridge v. Department of Public Health*,[25] the nation's first same-sex marriages occurred in Massachusetts.[26] Describing marriage as "a vital social institution"[27] that had to be extended to all on equal terms, the *Goodridge* majority acknowledged that its opinion would change the

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[19] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[20] *See infra* Part II.B (discussing how states are passing mini-DOMAs to bypass the Full Faith and Credit Clause of the United States Constitution).

[21] Status of Same-Sex Relationships Nationwide, *supra* note 15. On May 16, 2008, the California Supreme Court found the state's ban on gay marriage unconstitutional, making California the second state, after Massachusetts, to legalize same-sex marriage. Adam Liptak, *California Court Affirms Right to Gay Marriage*, N.Y. TIMES, May 16, 2008, at A1 ("The California Supreme Court, striking down two state laws that had limited marriages to unions between a man and a woman, ruled Thursday that same-sex couples have a constitutional right to marry."). In November, however, the people of California passed Proposition 8, a ballot measure that effectively overruled the California Supreme Court. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1.

[22] Status of Same-Sex Relationships Nationwide, *supra* note 15.

[23] *Id.*

[24] *Id.* On April 3, 2009, the Iowa Supreme Court voided the state's gay marriage ban on equal protection grounds. Varnum v. Brien, No. 07-1499, 2009 WL 874044 (Iowa 2009). Iowa is now the third state to allow same-sex marriage. Monica Davey, *Gay Couples in Iowa Win Right to Wed*, N.Y. TIMES, Apr. 4, 2009, at A1. On April 7, 2009, the Vermont Legislature voted to legalize same-sex marriage, making Vermont the fourth state to allow same-sex couples to wed. Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009, at A1.

[25] 798 N.E.2d 941, 948 (Mass. 2003).

[26] On May 17, 2004, David Wilson and Robert Compton exchanged vows at the Unitarian Universalist Arlington Street Church in Boston. Michael S. Rosenwald, *From This Day, Paired For Life*, BOSTON GLOBE, May 18, 2004, at B10. Across the city, other same-sex couples also exchanged vows. *Id.*

[27] *Goodridge,* 798 N.E.2d at 948.

course of marital history in the Commonwealth of Massachusetts.[28] Applying the rational basis test requested by the Attorney General, the Court stated that there was no "reasonable relationship" between "an absolute disqualification of same-sex couples who wish to enter into civil marriage and . . . protection of public health, safety, or general welfare."[29] Recognizing that "[t]he history of constitutional law 'is the story of the extension of constitutional rights and protections to people once ignored or excluded,'" the Court held that the State's constitutional guarantee of equal protection required that same-sex couples be allowed to marry.[30]

In October 2008, the Connecticut Supreme Court addressed the issue of same-sex marriage in *Kerrigan v. Commissioner of Public Health*.[31] The *Kerrigan* Court departed from the rational basis analysis employed in *Goodridge*,[32] instead grounding its decision in the quasi-suspect classification of homosexuals.[33] Noting "that the newly created classification of civil unions does not embody" the "status and significance" of marriage, the majority held that "the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm."[34]

While gay rights advocates celebrated *Kerrigan* as a major victory,[35] a ballot initiative in California was threatening a similar holding

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[28] *See id.* ("We are mindful that our decision marks a change in the history of our marriage law.").

[29] *Id*. at 968.

[30] *Id.* at 966.

[31] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

[32] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 978 (Mass. 2003) (Sosman, J., dissenting) (noting that "[i]n applying the rational basis test to any challenged statutory scheme, the issue is not whether the Legislature's rationale behind that scheme is persuasive to us, but only whether it satisfies a minimal threshold of rationality. Today, rather than apply that test, the court announces that, because it is persuaded that there are no differences between same-sex and opposite-sex couples, the Legislature has no rational basis for treating them differently with respect to the granting of marriage licenses.").

[33] *Kerrigan*, 957 A.2d at 431-32. In his dissent, Justice Borden opposed the granting of quasi-suspect class status to same-sex couples, stating:

> In my view, the majority's decision to grant quasi-suspect class status to sexual orientation is contrary to a sound and prudent interpretation of constitutional standards regarding equal protection of the laws because it unduly minimizes the unique and extraordinary political power of gay persons in this state, both generally speaking, and particularly in regard to the question of whether gay marriage should be recognized in this state.

Id. at 483 (Borden, J., dissenting).

[34] *Id.* at 412.

[35] *See* Susan Campbell, *Gays, Free at Last to Marry*, HARTFORD COURANT, Oct. 11, 2008, at A8 (describing *Kerrigan* as "historic and fraught with emotion"); Daniela Altimari, *Free to Wed: Connecticut Joins Two Other States in Allowing Same-Sex Marriages*, HARTFORD COURANT, Oct. 11, 2008, at A1 ("The state Supreme Court on Friday delivered gay and lesbian couples the validation they have long been seeking—the right to marry."). *See also* Susan Campbell, *Savoring a Proud Moment for State*, HARTFORD COURANT, Nov. 16, 2008, at F1 (reporting on Connecticut's overwhelming defeat on election date of a constitutional convention that may have, among other things, introduced an amendment to ban same-sex marriage).

released just months earlier by that state's Supreme Court.[36] In June 2008, the California Supreme Court ruled in *In re Marriage Cases* that the equal protection clause of the state constitution required the state to provide for same-sex marriages or refrain from performing marriages at all.[37] However, just four months later, the California Supreme Court's decision was rendered moot when the residents of California voted in record numbers to define marriage as between a man and a woman.[38]

As opposed to marriage, four states have adopted civil union laws: California, New Hampshire, New Jersey, and Oregon.[39] These states typically extend to same-sex couples the same economic benefits available to married spouses.[40] The first state to grant civil union rights was Vermont, which began offering civil unions to same-sex couples in 2000, following the state Supreme Court's decision in *Baker v. State*.[41] The

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[36] The ballot initiative, widely known as Proposition 8, limits marriage in California to heterosexual couples. Voter Information Guide, Proposition 8, http://www.voterguide.sos.ca.gov/title-sum/prop8-title-sum.htm (last visited Apr. 14, 2009). Though Proposition 8's future is uncertain due to the pending legal challenges discussed in Part III.B.2 of this Note, if the initiative survives judicial scrutiny, the California Constitution will be amended to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." *Id.*

[37] Jesse McKinley, *A Landmark Day in California as Same-Sex Marriages Begin to Take Hold*, N.Y. TIMES, June 17, 2008, at A19; In re Marriage Cases, 183 P.3d 384 (Cal. 2008).

[38] McKinley & Goodstein, *supra* note 21, at A1. The California Supreme Court held hearings to determine the fate of Proposition 8 on March 5, 2009. Maria L. LaGanga, *Ruling on Proposition 8: Activists Rally; Justices Hear Arguments*, L.A. TIMES, Mar. 6, 2009, at 14.

[39] Status of Same-Sex Relationships Nationwide, *supra* note 15. Prior to California's *In re Marriage Cases*, which legalized same-sex marriage, California passed a domestic partnership statute that provided same-sex couples with the same status and rights as heterosexual couples. CAL. FAM. CODE § 297.5(a) (2007). Following the passage of Proposition 8 in November 2008, same-sex marriage in California became invalid and civil unions resumed for same-sex couples. Status of Same-Sex Relationships Nationwide, *supra* note 15.

[40] Status of Same-Sex Relationships Nationwide, *supra* note 15. *See also* CAL. FAM. CODE § 297.5(a) (2007) ("Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses."); CAL. FAM. CODE § 308.5 (2000) ("Only marriage between a man and a woman is valid or recognized in California."). CAL. FAM. CODE § 308.5 is no longer valid in light of *In re Marriage Cases*, although the passage of Proposition 8 might reinstate the legal definition of marriage as between a man and a woman within California. CAL. FAM. CODE § 308.5 (West Supp. 2009). *See also* N.H. REV. STAT. § 457-A:6 (2007) ("Notwithstanding any other law to the contrary, the parties who enter into a civil union pursuant to this chapter shall be entitled to all the rights and subject to all the obligations and responsibilities provided for in state law that apply to parties who are joined together pursuant to RSA 457."); N.H. REV. STAT. § 457:1 (1987) ("No man shall marry . . . any other man."). The New Jersey Supreme Court ruled in *Lewis v. Harris* that the state constitution required civil unions to be the equivalent of marriage in terms of rights and responsibilities. 908 A.2d 196, 220 (N.J. 2006). Based on this holding, the New Jersey Legislature passed N.J. STAT. § 37:1-31(2007), which provided all of the same benefits, rights, and responsibilities to same-sex couples entering into civil unions as married heterosexual couples. N.J. STAT. ANN. § 37:1-31(a). Oregon's Domestic Partnership statute is codified in OR. REV. STAT. §§ 106.010–.990 (2007).

[41] 744 A.2d 864, 889 (Vt. 1999). In *Baker v. State*, the Vermont Supreme Court invalidated the State's marriage statutes, which limited benefits to heterosexual couples, based on the Common Benefits Clause of the Vermont Constitution. *Id.* at 869-70. Since passage of Act 91 in July 2000, which provided same-sex couples the opportunity to obtain the same benefits as opposite-sex married

Vermont Legislature recently reconsidered the issue of same-sex marriage and appointed a commission to examine whether Vermont should grant same-sex marriages instead of civil unions.[42] The commission found that in addition to the economic benefits already granted by civil unions, "such a change in the law would give access to less tangible incidents of marriage, including its terminology (e.g., marriage, wedding, married, celebration, divorce), and its social, cultural and historical significance."[43] In February 2009, a bill was introduced in the Vermont Legislature to replace civil unions with same-sex marriage.[44] Two months later, on April 7, 2009, the Vermont legislature overruled Governor Jim Douglas's veto of a marriage bill, becoming the first state to legalize same-sex marriage through the legislative process.[45]

Ten states have adopted domestic partnership statutes: Maine, Hawaii, Washington, Alaska, Arizona, Illinois, Montana, New York, Rhode Island, and New Mexico—as well as the District of Columbia.[46] These laws range dramatically in the types of benefits afforded to same-sex couples. For example, Oregon's statute parallels Vermont's former civil union statute, by providing the same rights as marriage, but under a

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couples, over 1,490 Vermont residents and 8,711 nonresidents have entered into a Vermont civil union. Office of the Vt. Sec. of State, THE VERMONT GUIDE TO CIVIL UNIONS 3 (2008) [hereinafter GUIDE TO CIVIL UNIONS]. *See also* VT. STAT. ANN. tit. 15, § 1204 (2002) ("Parties to a civil union shall have all the same benefits, protections and responsibilities under Vermont law, whether they derive from statute, policy, administrative or court rule, common law or any other source of civil law, as are granted to spouses in a marriage.").

Although same-sex couples seeking a Vermont civil union are afforded all of the rights recognized in heterosexual marriages, dissolving a civil union can pose unique challenges. For example, dissolution of the civil union becomes difficult when couples move out-of-state or visit Vermont for the sole purpose of obtaining a civil union. GUIDE TO CIVIL UNIONS, *supra* note 41, at 6. Dissolving a civil union also has the potential to be financially burdensome. If a couple lives in a state that will not recognize the partnership, in order for it to be legally dissolved one member of the couple will have to return to Vermont for one year before obtaining the dissolution. *Id.* at 11.

Vermont recognizes the problems created by the fact that many states will not recognize a Vermont civil union. Consequently, the State provides a disclaimer in its Guide to Civil Unions for out-of state residents: "It is easy to get a civil union in Vermont, but it may be hard to dissolve the civil union later." *Id.* at 6.

[42] *See* OFFICE OF LEGIS. COUNCIL, REPORT OF THE VERMONT COMMISSION ON FAMILY RECOGNITION AND PROTECTION 1 (2008), http://www.leg.state.vt.us/workgroups/FamilyCommission/.

[43] *Id.* at 27.

[44] Susan M. Cover, *Activists Lobby for Same-Sex Marriage*, PORTLAND PRESS HERALD, Jan. 14, 2009, at A1.

[45] Goodnough, *supra* note 24, at A1.

[46] Status of Same-Sex Relationships Nationwide, *supra* note 15. In 2009, Hawaii's Legislature proposed amending the state constitution to legalize civil unions, and extend to same-sex couples all of the benefits, protections, and responsibilities of marriage. *See* MSNBC, Senate Considers Watered Down Civil Union Law (Mar. 11, 2009), http://www.msnbc.msn.com/id/29626711/ (noting that although the bill passed the House, the state Senate was considering reducing the number of benefits in the bill and instead adding more benefits for same-sex couples in the state's reciprocal beneficiaries law). The Rhode Island Legislature also introduced amendments to its state constitution to allow same-sex marriage. Editorial, *Gay Marriage Needs a Vote*, N.Y. TIMES, Feb. 24, 2009, at A24 (noting that the bill is opposed by the state's Republican governor and two leading Democrats, the Speaker of the House and the Senate President).

different name.[47] Seven of these states, however, provide limited rights to domestic partners.[48] An interesting example is Hawaii, which at one time was expected to be the first state to offer full marriage rights to same-sex couples.[49] Instead, fifteen years after it contemplated same-sex marriage, the state only provides a Reciprocal Beneficiary Registry allowing same-sex couples partial rights based on their relationships.[50]

While the terms marriage, civil unions, and domestic partnerships are generally used interchangeably, they are fundamentally different.[51] Fully acknowledging these distinctions is important to achieving a better understanding of why many gay rights advocates demand actual marriage rights rather than civil unions or domestic partnerships.[52]

At bottom, marriage is incredibly different from domestic partnerships or even civil unions. Traditional marriage provides a recognized legal and social status to a relationship, in both the eyes of a couple's most intimate circle of friends as well as the public at large.[53] It also offers particular financial and legal benefits that are not always available to gay couples who have entered into civil unions or domestic partnerships. Included among these benefits are access to a spouse's health insurance, medical visitation and decision-making rights, and certain tax and bankruptcy benefits.[54] These benefits are directly impacted by the

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[47] Status of Same-Sex Relationships Nationwide, *supra* note 15.

[48] *Id.*

[49] *See supra* note 10 and accompanying text.

[50] The purpose of the Hawaiian Reciprocal Beneficiary Registry is "to extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law." HAW. REV. STAT. § 572C-1 (1997). For a same-sex couple to register as reciprocal beneficiaries, they need only file a notarized declaration form and pay the county clerk an eight-dollar filing fee. *Id.* § 572C-5. This provides the couple with limited property and health rights. To dissolve the partnership, the couple simply repeats the initial process by filing a second form and paying another eight-dollar fee. *Id.* § 572C-7.

[51] *See* Vincent Price, Lilach Nir & Joseph N. Cappella, *Framing Public Discussion of Gay Civil Unions*, 69 PUB. OPINION Q. 179 (2005) (discussing how conservatives and liberals frame the issue of same-sex marriage); Paul R. Brewer & Clyde Wilcox, *Same-Sex Marriage and Civil Unions*, 69 PUB. OPINION Q. 599 (2005) (describing trends in public opinion regarding legal recognition of same-sex marriage, civil unions, and domestic partnerships).

[52] *See* ACLU, Lesbian Gay Bisexual Transgender Project, http://www.aclu.org/lgbt/relationships /index.html (last visited Apr. 14, 2009) (reporting the ACLU's efforts to legalize same-sex marriage); Marriage & Relationship Recognition, *supra* note 18 (reporting the Human Rights Campaign's efforts to legalize same-sex marriage); Marriage, Relationships and Family Law, *supra* note 18 (reporting Lambda Legal's efforts to legalize same-sex marriage).

[53] *See* Murray Webster, Jr. & Stuart J. Hysom, *Creating Status Characteristics*, 63 AMER. SOC. REV. 351, 352 (1998) (discussing the role of status structures in society and their impact on interactions between individuals); KATHLEEN E. HULL, SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW (2006) (studying numerous LGBT couples and how they define their relationship status); *but see* BeyondMarriage.org, Beyond Same-Sex Marriage: A New Strategic Vision for all our Families & Relationships (July 26, 2006), http://www.beyondmarriage.org/full_statement.html (seeking a wide range of relationship options for LGBT couples).

[54] For an interesting case study, *see* ACLU-NJ, ACLU-NJ Chides Konica for Stripping Relocated NJ Couple's Benefits (Mar. 24, 2008), http://www.aclu-nj.org/news/aclunjchideskonicaforstrip.htm. Robert Ryan is a 9/11 survivor who was insured by Konica Minolta while living in New Jersey with his

choice of law issues that arise when certain states recognize same-sex marriage and others do not.[55]

Part I of this Note discusses the traditional choice of law approach to marriage. It looks at both the First Restatement of Conflicts and how *Loving v. Virginia* fundamentally redefined equal protection in relation to marriage in 1967. Part II sets forth the modern choice of law approach to marriage, and examines its application to same-sex marriage by reviewing the Second Restatement of Conflicts, the Defense of Marriage Act, and the proposed federal Marriage Protection Act. Part III provides examples of the two competing approaches used to establish same-sex marriage rights: conflicts of law and equal protection. First, I explore the choice of law approach by examining the law in New York and the implications of Governor Paterson's directive requiring state agencies to recognize out-of-state same-sex marriages. Second, I investigate Connecticut's transition from civil unions to same-sex marriage through the Supreme Court's application of the equal protection clause. Finally, I discuss California's legalization of same-sex marriage, the passage of Proposition 8, and the public reaction that has left the state of law in California in total disarray. This Note concludes with an explanation of why states must recognize same-sex marriages to avoid conflicts of law disputes nationwide.

II. MARRIAGE UNDER THE TRADITIONAL APPROACH

Long before the First Restatement of Conflicts became persuasive authority for judges and legal scholars, anti-miscegenation laws were passed throughout the country, particularly in the South,[56] and justified by the judiciary on grounds of public morality. For example, Virginia's Supreme Court held the Virginia anti-miscegenation statute legal on the following basis:

> The purity of public morals, the moral and physical

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domestic partner. *Id.* Ryan suffered from depression, anxiety, and other mental and physical health ailments due to the trauma of being in the World Trade Center on September 11, 2001. *Id.* After the couple moved to Idaho, Konica dropped Ryan from his partner's insurance policy because Idaho does not recognize domestic partnerships. *Id.* *See also* Laura Figueroa, *Gay Woman Fights Over Hospital Visitation Rights in Miami Court*, MIAMI HERALD, Feb. 6, 2009, at B5 (providing an example of a same-sex couple fighting for medical visitation and decision-making rights).

[55] These problems arise when same-sex couples enter into marriages or domestic partnerships in one state (or another country) and then move to a state that does not recognize such unions. *See infra* Part III.A (discussing *Funderburke*, which originated when a same-sex couple married in Canada and returned to New York, a state that did not recognize out-of-state same-sex marriages before 2008).

[56] *See* Emily Field Van Tassel, *"Only the Law Would Rule Between Us": Antimiscegenation, The Moral Economy of Dependency, and the Debate Over Rights After the Civil War*, 70 CHI.-KENT L. REV. 873, 896 (1995) ("Antimiscegenation rules, long a small part of the larger machinery of Southern slavery and caste law . . . were revived after the war, given new, independent emphasis, and put in service as a symbol of White resistance to 'social equality' with former slaves.").

> development of both races, and the highest advancement of our cherished southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent—all require that they should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law, and be subject to no evasion.[57]

Indeed, this public policy exception would be used to justify bans on interracial marriage until courts were offered an alternative theory to draw upon under the First Restatement.[58]

A. The First Restatement of Conflict of Laws

Published in 1934, the First Restatement of Conflict of Laws provided guidance to states on how to approach choice of law problems.[59] It articulated what became known as the traditional approach to choice of law issues, including marriage.[60] Section 121 of the First Restatement specifically governed the validity of marriage, providing that "[e]xcept as stated in §§ 131 and 132, a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with."[61] Sections 131 and 132 applied to remarriage after divorce and abhorrent marriages, respectively.[62] These sections largely served as a caveat to section 121, which was broadly written to encompass all marriages performed in accordance with state laws.

The commentary that followed section 121 also attempted to further narrow its broad language. Comment *b* provided an analytical framework for addressing questions of marriage validity:

> Marriage, by the law of all Christian countries, is based upon the consent of the parties. There are, therefore,

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[57] Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858 (Va. 1878).

[58] *See* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1971–76 (1997) (explaining the development of the public policy exception and its relevancy to same-sex marriage). *See also* Van Tassel, *supra* note 55 (examining Georgia's decision in *Scott v. State* reinforcing anti-miscegenation laws through social status theory).

[59] RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

[60] *See* LEA BRILMAYER, CONFLICT OF LAWS: CASES AND MATERIALS § 1.2 (1995) (providing background on the First Restatement of Conflict of Laws).

[61] Section 121 provides "Except as stated in §§ 131 and 132, a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with." RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 121 (1934).

[62] *Id.* §§ 131, 132.

> two legal steps in the creation of the status in a common law state: the mutual consent to the marriage, forming the contract of marriage; and the legal creation of the relationship predicated by some law upon the valid consent of the individuals concerned to take each other as husband and wife.[63]

In addition, comment *c* defined the marriage contract, while comment *e* created the "place of celebration" rule providing that the jurisdiction where the wedding occurred controlled the validity of the marriage.[64] If one faithfully followed the guidance of the Restatement, the state of domicile would always apply the law of the "place of celebration" when determining a marriage's validity. Comment *d*, however, recognized the potential conflict this could create:

> Since the domestic status of marriage is governed, like all domestic status, by the law of the domicil or domicils of the parties, it is that law which ultimately creates the marriage status. Because the domicils of the parties concerned might have different laws in this respect, this would lead to great difficulty, if it were not for the fact that all Anglo-American states agree in creating the status of marriage [except in regards to §§ 131 and 132] in every case where there is a contract of marriage valid in the state where the contract is made.[65]

Comment *d*'s concerns regarding the differing laws of the states reflected an appreciation of the problems that might arise when laws were in conflict, as in the case of anti-miscegenation statutes. While some states recognized interracial marriages, others characterized such unions as abhorrent and refused to recognize them, creating an inherent conflict between those states that permitted interracial marriage and those that did not.[66]

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[63] *Id.* § 121 cmt. b.

[64] *Id.* § 121. Comment *e* provides:

> In view of what is stated in Comment *b,* practically considered, there is ordinarily only one law which must be looked to in determining the validity of the marriage, and that is the law that makes the consent valid, which is the law of the state in which the parties agree to take each other as husband and wife, and thereby legally enter into a "contract of marriage."

Id.

[65] *Id.* § 121 cmt. d.

[66] *See* Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858 (Va. 1878); Scott v. State, 39 Ga. 321 (Ga. 1869). *See generally* Van Tassel, *supra* note 55.

Though the First Restatement was not responsible for the first anti-miscegenation statutes, courts eventually adopted its legal framework as persuasive authority to justify thirty years of marital discrimination.[67] Section 132, entitled "Marriages Declared Void by Law of Domicil," provided:

> A marriage which is against the law of the state of domicil of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases:
>
> (a) polygamous marriage,
>
> (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil,
>
> (c) *marriage between persons of different races where such marriages are at the domicil regarded as odious*,
>
> (d) marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state.[68]

This section, known as the "abhorrent" marriages provision, provided states with a means to void marriages if such unions were regarded as violating state public policy. Subsection c specifically addressed and allowed anti-miscegenation laws.

Equally strong language was used in section 134, which created an actual public policy exception for marriage. Aptly titled "Marriage Contrary to Public Policy," section 134 provided: "If any effect of a marriage created by the law of one state is deemed by the courts of another state sufficiently offensive to the policy of the latter state, the latter state will refuse to give that effect to the marriage."[69] It is against this legal and policy backdrop that Richard Loving and Mildred Jeter challenged Virginia's anti-miscegenation statute.[70]

B. Loving v. Virginia

Loving involved a white man and a black woman who married in the

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[67] The First Restatement of Conflict of Laws was published in 1934. Section 132(c) provided authority to forbid interracial marriages if regarded as "odious" by the state of domicil. In 1967, thirty-three years after the publication of the First Restatement, the Supreme Court ruled in *Loving v. Virginia* that anti-miscegenation laws were unconstitutional. 388 U.S. 1, 12 (1967).

[68] RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 132 (emphasis added).

[69] *Id.* § 134.

[70] Loving v. Virginia, 388 U.S. 1, 11-12 (1967).

District of Columbia and then moved back to their home state of Virginia.[71] Virginia's state prosecutors charged the couple with violating the state's ban on interracial marriage, and a grand jury indicted the Lovings in October 1958.[72] Invoking "Almighty God," the trial judge opined:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.[73]

The Lovings were convicted on January 6, 1959 and were sentenced to one year in prison, unless they agreed to leave the state for twenty-five years.[74] Finding the sentence unreasonable, the Court of Appeals of Virginia affirmed the conviction but remanded to the trial court for appropriate sentencing.[75]

In the spring of 1967, the U.S. Supreme Court agreed to hear the case, granting certiorari limited to the following question: "[W]hether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment."[76] Overruling the state Supreme Court, Chief Justice Warren rejected Virginia's anti-miscegenation law. While acknowledging that marriage was subject to the state's police power, the unanimous Court opined that anti-miscegenation laws were "arbitrary and invidious discrimination" in violation of the Fourteenth Amendment Equal Protection Clause.[77] More importantly, the Court declared marriage to be a fundamental right—a "vital personal right[] essential to the orderly pursuit of happiness by free men."[78] The Court's sweeping pronouncement, however, concluded by noting that marriage was essential to the "survival" and "existence" of the human race,[79] setting the stage for opponents of gay rights to challenge Loving's application to same-sex marriage.[80]

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[71] *Id.* at 2.
[72] *Id.* at 3.
[73] *Id.*
[74] Loving v. Commonwealth, 147 S.E.2d 78, 79 (Va. 1966).
[75] *Id.* at 83.
[76] Loving v. Virginia, 388 U.S. 1, 2 (1967).
[77] *Id.* at 10.
[78] *Id.* at 12.
[79] *Id.*
[80] *See, e.g.*, MARGARET A. SOMERVILLE, THE CASE AGAINST SAME-SEX MARRIAGE 1, 6 (2003) (examining an Onatrio case in which the judge "recognizes that a fundamental feature of marriage is

C. *The Legacy of Loving*

Today, the fight for same-sex marriage bears some resemblance to the legal struggle that occurred decades earlier to permit interracial marriages. Prior to *Loving*, certain states viewed interracial marriages as "odious" or "abhorrent," and refused to recognize those marriages on public policy grounds.[81] While anti-miscegenation statutes drew largely on white supremacist theory, opponents of gay rights tend to cite moral traditions and religious teachings as grounds for prohibiting same-sex marriage.[82] Though one might think that a simple application of *Loving* would validate same-sex marriage, both state and federal courts have yet to apply this analysis.

Even as state and federal governments continue to take action to solidify their positions banning same-sex marriage, the U.S. Supreme Court has managed to avoid the marriage issue thanks, ironically, to supporters of gay marriage.[83] Since its 2003 decision in *Lawrence v. Texas*, the make-up of the Court has changed significantly.[84] As a result, gay rights advocates cannot be certain that any equal protection claim would garner the five votes required for a majority opinion. A loss would be reminiscent of *Bowers v. Hardwick*,[85] and would serve as a significant blow to the cause of same-sex marriage. Yet without a Supreme Court decision or new legislation from Congress, the legality of same-sex marriage remains an open question. As a consequence, gay couples have been forced to adjudicate cases, on a state-by-state basis, relating to

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related to procreation"); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (rejecting claims made by the Superior Court and the Department of Public Health that "the state's interest in regulating marriage is based on the traditional concept that marriage's primary purpose is procreation.")

[81] *See supra* note 65 and accompanying text.

[82] *See* Focus on the Family, Marriage, http://www.focusonthefamily.com/socialissues/marriage_and_family/marriage.aspx (last visited Apr. 14, 2009) (advocating for traditional heterosexual marriage) ; AmericanCatholic.org, U.S. Bishops Urge Constitutional Amendment to Protect Marriage, http://www.americancatholic.org/News/Homosexuality/default.asp (last visited Apr. 14, 2009) (urging constitutional amendment to ban same-sex marriage). Rick Warren, the megachurch pastor selected by President Obama to deliver the invocation at the 2009 Presidential Inauguration, came under fire after his selection because of comments he made comparing same-sex marriage to incest and polygamy. *See* Posting by Laurie Goodstein to The Caucus, Rick Warren Chooses Silence, http://thecaucus.blogs.nytimes.com/2009/01/15/rick-warren-chooses-silence/ (Jan. 25, 2009 13:33 EST).

[83] *See infra* Part II.B.

[84] While all five justices of the majority are still on the Supreme Court, both Justice Sandra Day O'Connor, who concurred in the opinion, and Chief Justice William Rehnquist, who joined Justice Scalia's dissent, are no longer on the bench. They were replaced by two conservative appointees—Chief Justice John Roberts and Justice Samuel Alito.

[85] *Bowers v. Hardwick* is a 1986 decision in which the Supreme Court upheld a Georgia sodomy law that criminalized oral and anal sex between consenting adults. 478 U.S. 186 (1986). *Bowers* was overruled by *Lawrence* in 2003. 539 U.S. 558 (2003).

interstate marriage recognition, dissolution, and even child custody.[86]

The choice of law crisis, however, represents a different avenue for advocates of same-sex marriage to explore, and an opportunity to challenge state statutes without risking a loss on equal protection grounds. In light of the various choice of law conflicts that may arise in the context of same-sex marriage, many avenues are open for challenging a state DOMA. Yet if a case were to advance to the U.S. Supreme Court, the current Court might disregard the conflicts implications and instead focus on federalism and equal protection, while striking down same-sex marriage.[87]

III. SAME-SEX MARRIAGE AND CONFLICTS TODAY

Today, gay rights opponents have waged legislative and judicial attacks at both the state and federal level to prevent same-sex marriage. Since 1993, when same-sex marriage became a foreseeable possibility, politicians at all levels of government pushed for legislation defining marriage as the union between a "man" and a "woman."[88] As progressive states legalize domestic partnerships, civil unions, and even marriage for same-sex couples, the inevitable result of these opposing forces is a choice of law and comity crisis.

A. The Second Restatement and the Public Policy Exceptions

Like the First Restatement, the Second Restatement of Conflict of Laws provides persuasive authority for courts and legal scholars on the issue of marriage. Section 283 sets forth the "most significant relations" test to determine the validity of the marriage.[89] This test provides that "[t]he validity of a marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6."[90] Section 6 lists the seven relevant factors used to determine which state possesses the most significant relationship to the parties.[91]

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[86] *See* ACLU, Virginia Court Affirms Vermont's Jurisdiction in Same Sex Couple's Interstate Custody Dispute (Aug. 22, 2008), http://www.aclu.org/lgbt/parenting/36542prs20080822.html (discussing child custody dispute between lesbian parents in Vermont and Virginia).

[87] *See generally* MARK PHILIP STRASSER, ON SAME-SEX MARRIAGE, CIVIL UNIONS, AND THE RULE OF LAW: CONSTITUTIONAL INTERPRETATION AT THE CROSSROADS (2002).

[88] *See infra* Part II.B (discussing the passage of DOMA at the federal level and mini-DOMAs at the state level).

[89] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971).

[90] *Id.*

[91] *See id.* § 6 (providing seven factors for determining the most significant relationship). Subparagraph (2) of § 6 lists the factors:

> (a) the needs of the interstate and international systems,
> (b) the relevant policies of the forum,

Yet, most relevant for same-sex marriage is subsection 2 of section 283, which provides a public policy exception: "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage."[92] Much like Virginia's claim in *Loving* that interracial marriages violated state public policy, opponents of same-sex marriage have invoked similar policy grounds to deny the extension of equal marriage rights to gay couples.[93]

In light of the guidance provided by the Restatements, courts have acknowledged this public policy exception, but have recommended caution in its application. As Justice Cardozo sagely wrote:

The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.[94]Opponents, however, argue that same-sex marriage does violate the "prevalent conception of good morals [and] some deep-rooted tradition of the common weal," and therefore must be prohibited. Professors Monrad Paulsen and Michael Sovern provide a different perspective on the public policy argument, noting that "[t]he principal vice of the public policy concepts is that they provide a substitute for analysis. The concepts stand in the way of careful thought, of discriminating distinctions, and of true policy development in the conflicts of law."[95] Paulsen and Sovern acknowledge that the public policy exception is an escape device with unfortunate consequences—offering the judiciary a substitute for rigorous analysis, rather than requiring judges to confront the pressing legal issue presented.

> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> (d) the protection of justified expectations,
> (e) the basic policies underlying the particular field of law,
> (f) certainty, predictability and uniformity of result, and
> (g) ease in the determination and application of the law to be applied.

Id.

[92] *Id.* § 283.

[93] *See* Loving v. Virginia, 388 U.S. 1, 7 (1967) (describing the Commonwealth of Virginia's legal position in the Loving case); The Pew Forum on Religious and Public Life, Question & Answer: An Argument Against Same-Sex Marriage; An Interview with Rick Santorum (Apr. 24, 2008), http://pewforum.org/events/?EventID=180 (arguing that same-sex marriage is against public policy); New York State Catholic Conference, Statement on "Same-Sex Marriage" (June 9, 2008), http://www.nyscatholic.org/pages/news/show_newsDetails.asp?id=466 (stating Catholic Church's position against same-sex marriage).

[94] Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 202 (N.Y. 1918).

[95] Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969, 1016 (1956).

Fear and a lack of trust in the "activist" judiciary have encouraged political action to ensure that same-sex marriage and domestic partnerships are prevented from gaining legal ground, in the event that the public policy exception does not prevail.[96] Even with nineteen states acknowledging some form of civil commitment between members of the same sex, other states and the federal government have taken steps to prevent further advances on this front, largely making the public policy exception an artifact of the past.[97]

B. The Defense of Marriage Act and Full Faith & Credit

The Defense of Marriage Act ("DOMA") was signed into law by President William Jefferson Clinton on September 21, 1996.[98] DOMA defines the terms "marriage" and "spouse" for federal government application, specifically providing that:

> [i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[99]

More importantly, DOMA is further codified in 28 U.S.C. § 1738C, which addresses the Full Faith and Credit Clause of the United States Constitution.[100] Section 1 of Article IV obligates the states to give "Full Faith and Credit . . . to the public Acts, Records, and judicial Proceedings of every other State."[101] Article IV further provides Congress with the power to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof" through the passage of "general Laws."[102] In creating DOMA, Congress exercised its Article IV authority and effectively stripped the Full Faith and Credit Clause of its power in relation to same-sex marriage.[103] The codified result, Section 1738C, provides that no state, territory, or "Indian" tribe is required to

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[96] *See infra* Part II.B (discussing the Defense of Marriage Act).
[97] *Id.*
[98] 1 U.S.C. § 7 (1996).
[99] *Id.*
[100] 28 U.S.C. § 1738C (1996).
[101] U.S. CONST. art. IV, §1.
[102] *Id.*
[103] Emily J. Sack, *The Retreat from DOMA: The Public Policy of Same-Sex Marriage and a Theory of Congressional Power Under the Full Faith and Credit Clause*, 38 CREIGHTON L. REV. 507, 509 (2005).

recognize same-sex marriages or civil unions.[104]

In effect, DOMA removed same-sex marriage from the grips of federal control and firmly placed it in the hands of the fifty states. In response, states have enacted statutes that define marriage and place limits on what forms of civil commitment the state will recognize.[105] Essentially, these so called "mini-DOMAs" are statutory public policy exceptions. A total of forty-six states have statutes or interpret their statutes to prohibit same-sex marriage,[106] while twenty-nine states have passed constitutional amendments banning marriages of same-sex couples.[107] In practice, such mini-DOMAs create a choice of law limitation that "geographically cabin[s] the validity of same-sex marriages and civil unions and their related benefits."[108] This creates problems when same-sex couples move to states that do not recognize their unions, and in particular complicates same-sex unions that end in divorce or dissolution. For instance, in 2006 the extraterritorial reach of Virginia's mini-DOMA was examined after the dissolution of a Vermont civil union resulted in a child custody battle between a Vermont resident and a Virginia resident.[109] The case involved two competing court orders—one for visitation, the other for termination—that ultimately was resolved by the Supreme Court of Appeals of Virginia in favor of the Vermont court order granting visitation rights.[110]

In the event that mini-DOMAs are challenged on conflicts of law grounds, the Supreme Court will likely turn to *Pacific Employers Insurance v. Industrial Accident*[111] for guidance. In *Pacific Employers*, the Supreme Court addressed the issue of "how far the full faith and credit clause compels the qualification or denial of rights asserted under the laws

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[104] 28 U.S.C. § 1738C.

[105] *See* Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265, 270–78 (2007) (discussing the varieties of mini-DOMAs passed by state legislatures).

[106] Status of Same-Sex Relationships Nationwide, *supra* note 15.

[107] *Id.* On April 3, 2009, the Iowa Supreme Court held that the state's prohibition of same-sex marriage was unconstitutional. Varnum v. Brien, No. 07-1499, 2009 WL 874044 (Iowa 2009).

[108] Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage,* 86 B.U. L. REV. 881, 903 (2006).

[109] Virginia's Marriage Affirmation Act provides that "[a]ny such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable." V.A. CODE § 20-45.3 (2004). The Marriage Affirmation Act became the focus of a custody dispute that unfolded in Vermont and Virginia between Lisa Miller and her former lesbian partner, Janet Jenkins, over their three year old daughter, Isabella. Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330 (Va. App. 2006).

The Miller-Jenkins case involved two women who entered into a Vermont civil union. *Id.* at 332. Upon dissolution of the union, a lengthy child custody battle began in which the birth mother applied for sole custody in Virginia, while her partner sought custody in Vermont. *Id.* A jurisdictional misstep by the birth mother allowed the Virginia Appellate Court to extend full faith and credit to Vermont's order without invoking the Affirmation Act. In June 2008, the Virginia Supreme Court upheld the Vermont court order. *Id.* at 337-38.

[110] *Id.* at 338.

[111] Pacific Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493 (1939).

of one state, that of the forum, by the statute of another state."[112] *Pacific Employers* involved an insurance claim, in which a Massachusetts employee was injured in California.[113] The legal dispute arose from the conflicting workmen compensation schemes of the two states.[114] *Pacific Employers* applied an interest analysis approach to determine the extent of the Full Faith and Credit Clause.[115] The Court noted that "a rigid and literal enforcement" of the clause could not occur without taking into consideration the laws of the forum state,[116] which the court regarded as an "expression of domestic policy."[117] As legal challenges to DOMAs are explored, *Pacific Employers* may provide some insight into how the Supreme Court will approach same-sex marriage. Under that legal framework, the Court will likely show deference to the states and regard the mini-DOMA as "expression[s] of domestic policy."

C. The Marriage Protection Act

The Marriage Protection Act ("MPA") is a proposed amendment to title 28 of the United States Code, which would limit the federal judiciary's review of cases challenging DOMA.[118] Originally introduced in 2003, the MPA was the product of conservative politicians' fears that DOMA might be unconstitutional.[119] Rather than face the uncertain outcome of such a legal challenge, the MPA was proposed as a means of protecting DOMA by insulating it from judicial review.[120] While the 2003 Act never made it beyond the House floor, the MPA has continually been reintroduced as H.R. 3313[121] in 2004, H.R. 1100[122] in 2005, and once again in 2007 as H.R. 724.[123]

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[112] *Id.* at 502.

[113] *Id.* at 504.

[114] *Id.* at 497.

[115] *See generally* BRILMAYER, *supra* note 59, at § 2.1.1 (explaining the methods and objectives of the interest analysis approach to conflicts of law).

[116] *Pacific Employers*, 306 U.S. at 501.

[117] *Id.* at 503.

[118] H.R. 724, 110th Cong. (2007).

[119] The MPA was originally introduced as H.R. 3313 in 2003. For an overview of the MPA, *see* Risa E. Kaufman, *Access to the Courts as a Privilege or Immunity of National Citizenship*, 40 CONN. L. REV. 1477, 1520–21 (2008).

[120] *See* Mary Fitzgerald & Alan Cooperman, *Marriage Protection Act Passes: House Bill Strips Federal Courts of Power Over Same-Sex Cases*, WASH. POST, July 23, 2004, at A04.

[121] H.R. 3313, 108th Cong. (2004).

[122] H.R. 1100, 109th Cong. (2005).

[123] H.R. 724, 110th Cong. (2007). Ironically, Senators Larry Craig and David Vitter sponsored the 2007 version of the MPA. In 2007, police arrested Larry Craig for soliciting an officer posing as a male prostitute in an airport bathroom. David Stout, *Senator, Arrested in an Airport Bathroom, Pleads Guilty*, N.Y. TIMES, Aug. 28, 2007, at A19. David Vitter, a self-proclaimed social conservative, was linked to the D.C. Madam scandal that unfolded in 2007. Shailagh Murray, *Senator's Number on 'Madam' Phone List*, WASH. POST, July 10, 2007, at A03. Vitter previously withdrew from a Louisiana gubernatorial contest when rumors of a one-year relationship with a prostitute became

It is interesting to note that at the time the 2003 version of the bill was introduced, same-sex couples did not have standing to challenge DOMA.[124] Rather, the MPA was a preemptive strike by legislators following the Supreme Court's ruling in *Lawrence v. Texas*,[125] designed to combat the fears expressed in Justice Scalia's blistering *Lawrence* dissent.[126] In his dissent, Justice Scalia expressed concern that allowing adults to engage in consensual sexual acts in the privacy of their own homes would put the United States on a slippery slope of moral decay, clearing the way for legalization of "bigamy, *same-sex marriage*, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."[127] The following year, at least one of Justice Scalia's and the conservative right's fears was realized, when Massachusetts became the first state to legalize same-sex marriage. Perhaps not surprisingly, 2004 was the year that the MPA made its most significant political gains, passing in the House, but failing in the Senate.[128] The MPA of 2007 was last referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties in March 2007.[129] It has remained idle ever since.[130]

A strong argument can be made that the "jurisdiction stripping" MPA is unconstitutional.[131] It would prevent any federal court from hearing a case relating to DOMA—including the United States Supreme Court.[132] This is unprecedented given that no law "has ever completely removed an issue from the Supreme Court's reach."[133] Additionally, since the MPA and DOMA target same-sex couples' rights, both may be unconstitutional on equal protection grounds.[134] Could the MPA prevent the Supreme Court from hearing a constitutional challenge to DOMA or even the MPA on equal protection grounds? In regards to state statutory schemes, would the MPA strip the federal courts of their jurisdiction to hear challenges to mini-DOMAs, since they are related to the federal DOMA?

These unanswered questions appear to pose separate conflicts of law issues that will set the federal judiciary against the legislative branch. Indeed, the passage of the MPA may force the Court to address the issue of

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public. Glenn Greenwald, Sen. David Vitter, A Leading Christian Social Conservative (July 10, 2007), http://www.salon.com/opinion/greenwald/2007/07/10/vitter/.

[124] In 2003, no state allowed same-sex marriage; therefore, homosexuals had no grounds for constitutional standing. Joanna Grossman, The Proposed Marriage Protection Act: Why It May Be Unconstitutional (July 27, 2004), http://writ.news.findlaw.com/grossman/20040727.html.

[125] Lawrence v. Texas, 539 U.S. 558 (2003).

[126] *Id.* at 586–605 (Scalia, J., dissenting).

[127] *Id.* at 590 (Scalia, J., dissenting) (emphasis added).

[128] H.R. 3313, 108th Cong. (2004).

[129] H.R. 724, 110th Cong. (2007).

[130] *Id.*

[131] Grossman, *supra* note 123.

[132] *Id.*

[133] *Id.*

[134] *Id.*

same-sex marriage, if only to decide the constitutionality of the MPA.[135] Yet, if the MPA is passed and not addressed by the Court, same-sex marriage will become the proverbial elephant in the room, existing but ignored in the federal judiciary.[136]

IV. LOOKING FORWARD—CONFLICTS OF LAW IN CONTRAST TO EQUAL PROTECTION

A. Conflict of Law Approach—New York

The year 2008 marked a formal departure in how the various branches of government in New York approached same-sex marriage and civil unions. Even before Governor David Paterson took the oath of office, however, the New York judiciary appeared ready to acknowledge same-sex unions. Only three years after the Appellate Division overruled Judge Doris Ling-Cohan in her landmark opinion *Hernandez v. Robles*, the Court seemed to be warming to the idea of recognizing same-sex unions from other jurisdictions.[137]

Hernandez was brought by five same-sex couples who alleged that the New York Domestic Relations Law violated state constitutional guarantees of equal protection and substantive due process.[138] As a matter of constitutional analysis, the opinion was quite remarkable; drawing on theories of equal protection and due process, Judge Ling-Cohan found that marriage was a fundamental right available to all on equal terms.[139] Acknowledging that the denial of same-sex marriage was no different from the anti-miscegenation laws of the past, Judge Ling-Cohan wrote that while "prejudice against gay people may still prevail elsewhere [it] cannot be a legitimate justification for maintaining it in the marriage laws of this

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[135] *See generally* Vikram David Amar, The Marriage Protection Bill Passed by the House of Representatives: Trying to Make Sense of the Nonsensical (Aug. 6, 2004), http://writ.news.findlaw.com/amar/20040806.html.

[136] This raises an interesting choice of law issue separate from same-sex marriage. In Williams v. North Carolina, 317 U.S. 287 (1942), the Supreme Court held that it "is the final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause." *Id.* at 302. Even if a jurisdiction-stripping statute is constitutional, under *Williams* it is likely that the Supreme Court will still be able to hear challenges to the MPA and DOMA.

[137] *See* Funderburke v. New York State Dep't of Civil Serv., 822 N.Y.S.2d 393 (N.Y. Sup. Ct. 2006). On February 4, 2005, Judge Ling-Cohan announced her decision in *Hernandez*. Reflecting on the decision at a New York City Bar Association event in June 2008, Judge Ling-Cohan told the audience that she recognized *Hernandez* would be the most important opinion of her judicial career. Listening to her speak about *Hernandez*, one can hear the pride in her voice as she describes personally composing the opinion due to the momentous importance of the decision. One can also identify with the adversity that Judge Ling-Cohan encountered after the opinion was released. While an immediate hero in the gay rights movement, Judge Ling-Cohan also became public enemy number one among opponents of same-sex marriage.

[138] Hernandez v. Robles, 794 N.Y.S.2d 579, 583-84 (N.Y. Sup. Ct. 2005).

[139] *Id.* at 596.

State."[140] For a brief moment in 2005, same-sex marriage became a possibility in the state of New York. By the close of the year, however, the Appellate Division reversed *Hernandez*.[141]

One year after *Hernandez*, New York confronted same-sex marriage in the choice of law context. In *Funderburke v. New York State Department of Public Service*, two New York residents, married in Canada, returned to the state to reside.[142] After Duke Funderburke, a retired public school teacher, and Bradley Davis were married in 2004, Duke requested health insurance coverage from the district for his new husband.[143] The school district's counsel responded to the request by advising Duke that the district did not have an obligation to provide same-sex benefits, and elected not to provide benefits to Duke's husband.[144]

Duke sued for his benefits on a choice of law theory, raising the issue of whether New York would acknowledge out-of-state same-sex marriages.[145] Granting the District's motion for summary judgment and citing *Hernandez*, the state's trial court held that under current state law Duke and Bradley were "not considered spouses and therefore spousal insurance benefits [were] unavailable to them."[146] The court further noted that the issue would be more appropriate for the legislature to address.[147]

Funderburke appealed the trial court's decision and two years later, in March 2008, the case went before the Appellate Division.[148] In the interim, however, the school district changed its policy and elected to recognize "foreign same-sex marriages."[149] While this effectively made Duke and Bradley's challenge moot, the Appellate Division decided to review the case after expressing concern that the "[trial court's] orders could spawn adverse legal consequences for the plaintiff or be used as precedent in future cases, causing confusion of the legal issues in this area of the law."[150] Acknowledging that its review was purely academic, the Appellate Division vacated the lower court's previous orders on March 25, 2008.[151]

The Appellate Division may have been influenced by another recent

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[140] *Id.* at 610.

[141] Hernandez v. Robles, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005).

[142] Funderburke v. New York State Dep't of Civil Serv., 822 N.Y.S.2d 393, 394 (N.Y. Sup. Ct. 2006).

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* at 394.

[148] Funderburke v. New York State Dep't of Civil Serv., 854 N.Y.S.2d 466 (N.Y. App. Div. 2008).

[149] *Id.* at 468.

[150] *Id.* at 470.

[151] *Id.* at 469-70.

New York case, *Martinez v. County of Monroe*.[152] Decided on February 1, 2008, a sister Appellate Division recognized a lesbian couple's Ontario marriage. The Court held that since there was no positive law in New York preventing recognition, the couple was entitled to the rights that accompanied the relationship.[153] Addressing the role of the legislature, the unanimous Court wrote, "The Legislature may decide to prohibit the recognition of same-sex marriages solemnized abroad. Until it does so, however, such marriages are entitled to recognition in New York."[154]

While the New York legislature's official position on same-sex marriage remains to be seen, the judiciary's current approach is consistent with the literal spirit of the Full Faith and Credit Clause. New York's judiciary also now has a strong ally in this matter. Shortly after David Paterson was elevated to the position of governor, he established himself as a leader on gay, lesbian, bisexual, and transgender ("GLBT") issues. A long-time ally of the GLBT communities of New York, Governor Paterson has shared with the public his experiences within that community. In a May 2008 *New York Times* article, Governor Paterson recalled times during his childhood when he stayed with family friends—Uncles Stanley and Ronald.[155] Years later, as a rising politician in Harlem, Paterson often acted as a go-between in the strained relationship bewteen gay and black residents in his community.[156] These experiences would influence one of his first and most controversial directives as governor—the recognition of out-of-state same-sex marriages and civil unions.[157]

On May 14, 2008, Governor Paterson issued an executive directive ordering all New York agencies to recognize out-of-state same-sex marriages and civil unions.[158] Describing the directive as "a strong step toward marriage equality," the governor acknowledged that his actions effectively moved New York closer to legalized civil unions or same-sex marriage.[159] Though a victory for the gay rights movement, Governor Paterson's directive nonetheless made New York the only state to acknowledge same-sex unions from out-of-state, while not extending similar rights to New York residents.[160]

In its application of conflicts of law principles, New York is doing its

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[152] Martinez v. County of Monroe, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008).

[153] *Id.* at 742.

[154] *Id.* at 743.

[155] Jeremy W. Peters & Danny Hakim, *How Governor Set His Stance on Gay Rights*, N.Y. TIMES, May 30, 2008, at A1.

[156] *Id.*

[157] *Id.*

[158] Jeremy W. Peters, *New York to Back Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2008, at A1.

[159] *Id.* Enforcement of the directive will require the modification of approximately 1,300 state statutes and regulations. *Id.*

[160] *Id.*

part to ensure comity amongst the states, while also promoting legislative and judicial harmony.[161] While ensuring that rights are recognized, the judiciary has been careful not to assume the position of public policy maker, potentially undermining the role of the legislature. This is in stark contrast to the position of the judiciary in Connecticut and California, which have found that the denial of same-sex marriage is a violation of equal protection. Although their decisions should be applauded as victories for the gay rights movement, they also invite organized opposition and open the door for legislation such as Proposition 8.

B. Equal Protection Approach—Connecticut and California

Both Connecticut and California legalized same-sex marriage through judicial application of each state's respective equal protection clause.[162] In each case, the Supreme Courts determined that civil unions were not the constitutional equivalent of marriage, forcing the state to either permit same-sex marriage or stop performing marriages altogether.[163] Although the Connecticut Supreme Court's decision in *Kerrigan* remains good law today, California's extension of equal marriage rights to same-sex couples has not fared as well.[164]

1. Kerrigan v. Commissioner of Public Health

The *Kerrigan* case originated in 2004 when eight plaintiffs brought suit for declaratory judgment against Connecticut's public health department and Madison's town clerk.[165] In their original complaint, the plaintiffs alleged that the state's denial of same-sex marriage violated the state constitution's due process and equal protection clauses.[166] After passage of the Civil Union Laws in 2005, which permitted civil unions but defined marriage "as 'the union of one man and one woman,'"[167] the plaintiffs amended their complaint to "whether the civil union law and its prohibition against same-sex marriage pass muster under the state constitution."[168]

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[161] The District of Columbia Council adopted an approach similar to the one in New York, by voting to recognize out-of-state same-sex marriage. The Council's vote came on April 7, 2009, the same day that the Vermont legislature legalized same-sex marriage. Nikita Stewart & Tim Craig, *D.C. Council Votes to Recognize Gay Nuptials Elsewhere*, WASH. POST, Apr. 8, 2009, at A01.

[162] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); In re Marriage Cases, 183 P.3d 384 (Cal. 2008). Vermont is the only state to date to legalize same-sex marriage through the legislative process. Goodnough, *supra* note 24, at A1.

[163] *Kerrigan,* 957 A.2d at 482; *In re Marriage Cases*, 183 P.3d at 452-53.

[164] *See infra* Part III.B.2.

[165] 957 A.2d at 412.

[166] *Id.* at 412-13. One year after *Kerrigan* was filed, the Connecticut Legislature passed Public Act No. 05-10, establishing civil unions. The law was codified at CONN. GEN. STAT. §§ 46b-38aa to -38pp.

[167] *Kerrigan*, 957 A.2d at 413.

[168] *Id.*

When addressing the equal protection argument, Justice Palmer, writing for a narrow majority, drew directly on the California Supreme Court's landmark decision in *In re Marriage Cases*, which held that homosexuals were a suspect class and that limiting marriage to heterosexual couples violated the state constitution's equal protection clause.[169] Quoting the California decision, Justice Palmer wrote:

> Both same sex and opposite sex couples consist of pairs of individuals who wish to enter into a formal, legally binding and officially recognized, long-term family relationship that affords the same rights and privileges and imposes the same obligations and responsibilities. Under these circumstances, there is no question but that these two categories of individuals are sufficiently similar to bring into play equal protection principles that require a court to determine whether distinctions between the two groups justify the unequal treatment.[170]

In defining the appropriate level of scrutiny for equal protection purposes, the Court ultimately recognized homosexuals as a quasi-suspect class entitled to heightened scrutiny.[171]

In making this critical determination, the majority relied on both federal and state equal protection jurisprudence. For federal guidance, the Court drew on both *Bowers* and *Lawrence*, and their respective historical impact on the status of gay rights.[172] The *Kerrigan* majority recognized that "*Lawrence* undermines the validity of the federal circuit court cases that have held that gay persons are not entitled to heightened judicial protection because, as we have explained, the courts in those cases relied heavily—and in some cases exclusively—on *Bowers* to support their conclusions."[173] While recognizing *Lawrence's* impact on gay rights, the Court departed from Justice Kennedy's majority opinion, which had refused to identify sexual orientation as a quasi-suspect class for equal protection purposes.[174] Instead, the *Kerrigan* Court determined that:

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[169] Mike McKee, *Connecticut's Same-Sex Marriage Ruling Draws on California's*, THE RECORDER, Oct. 14, 2008, http://www.law.com/jsp/article.jsp?id=1202425246029. For a discussion of *In re Marriage Cases*, *see infra* Part III.B.2.

[170] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 424 (Conn. 2008).

[171] *Id.* at 431-32.

[172] *Id.* at 434.

[173] *Id.* at 467.

[174] The *Lawrence* five-Justice majority based its decision on substantive due process instead of equal protection. 539 U.S. 558, 564. Considering the Court's make-up at the time, this approach could have been to ensure a five-Justice majority. The only Justice to address the equal protection argument was Justice O'Connor, who filed a concurrence. *Id*. at 579. *See generally* Nan D. Hunter, *Sexual Orientation and the Paradox of Heightened Scrutiny*, 102 MICH. L. REV. 1528 (2004); Edward Stein,

> Gay persons have been subjected to and stigmatized by a long history of purposeful and invidious discrimination that continues to manifest itself in society. The characteristic that defines the members of this group—attraction to persons of the same sex—bears no logical relationship to their ability to perform in society, either in familial relations or otherwise as productive citizens. Because sexual orientation is such an essential component of personhood, even if there is some possibility that a person's sexual preference can be altered, it would be wholly unacceptable for the state to require anyone to do so. Gay persons also represent a distinct minority of the population. It is true, of course, that gay persons recently have made significant advances in obtaining equal treatment under the law. Nonetheless, we conclude that, as a minority group that continues to suffer the enduring effects of centuries of legally sanctioned discrimination, laws singling them out for disparate treatment are subject to heightened judicial scrutiny to ensure that those laws are not the product of such historical prejudice and stereotyping.[175]

When applying the heightened standard of review, the Court found that the state had failed to provide a compelling justification for denying same-sex marriage.[176] As the Massachusetts and California Supreme Courts before it, the Connecticut Supreme Court held that failing to extend equal marriage rights to gay couples was a violation of equal protection and therefore unconstitutional.[177] Explaining that recognition of same-sex relationships "does not alter the nature of marriage," Justice Palmer wrote:

> It is only because the state has not advanced a sufficiently persuasive justification for denying same sex couples the right to marry that the traditional definition of marriage necessarily must be expanded to include such couples. If the defendants were able to demonstrate sufficient cause to deny same sex couples the right to

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Introducing Lawrence v. Texas: *Some Background and a Glimpse of the Future*, 10 CARDOZO WOMEN'S L.J. 263 (2004).

[175] *Kerrigan*, 957 A.2d at 432.

[176] Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 480 (Conn. 2008).

[177] *Id.* at 482. The dissent argued that granting quasi-suspect class status to homosexuals was "contrary to a sound and prudent interpretation of constitutional standards" because it "unduly minimize[d] the unique and extraordinary political power of gay persons." *Id.* at 483.

> marry, then we would reject the plaintiffs' claim and honor the state's desire to preserve the institution of marriage as a union between a man and a woman. In the absence of such a showing, however, we cannot refuse to follow settled equal protection jurisprudence merely because doing so will result in a change in the definition of marriage. Contrary to the suggestion of the defendants, therefore, we do not exceed our authority by mandating equal treatment for gay persons; in fact, any other action would be an abdication of our responsibility.[178]

A poll released by the *Advocate* in December 2008 suggests that Connecticut residents are largely supportive of the court's ruling; a majority of respondents supported the decision, and a full sixty-one percent of those polled opposed banning same-sex marriage through a constitutional amendment.[179]

2. In re Marriage Cases

In contrast to *Kerrigan's* support among residents of Connecticut, California's experience with same-sex marriage has been both tumultuous and short-lived. On May 15, 2008, the California Supreme Court announced its landmark same-sex marriage decision in *In re Marriage Cases*.[180] The case consisted of six consolidated appeals challenging the denial of marriage to same-sex couples.[181] At the time of the appeal, California law permitted domestic partnerships for same-sex couples, which provided the same rights as traditional marriage.[182] The California Supreme Court framed the issue presented as:

> [W]hether our state constitution prohibits the state from establishing a statutory scheme in which both opposite-sex and same-sex couples are granted the rights to enter into an officially recognized family relationship that affords all of the significant legal rights and obligations traditionally associated under state law with

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[178] *Id.* at 480-81.

[179] *See* The Advocate, Poll: Connecticut Voters Support Same-Sex Marriage (Dec. 18, 2008), http://www.advocate.com/news_detail_ektid68610.asp.

[180] 183 P.3d 384 (Cal. 2008). On June 4, 2008, the California Supreme Court denied requests to stay its decision until the November election and denied petitions for rehearing. News Release, Judicial Council of California, California Supreme Court Denies Rehearing and Stay in Marriage Cases (June 4, 2008).

[181] *In re Marriage Cases*, 183 P.3d at 397.

[182] *See* California Domestic Partners Rights and Responsibilities Act of 2003, CA. FAM. CODE § 297.5 (2008).

> the institution of marriage, but under which the union of an opposite sex couple is officially designated a "marriage" whereas the union of a same-sex couple is officially designated a "domestic partnership." The question we must address is whether, under these circumstances, the failure to designate the official relationship of same-sex couples as marriage violates the California Constitution.[183]

The Court began its analysis with a lengthy discussion of the history of marital rights in the state of California, and then turned its attention to the plaintiff's equal protection claim.[184] The Court found that homosexuals were a suspect class[185] and that the provision of the Family Code limiting marriage to opposite-sex couples violated the equal protection clause of the state constitution.[186] Writing for the majority, Chief Justice George held that:

> the statutory provisions restricting marriage to a man and a woman cannot be understood as having merely a disparate impact on gay persons, but instead properly must be viewed as directly classifying and prescribing distinct treatment on the basis of sexual orientation. By limiting marriage to opposite-sex couples, the marriage statutes, realistically viewed, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation.[187]

The 4-3 decision was met with cheers from crowds who had lined the streets of San Francisco to purchase copies of the historic opinion.[188]

Yet, the Court's decision almost immediately faced an uncertain future.[189] Less than a month after its release, proponents of Proposition 8, a bill to amend the state constitution to define marriage as between a man and a woman, had garnered enough signatures to ensure that it would be included on the November General Election ballot.[190] After a seventy-million dollar campaign, largely financed by the religious right,

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[183] *In re Marriage Cases*, 183 P.3d at 398.

[184] *Id*. at 407-13. A section discussing the history of domestic partnership legislation in the state follows the history of the right to marry in California. *Id.* at 413-18.

[185] *Id.* at 441-43.

[186] In re Marriage Cases, 183 P.3d 384, 453 (Cal. 2008).

[187] *Id.* at 440-41.

[188] Maura Dolan, *Gay Marriage Ban Overturned*, L.A. TIMES, May 16, 2008, at 1.

[189] *Id.*

[190] Press Release, Cal. Sec'y of State, Secretary of State Debra Bowen Certifies Eighth Measure for November 4, 2008, General Election (June 2, 2008).

Proposition 8 passed by a narrow margin.[191] In addition to serving as a huge public setback for same-sex couples and gay rights advocates nationwide, the passage of Proposition 8 had significant private consequences for the 16,000 married same-sex couples who feared the law might be applied retroactively.[192]

As the nation celebrated the election of Barack Obama, many were shocked that Proposition 8 passed in California, a state traditionally viewed as politically left of center.[193] Thousands of protestors across the country rallied against the passage of the bill,[194] while attorneys on both sides prepared themselves for the coming legal challenges.[195] The State Attorney General also became involved, immediately requesting that the California Supreme Court rule on the validity of Proposition 8.[196]

On November 19, the California Supreme Court granted review in the Proposition 8 legal dispute.[197] Days into the New Year, multiple gay rights organizations had filed reply briefs in the action;[198] a press release published by the American Civil Liberties Union offered a glimpse of the coming legal changes:

> California's Equal Protection clause was not written in sand, to be erased by shifting political tides. It's a solid guarantee that we all have the same rights and it's the foundation of our government. Exceptions can't be carved by simple majority vote or the equality guarantee becomes a discrimination guarantee. No initiative can cause such a profound change in our legal system.[199]

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[191] Tamara Audi, Justin Scheck & Christopher Lawton, *California Votes for Proposition 8*, WSJ, Nov. 5, 2008, *available at* http://online.wsj.com/article/SB122586056759900673.html. The Mormon Church donated approximately $180,000 to help pass Proposition 8. Posting of Jessica Garrison to L.A. Now, Mormon Church Reports Spending $180,000 on Proposition 8, http://latimesblogs.latimes.com/lanow/2009/01/top-officials-w.html (Jan. 30, 2009, 20:51 EST). The California Southern Baptist Convention also encouraged its congregations to financially support Proposition 8. *See* California Southern Baptist Convention, Proposition 8 Resources for Churches, http://www.csbc.com/protectmarriage (last visited Apr. 14, 2009).

[192] Bob Egelko, *If Prop. 8 Passes, What About Those Who Wed?,* S.F. CHRONICLE, Nov. 1, 2008, at A1.

[193] *See* Hendrik Hertzberg, *Eight is Enough*, THE NEW YORKER, Dec. 1, 2008 (providing commentary on the speculation surrounding the passage of Proposition 8). Arizona and Florida also passed similar laws on Election Day, but neither state captured the public's attention quite like California. CNN, Same-Sex Marriage Rallies Stretch Across Nation (Nov. 16, 2008), http://www.cnn.com/2008/US/11/15/same.sex.marriage/index.html [hereinafter Marriage Rallies].

[194] Marriage Rallies, *supra* note 193.

[195] Jessica Garrison, Maura Dolan & Nancy Vogel, *Gay-rights Advocates to Challenge Proposition 8*, CHI. TRIB., Nov. 6, 2008, at 15.

[196] Bob Egelko, *Jerry Brown Seeks Legality of Prop. 8*, S.F. CHRONICLE, Nov. 18, 2008, at A1.

[197] Press Release, ACLU, California Supreme Court Grants Review in Prop. 8 Legal Challenges (Nov. 19, 2008).

[198] Press Release, ACLU, New Filing in Prop. 8 Legal Challenge (Jan. 5, 2009).

[199] *Id.*

As same-sex couples of Connecticut enjoy their newfound rights under their state's equal protection clause, the residents of California now must wait for their Supreme Court's decision. The Court held oral arguments on March 5, 2009.[200]

V. CONCLUSION

While *Lawrence v. Texas* sparked strong reactions on both sides of the political spectrum,[201] what was once thought to be a pivotal moment in the gay rights movement has been anticlimactic. Even though *Lawrence* recognized the right to privacy for consensual adult sexual activity,[202] there was great fear among conservatives that overruling *Bowers v. Hardwick* would provide a legal basis for moral depravity.[203] Immediately after the U.S. Supreme Court's landmark ruling in *Lawrence*, *Goodridge* made same-sex marriage a reality in Massachusetts, confirming at least one of Justice Scalia's fears and potentially paving the way for same-sex marriage nationwide. Yet in reality, little has changed across the country. Though more states now allow for domestic partnerships and same-sex marriage, the majority of states have legislated some type of mini-DOMA, and in most states gays and lesbians are still struggling for equal access to the sacred institution of marriage.[204]

Goodridge (as well as *Baker*), however, opened a Pandora's box for conflicts of law issues. As more states legislatively extend rights to same-sex couples, these laws come into direct conflict with state mini-DOMAs that ban such relationships. The denial of rights also has practical consequences for same-sex couples, such as parenting, adoption, and even tax implications.[205] For instance, although Vermont permits same-sex partners to file joint tax returns, the Internal Revenue Service is prohibited from recognizing these joint filings because of DOMA.[206]

Today, the conflicts of law issues surrounding same-sex marriage are simply too large and complicated to be addressed by states operating in a vacuum. These issues must be resolved at the federal level, with the Supreme Court either upholding DOMA or finding it and the mini-

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[200] LaGanga, *supra* note 38, at 14.

[201] Lawrence v. Texas, 539 U.S. 558 (2003).

[202] *Id.* at 578-79.

[203] *Id.* at 590 (Scalia, J., dissenting).

[204] Status of Same-Sex Relationships Nationwide, *supra* note 15.

[205] For a discussion on same-sex marriage dissolution and the difficulties that accompany it *see* MSNBC, Same-Sex Marriages Hard to Undo: Patchwork of State-by-State Laws Making it Tough for Same-Sex Splits, http://www.msnbc.msn.com/id/24142681/print/1/displaymode/1098 (last visited Apr. 14, 2009).

[206] Kevin McCormally, *Tax Savings for Domestic Partners*, WASH. POST, Feb. 22, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/ 02/22/AR2008022200917.html.

DOMAs unconstitutional. However, even a ruling to uphold DOMA would leave many issues unresolved: a minority of states would slowly legalize same-sex marriage, while others would continue to pass stronger mini-DOMAs and resist recognition of out-of-state gay marriages. Until the Supreme Court broadly rejects the constitutionality of both DOMA and mini-DOMAs, same-sex couples will continue to face unequal treatment under the law.