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The Litigation to Redefine Marriage: Equality and Social Meaning

William C. Duncan*

“The life of reason is our heritage and exists only through tradition. Now the misfortune of revolutionists is that they are disinherited, and their folly is that they wish to be disinherited even more than they are.”¹

I. INTRODUCTION

Over the past three decades, few litigation strategies have evoked more comment, political turmoil, constitutional change, and legal commentary as the effort to redefine marriage to include same-sex couples. Nearly a dozen cases have been decided and more are now pending. Two successful cases have led to state constitutional amendments² and the Federal Defense of Marriage Act.³

This article will describe the early same-sex marriage litigation, then turn to the cases from the 1990's before describing current same-sex marriage litigation. I have assigned some cases to categories that are not chronologically accurate because the context of the case makes them more like cases from a previous era. Of course, the assignment may be somewhat arbitrary.⁴

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1. JOHN BUCHAN, MEMORY HOLD-THE-DOOR 202 (1940) (quoting George Santayana).

2. ALASKA CONST. art. I, § 25 (see Kevin G. Clarkson, William C. Duncan & David Orgon Coolidge, *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213 (1999)); HAW. CONST. art. I, § 23 (see David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Constitutionality*, 22 HAW. L. REV. 19 (2000)).

3. Pub. L. No. 104-199, 100 Stat. 2419 (1996) codified as 1 U.S.C. § 7 and 28 U.S.C. § 1738C (1997).

4. For instance, the Alaska case discussed in Part III bears a resemblance to the cases of the 1970s in posture. I have included it in its chronological context because of its outcome.

The article will then make some observations about the changing nature of the litigation in an attempt to explain the shift in success between the first and second wave of cases attempting to redefine marriage. Finally, it will speculate on the future of claims for same-sex marriage: how they might arise and what they might bode for the social meaning of marriage.

II. LONG SHOT: 1970S AND 1980S

Until the mid-1990s same-sex marriage litigation was always something of a long shot. The first few cases illustrate the difficulty plaintiffs had in convincing the courts to adopt their novel reasoning.

A. *Minnesota*

The first case in which a same-sex couple sought to compel a state to grant them a marriage license began in Minnesota in 1970 when Jack Baker and Michael McConnell filed suit.⁵ Both men saw their lawsuit as part of a broader challenge to marriage and its place in the culture.⁶ The Minnesota Supreme Court's opinion in the case flatly rejected their contentions. It first held that the State's marriage statute could not be construed to permit same-sex marriage since marriage is inherently opposite-sex as evidenced by the dictionary definition of the term and the use of gender specific terms in the family statutes.⁷ The court also rejected plaintiffs' due process claim on the basis of history, saying the due process clause was not a charter for judicial legislation.⁸ They distinguished *Griswold v. Connecticut*⁹ because that case assumed the opposite-sex nature of marriage and dealt only with rights within marriage.¹⁰ The court also rejected plaintiffs' analogy to sterile couples because the majority felt a fertility requirement would violate privacy and because the distinction between same- and opposite-sex couples in regards to procreative potential is largely accurate despite some exceptions among opposite-sex couples.¹¹ In regards to the plaintiffs' equal protection claim, the court rejected their proffered analogy to

5. Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 20 (2000).

6. *Id.*

7. *Baker v. Nelson*, 191 N.W.2d 185, 185-86 (Minn. 1972), *dismissed for lack of substantial federal question*, 409 U.S. 810 (1973).

8. *Id.* at 186.

9. 381 U.S. 479 (1965).

10. *Baker*, 191 N.W.2d at 186.

11. *Id.* at 187.

Loving v. Virginia,¹² noting that this precedent related to race while the relevant category in this case was sex, a fundamentally different category.¹³

Although not widely recognized, this case also created U.S. Supreme Court precedent on the same-sex marriage issue. The plaintiffs appealed to the U.S. Supreme Court in February 1972.¹⁴ The American Civil Liberties Union declined to take the case, believing it might harm other efforts, so the Minnesota Civil Liberties Union pursued the appeal arguing that Minnesota's marriage law constituted sex discrimination.¹⁵ When the Court rejected plaintiffs' petition for certiorari, they unanimously did so on the grounds that the case failed to raise a substantial federal question.¹⁶ The Court has expressly noted that such a decision is a ruling on the merits of the case.¹⁷ Thus, unless the Court reconsiders, there is binding precedent to the effect that the U.S. Constitution creates no right to redefine marriage to include same-sex couples. It is also interesting to note that this decision came just six years after the Supreme Court's right to marry decision in *Loving v. Virginia*¹⁸ and despite an invitation from the plaintiffs to hold that *Loving* applied.¹⁹

B. Washington

The next same-sex marriage case arose in Seattle, Washington and involved another male couple, also associated with a broader cultural agenda.²⁰ Their effort was also unsuccessful. The Washington Court of Appeals, relying on gender specific language in the marriage-related statutes, rejected plaintiffs' statutory interpretation claim.²¹ An important aspect of the court's decision was its response to the plaintiffs' claim that marriage is a form of sex discrimination. First, the court held that the state Equal Rights Amendment was not intended to redefine marriage, rather its purpose was to protect women, not promote same-sex marriage.²² It asserted that plaintiffs are unable to marry because of the

12. 388 U.S. 1 (1967).

13. *Baker*, 191 N.W.2d at 187.

14. JOYCE MURDOCH & DEB PRICE, *COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT* 167 (2001).

15. *Id.* at 168-69.

16. *Baker v. Nelson*, 409 U.S. 810 (1973). *See also* MURDOCH & PRICE, *supra* note 14, at 171.

17. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

18. 388 U.S. 1 (1967).

19. *See Baker v. Nelson*, Jurisdictional Statement at 14-17 (Feb. 11, 1973).

20. Johnson, *supra* note 5 at 22.

21. *Singer v. Hara*, 522 P.2d 1187, 1189 (Wash. Ct. App. 1974), *cert. denied*, 84 Wash. 2d 1008 (1974).

22. *Id.* at 1191, 1194.

definition of marriage, not their sex.²³ It specified that the Equal Rights Amendment allows both sexes to access existing rights, it does not create new rights.²⁴ Finally, the court held that a law based on physical differences is an exception even to the absolutist reading of the Equal Rights Amendment.²⁵ Since the State's interest in marriage stems from the value of propagation of humanity and same-sex couples are absolutely unable to have children, the marriage law would fit the physical difference exception to the Equal Rights Amendment.²⁶ The court also specified that the marriage law was to be reviewed under a rational basis standard.²⁷ It identified the close relationship between marriage and the State's interest in protecting the environment in which children are raised as a rational basis supporting the law.²⁸ The Washington court also rejected the analogy to *Loving* saying *Loving* was about race and did not involve a fundamental change in the nature of marriage.²⁹ Given all this, the court felt justified in deferring to the legislature on the matter of changing the State's definition of marriage.³⁰

C. Kentucky

The first marriage case to involve a female couple arose in Kentucky. The very brief decision arising from the controversy tracked the other opinions by holding that, based on the historical nature of marriage as well as its dictionary definition, same-sex couples are by definition precluded from marriage.³¹ The court noted that while marriage has changed over time, the sex requirement has been constant.³² Thus, the law recognizes but does not create the intrinsic nature of marriage.³³ The court rejected plaintiffs' novel religious freedom claim holding that a religious ceremony cannot trump state law.³⁴ On another novel claim, the court held that failure to issue a license was not a form of punishment for purposes of the Eight Amendment.³⁵

23. *Id.* at 1192.

24. *Id.* at 1194.

25. *Id.*

26. *Id.* at 1195.

27. *Id.*

28. *Id.* at 1197.

29. *Id.* at 1192 n.8.

30. *Id.* at 1196 n.12.

31. *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973).

32. *Id.*

33. *Id.*

34. *Id.* at 590.

35. *Id.*

D. Colorado

After the initial set of cases from the early 1970s, state courts were silent for awhile. Then an immigration controversy brought the issue squarely into the federal courts for the first time. In this case a same-sex couple sought to have a religious commitment ceremony recognized as marriage in order to gain preferential immigration status.³⁶ Following a marriage entered into solely to gain immigration status and its annulment, an Australian citizen and his U.S. citizen same-sex partner were “married” in a religious ceremony in Colorado where the county clerk had issued them a marriage license.³⁷ The State Attorney General quickly declared the marriage invalid.³⁸ When the couple returned to Los Angeles, the INS began deportation proceedings for the Australian Tony Sullivan.³⁹ The Board of Immigration Appeals rejected Mr. Sullivan’s claim to be married to a U.S. citizen.⁴⁰ The couple, represented by David M. Brown (an attorney in the California “palimony” case *Marvin v. Marvin*⁴¹), then sued in federal court, but their claim was rejected at the trial court level.⁴² On appeal, a panel of the Ninth Circuit held that, relying on the Colorado Attorney General opinion and sex-specific language in the statutes, Colorado’s statutory definition of marriage precluded marriage by same-sex couples.⁴³ In addition, relying on historical analysis and the link between marriage and procreation, they held that a marriage between persons of the same sex would violate federal public policy.⁴⁴ The court further rejected plaintiffs’ claim that they were “putative spouses” because they could not have a good faith belief in the validity of their marriage (i.e. all are on notice of invalidity of such a marriage).⁴⁵ The court relied on the rejection of the *Baker v. Nelson* case by the U.S. Supreme Court for the proposition that the constitutional questions are insubstantial.⁴⁶ The court relied on the intrinsically opposite-sex nature of marriage as further evidence that there is no constitutional violation.⁴⁷ They noted that the justification of

36. *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1980), *cert. denied*, 458 U.S. 1111 (1982).

37. *MURDOCH & PRICE*, *supra* note 14, at 220.

38. *Id.* at 220-21.

39. *Id.* at 221.

40. *Id.*

41. 557 P.2d 106 (Cal. 1976).

42. *MURDOCH & PRICE*, *supra* note 14, at 221.

43. *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1980), *cert. denied*, 458 U.S. 1111, 1122 (1982).

44. *Id.* at 1123.

45. *Id.*

46. *Id.* at 1124.

47. *Id.*

state recognition of marriage is procreation and, although that interest may be overinclusive (meaning opposite-sex couples without the ability or intent to have children are still allowed to marry), it needed to be so to avoid privacy concerns (such as in examining a potential bride for fertility).⁴⁸ The court concluded that the opposite-sex definition of marriage is the “least intrusive alternative available to protect the procreative relationship”⁴⁹ and that recognition of homosexuals in discrimination laws or even legal recognition of same-sex relationships does not raise same-sex unions to the level of a marriage.

E. Pennsylvania

In an atypical case, a same-sex couple in Pennsylvania sought a divorce, claiming they had established a common-law marriage.⁵⁰ The Pennsylvania Supreme Court held that the nature of common-law marriage is determined by reference to statutory marriage and Pennsylvania law uses sex-specific terms, thus indicating the opposite-sex nature of marriage.⁵¹ The court also reasoned that the law’s disfavor of common-law marriages argues against expanding it to include same-sex couples.⁵² The court said that the decision to expand the definition of marriage is the legislature’s.⁵³ No constitutional issues were heard in the appeal because they had not been raised below.⁵⁴

F. District of Columbia

In late 1990, two men sued after being denied a marriage license from the clerk of the District of Columbia Superior Court.⁵⁵ The D.C. Court of Appeals dismissed the plaintiffs’ claims in a decision producing three separate opinions. The majority opinion by Judge Ferren dismissed the claim that the marriage statute allowed for same-sex marriage, based on (1) the fact that the D.C. Council had rejected a bill to allow same-sex marriage, (2) gender-specific statutory language, (3) the traditional understanding of marriage and (4) other state decisions.⁵⁶ Judge Ferren also held that the sex discrimination law of the District did not intend to

48. *Id.*

49. *Id.* at 1125.

50. *DeSanto v. Barnsley*, 476 A.2d 952 (Pa. 1984).

51. *Id.* at 954.

52. *Id.* at 955.

53. *Id.*

54. *Id.* at 956.

55. *Dean v. District of Columbia*, 653 A.2d 307 (App. D.C. 1995).

56. *Id.* at 310.

redefine marriage and would have mentioned its intent to do if it had.⁵⁷ The court held that there was no fundamental right to same-sex marriage because it is not deeply rooted in the history and tradition of the country.⁵⁸ The court noted that the U.S. Supreme Court's discussion of the right to marry had linked the right to procreation, which the court took as indicating that the right would not include same-sex couples.⁵⁹ The majority opinion concluded that the state interest in child bearing provided a rational basis for marriage law.⁶⁰

Judge Terry concurred in the decision, arguing that the inherent nature of marriage makes same-sex marriage an impossibility.⁶¹ He also argued that the court could not order a redefinition of marriage because to do so would violate the principle of separation of powers.⁶²

In another concurrence, Judge Steadman took issue with the discrimination claims of the plaintiffs. He said that marriage laws are not motivated by purposeful intent to discriminate against homosexuals.⁶³ Because the law applied equally to men and women, he thought it appropriate to reject the sex discrimination claim.⁶⁴ He did not think an examination of the claim for suspect class status based on sexual orientation was necessary because even if the statute applied unequally to homosexuals (and homosexuals were a suspect class), the absence of a right to same-sex marriage prevented an equal protection problem.⁶⁵ To bolster this claim, he reasoned that if sodomy can be criminalized, a relationship based on it cannot rise to the level of a constitutional right.⁶⁶

In the portion of his opinion dissenting from the court's disposition of the case, Judge Ferren argued that public moral disapproval of homosexuality was not enough to justify the law.⁶⁷ He would have required the state to show concrete harm (preferably in statistics) to establish a substantial or compelling interest.⁶⁸ Thus, he felt a remand was needed for a trial on the level of scrutiny and compelling interest (including whether homosexuality is immutable).⁶⁹ He believed that the

57. *Id.* at 316, 320.

58. *Id.* at 331.

59. *Id.* at 333.

60. *Id.* at 337.

61. *Id.* at 361 (Terry, J., concurring).

62. *Id.* at 362.

63. *Id.* at 362-63.

64. *Id.* at 363.

65. *Id.*

66. *Id.* at 363 n.5.

67. *Id.* at 355.

68. *Id.* at 356.

69. *Id.* at 358.

argument that marriage is inherently homosexual was just like arguments supporting anti-miscegenation laws because same-sex couples want to marry for the same reasons opposite-sex couples do.⁷⁰ He further argued that the marriage law was not just disparate in its impact, it excludes all couples in the affected class and that laws can be discriminatory without a discriminatory intent.⁷¹

III. STATE CONSTITUTIONAL LAW: 1990S TO THE PRESENT

Professor Greg Johnson suggests that the second wave of same-sex marriage lawsuits differed from the first in its more narrow focus on securing marriage licenses rather than advancing broad cultural aims.⁷² This second group of cases was certainly more strategic. Most importantly, these cases were more successful.

A. *Hawaii*

The breakthrough case for putting the definition of marriage on the national stage, initiated just after the *Dean* litigation, arose in Hawaii. In 1990, after failing to gain the support of national groups, local activist Bill Woods recruited three same-sex couples to challenge Hawaii's marriage law.⁷³ The trial court dismissed the case in 1991.⁷⁴ The Hawaii Supreme Court issued its decision in the case in 1993.⁷⁵ The case produced three opinions. The plurality opinion of Chief Justice Moon and Justice Levinson sharply diverged from previous decisions on the subject. While they held that the fundamental right to marriage recognized by the U.S. Supreme Court only applies to opposite-sex marriage and that same-sex marriage was not rooted in the traditions of the constitution, the matter did not end there.⁷⁶ Like previous decisions, the court held that the statutory language could not be understood to allow same-sex marriage (relying on sex-specific statutory language).⁷⁷ The court also held that there was no fundamental right to marriage under Hawaii's due process clause.⁷⁸

70. *Id.* at 359.

71. *Id.* at 359-60.

72. Johnson, *supra* note 5, at 22.

73. David Orgon Coolidge, *In Same-Sex 'Marriage' Fight, Courts Try an End Run*, NAT'L CATH. REG. 1 (Feb. 7-13, 1999).

74. *Id.*

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

76. *Id.* at 56-57.

77. *Id.* at 60.

78. *Id.* at 57.

The divergence began with the court's treatment of the equal protection claims of the plaintiffs. The court approached these on the premise that marriage is a state-created status.⁷⁹ The court then ruled that the marriage law employed a sex classification on its face.⁸⁰ The court further held that marriage is a sex-based classification because it takes into account the sex of one of the parties.⁸¹ Since, as the court held, sex-based classifications are subject to strict scrutiny under the State Equal Rights Amendment, the marriage statute was thus presumed unconstitutional unless the State was able to show a compelling interest in the law.⁸² The court rejected the State's argument that the dual-sex nature of marriage is intrinsic to its definition as circular.⁸³ The court also rejected the State's proffered interest in procreation as a justification for the law by saying that impotent persons may marry.⁸⁴ The court distinguished the Pennsylvania *DeSanto* case because it involved common-law marriage.⁸⁵ It rejected *Baker v. Nelson* because that case involved federal constitutional claims.⁸⁶ Perhaps, most importantly, it rejected the holdings in *Jones v. Hallahan* and *Singer v. Hara* by analogy to the U.S. Supreme Court decision in *Loving v. Virginia* in which the trial court had suggested that interracial marriages were an impossibility.⁸⁷ Relying on this analogy, suggested in an amicus brief before the court filed by the Lambda Legal Defense and Education Fund, the court finally rejected the State's defense that the law applied equally to both men and women.⁸⁸

Judge Burns concurred in the court's judgment but also suggested that there was a question of fact as to whether homosexuality constitutes a discrete sex.⁸⁹ The dissenters, Judge Heen and Justice Hayashi, agreed with the plurality that the right to marry does not mean a right to same-sex marriage.⁹⁰ However, they rejected the equal protection claim because they believed the marriage law did not discriminate because it treats both sexes the same.⁹¹ They also believed the marriage law was

79. *Id.* at 58.

80. *Id.* at 60.

81. *Id.* at 64.

82. *Id.* at 67.

83. *Id.* at 61.

84. *Id.* at 49 n.1.

85. *Id.* at 61.

86. *Id.*

87. *Id.* at 63.

88. *Id.* at 67; see David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 *BYU J. PUB. L.* 201, 206 (1998).

89. *Baehr*, 852 P.2d at 69-70.

90. *Id.* at 71.

91. *Id.*

justified by the State's rational basis in encouraging procreation.⁹² Finally, the dissenters said that redress for plaintiffs claim should come from the legislature, not the court.⁹³

The case thus went back to the circuit court level where the State would be required to rebut the presumption of unconstitutionality by demonstrating a compelling interest in the current definition of marriage. At this point, Evan Wolfson of the Lambda Legal Defense and Education Fund became co-counsel in the case.⁹⁴ The trial began September 10, 1996 and lasted two weeks.⁹⁵ The trial consisted of "dueling social-science experts" attempting to either establish or rebut the one ground on which the State chose to make its defense: the possibility of harm to children if marriage were redefined to include same-sex couples.⁹⁶ At one point, the trial devolved into attacks on the credentials of State witnesses based on their personal religious beliefs.⁹⁷

Judge Chang issued his opinion on December 3, 1996.⁹⁸ The opinion made a number of findings including that a father and mother are not essential to a child's healthy development, that homosexual parents can raise healthy children, and that the State had demonstrated no causal link between same-sex marriage and negative outcomes for children.⁹⁹ In fact, the court believed children would be assisted by same-sex marriage since it allows same-sex couples with children to access marital benefits.¹⁰⁰ Judge Chang said that same-sex couples want to marry for the same kinds of reasons as opposite-sex couples and that same-sex marriage will not harm any government interest.¹⁰¹ The conclusion was clear: Hawaii's marriage statute was unconstitutional.¹⁰²

The State immediately appealed, and before the Hawaii Supreme Court could address the lower court's opinion, the Hawaii Legislature proposed and the people of Hawaii approved (by a 69-31 margin) a state

92. *Id.* at 73.

93. *Id.* at 74.

94. Coolidge, *supra* note 88, at 206 n.14.

95. David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 15 (1997).

96. David Orgon Coolidge, *Same-Sex Marriage: As Hawaii Goes . . .*, FIRST THINGS 33 (Apr. 1997).

97. David Orgon Coolidge, *Marriage on Trial: Leaving it to the Experts*, HAW. CATH. HERALD 1 (Sept. 20, 1996).

98. Baehr v. Miike, Docket No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

99. *Id.* at 17.

100. *Id.* at 18.

101. *Id.* at 18, 21.

102. *Id.* at 22.

constitutional amendment reserving to the legislature the power to define marriage.¹⁰³

B. Alaska

In 1995, Jay Brause and Gene Dugan owners of the Out North Contemporary Art House and long-time “political activists” filed suit challenging Alaska’s marriage law.¹⁰⁴ Anchorage Superior Court Judge Peter Michalski issued an opinion in 1998 that was startlingly sympathetic to the arguments.¹⁰⁵ The court held that it could not just accept the traditional understanding of marriage.¹⁰⁶ The court then broadly construed the State constitution’s right to privacy to include the fundamental right to choose one’s life partner.¹⁰⁷ For the court, the individual’s decision was the fundamental unit of analysis and the denial of that right mandated strict scrutiny.¹⁰⁸ Almost as an afterthought, the court accepted the argument that marriage is a sex-based classification which invokes intermediate scrutiny, although this was moot since a fundamental privacy right was already found.¹⁰⁹ Thus, Judge Michalski ordered a trial to be held to determine if the State has a compelling interest justifying its marriage law.¹¹⁰ Before the trial took place, the legislature proposed and an overwhelming majority of Alaskans approved a state constitutional amendment defining marriage as the union of a man and a woman.¹¹¹

C. Vermont

Professor Greg Johnson has noted that significant legal gains by same-sex couples preceded the high profile litigation in Vermont, including the appointment of gay and lesbian “co-liaisons” to the governor in 1986, the enactment of a “hate crimes” law in 1990, and the inclusion of “sexual orientation” as a discrete category in the state’s anti-discrimination law in 1992.¹¹² The Vermont Freedom to Marry Task Force was founded in 1995 and public relations work began before the

103. Coolidge, *supra* note 73.

104. Johnson, *supra* note 5, at 22-23.

105. Brause v. Bureau of Vital Statistics, Docket No. 3AN-95-6562 CI 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

106. *Id.* at 2.

107. *Id.* at 4.

108. *Id.* at 6.

109. *Id.*

110. *Id.* at 2.

111. See Clarkson, Duncan & Coolidge, *supra* note 2.

112. Johnson, *supra* note 5, at 28.

case on behalf of three same-sex couples was actually filed in July 1997.¹¹³ In December 1997, this case was dismissed on a motion by the State, and plaintiffs appealed.¹¹⁴ During the long wait for the supreme court's opinion, the work of the Task Force seemed to pay off when the Governor's Commission on Women gave an award to the plaintiffs in the case for their "courage" in pursuing the litigation.¹¹⁵ This provoked a minor disturbance, though, when a group opposed to the redefinition of marriage pointed out that one of the Commission members was married to a Vermont Supreme Court justice before whom the case was pending.¹¹⁶

Not long before Christmas 1999, the court finally issued its closely watched opinion.¹¹⁷ All of the justices concurred in the result that the State's marriage law was constitutionally infirm, but with a significant twist. The majority opinion first dismissed religious and moral issues as irrelevant.¹¹⁸ They then joined the unanimous opinion among courts addressing the issue, holding that the statutory definition of marriage requires a man and a woman (relying on the dictionary definition, common law, and other statutory language).¹¹⁹ The state constitutional analysis, however, was significantly different from anything that had come before. The majority first said that the appropriate constitutional analysis under the Common Benefits Clause of the Vermont Constitution is based on principle of "inclusion."¹²⁰ Thus, according to the majority, if a statute is not "inclusive," the State must show it is "reasonably necessary" to advance a state objective.¹²¹ Before looking at the objectives of the statute, the majority summarily dismissed the sex discrimination argument, holding that the marriage statute was neutral as to sex and that the purpose of marriage law was not to disadvantage one sex.¹²²

The majority dismissed the asserted state interest in maintaining the link between procreation and child rearing, calling it underinclusive because some married couples cannot have children and some same-sex

113. *Id.* at 29-30.

114. *Id.* at 30-31.

115. *Id.* at 33.

116. See Nancy Remsen, *Justice Dooley Challenged*, BURLINGTON FREE PRESS 1 (Sept. 21, 1999).

117. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

118. *Id.* at 867.

119. *Id.* at 868.

120. *Id.* at 878.

121. *Id.*

122. *Id.* at 880 n.13.

couples do.¹²³ The majority further held that the link between procreation and child rearing had already been severed by the existence of artificial reproductive technology.¹²⁴ The majority said that the link between procreation and child rearing does not advance a substantial interest because same-sex and married couples are the same in regards to rearing children.¹²⁵ Also, since Vermont already allowed same-sex couples to adopt, state policy doesn't really favor child-rearing by married couples.¹²⁶

The majority also dismissed some of the State's other justifications for its marriage law.¹²⁷ They held that existing differences in Vermont marriage law from that of other states defeated the claim that Vermont had an interest in consistency with other states.¹²⁸ They also held that Vermont's sexual orientation discrimination law, adoption law, and other similar statutes undermine the State's claim that its public policy disfavors the legal recognition of same-sex relationships.¹²⁹

The majority had noted that the benefits of marriage are so great that only a substantial interest could justify the exclusion of same-sex couples and having dismissed all justifications held that the Vermont constitution requires benefits of marriage to be extended to same-sex couples.¹³⁰ The majority did not, however, order the State to issue marriage licenses to same-sex couples. In fact, they held that the legislature can decide whether to redefine marriage or create a substantially similar option for same-sex couples.¹³¹ Lest the majority be accused of deferring to the legislature though, the court specified that if the legislature did not provide the benefits of marriage to same-sex couples, the court would retain jurisdiction and order the issuance of marriage licenses to same-sex couples.¹³²

In concurring, Justice Dooley accused the court of making a decision without any principled basis.¹³³ He noted that all previous Vermont case law had at least applied federal constitutional analysis.¹³⁴ Thus, he felt that the court's approach allowed too much judicial discretion so that the

123. *Id.* at 881.

124. *Id.* at 882.

125. *Id.* at 884.

126. *Id.* at 885.

127. *Id.* at 884-86.

128. *Id.* at 884-85.

129. *Id.* at 885.

130. *Id.* at 884, 886.

131. *Id.* at 886.

132. *Id.* at 887.

133. *Id.* at 893 (Dooley, J., concurring).

134. *Id.* at 894.

judges were acting like legislators.¹³⁵ Justice Dooley would however, not have followed federal precedent because he believed Vermont's legal climate was more favorable to homosexuals than the federal climate.¹³⁶ Instead, he would have followed the analysis of an Oregon Court of Appeals decision and held that homosexual persons constitute a suspect class.¹³⁷ Thus, he believed that although marriage statutes are facially neutral, they have a disparate impact based on sexual orientation and would be unconstitutional.¹³⁸

The court's attempt to draw a "compromise" position drew a strong dissent from Justice Johnson who believed that the court's remedy involves the court too much in the legislative process and does not decrease uncertainty for plaintiffs.¹³⁹ She would have ordered marriage licenses for the plaintiffs.¹⁴⁰ Her rationale was that denying marriage licenses to same-sex couples is sex discrimination since the sex of one party is taken into account.¹⁴¹ Further, she believed same-sex marriage is a logical extension of the state public policy enacted in Vermont's sexual orientation discrimination law.¹⁴²

In response to the court's mandate, the Vermont Legislature created a new status called "civil unions," which allowed same-sex couples to take advantage of all of the benefits of marriage under another name.¹⁴³

D. Massachusetts

In April 2001, seven same-sex couples represented by the co-counsel in the Vermont case, filed suit in the Suffolk County Superior Court making the familiar claims for marriage licenses.¹⁴⁴ The plaintiffs however, made clear that they did not want to obtain some kind of civil union status as in Vermont.¹⁴⁵ On a motion for summary judgment, the judge concurred with previous decisions in holding that the word marriage in Massachusetts statutes refers to the union of a man and a woman, as evidenced by the use of gender specific terms in the statute

135. *Id.* at 897.

136. *Id.* at 891.

137. *Id.* at 893.

138. *Id.* at 890.

139. *Id.* at 898 (Johnson, J., concurring and dissenting).

140. *Id.*

141. *Id.* at 905.

142. *Id.* at 902 n.5.

143. See David Orgon Coolidge & William C. Duncan, *Beyond Baker: The Case for a Vermont Marriage Amendment*, 25 VT. L. REV. 61 (2000).

144. Yvonne Abraham, *Gays Seek Right to Marry*, BOSTON GLOBE, Apr. 12, 2001, at A1.

145. *Id.*

and the history of the marriage institution.¹⁴⁶ Relying on separation of powers principles the court held that it was required to defer to the state marriage statute unless the plaintiff can show there is no conceivable grounds to support its validity.¹⁴⁷ The court did find such a ground: “Recognizing that procreation is marriage’s central purpose, it is rational for the Legislature to limit marriage to opposite-sex couples who, theoretically, are capable of procreation.”¹⁴⁸ The court summarily dismissed plaintiffs’ claim that the marriage law violated the state Equal Rights Amendment because the Amendment does not apply to discrimination on the basis of “sexual orientation.”¹⁴⁹ Further, the court noted that Massachusetts had no provision analogous to Vermont’s common benefits clause that would support a finding that the marriage statute is unconstitutional and that Article 6 of the Massachusetts Constitution is only violated if a statute’s purpose is to confer special privileges on a particular group.¹⁵⁰ Most of the opinion focused on the question of a due process right to same-sex marriage. The court held that the Massachusetts constitution recognizes only rights “deeply rooted in the Commonwealth’s history and tradition” as fundamental and the definition of marriage as the union of a man and a woman is “deeply rooted in our Commonwealth’s legal tradition and practice.”¹⁵¹ Plaintiffs’ novel claims for marriage licenses based on rights of speech and association were also rejected.¹⁵² Given all this, the court concluded that the plaintiffs’ request should properly be directed to the legislature, not the courts.¹⁵³

The plaintiffs appealed and oral argument was held in the Supreme Judicial Court (SJC) in March 2003.¹⁵⁴ The SJC handed down its decision on November 17, 2003 and what it lacked in promptness it made up in novelty.¹⁵⁵ The SJC framed the question raised in the debate as “whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish

146. *Goodridge v. Dep’t of Pub. Health*, Docket No. 20011647A, 2002 WL 1299135 at *2 (Mass. Super. May 7, 2002).

147. *Id.* at *5.

148. *Id.* at *13.

149. *Id.* at *5 n.6.

150. *Id.* at *6-7.

151. *Id.* at *10.

152. *Id.* at *11.

153. *Id.*

154. Kathleen Burge, *SJC Peppers Lawyers on Same-Sex Marriage*, BOSTON GLOBE, Mar. 5, 2003, at A1.

155. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

to marry.”¹⁵⁶ The succinct answer of four of the court’s seven judges was: “We conclude that it may not.”¹⁵⁷ In its opinion, the majority noted the deep cultural divisions surrounding the proposal to redefine marriage to include same-sex couples.¹⁵⁸ It cavalierly swept these aside though, quoting *Lawrence v. Texas* to assure the people of Massachusetts that it was “defin[ing] the liberty of all, not . . . mandat[ing] our own moral code.”¹⁵⁹ In the first section of the opinion, the court went to great length to portray the plaintiffs in a most positive light even including the improbable statement that some of the same-sex couples lived with “their” children, conveniently ignoring the reality that these children somewhere have at least one other parent not mentioned in this case (unless procreative technology has taken a leap of which all of us have been unaware).¹⁶⁰ The court then turned to the claim that since Massachusetts law has not included a specific statutory definition of marriage it could already include same-sex couples.¹⁶¹ Like all of the previous decisions from other states, the court rejected this claim.¹⁶²

The decision goes to some effort in multiple places to assure us that their opinion is based on the provisions of the Massachusetts Constitution so as to avoid any possibility of review by the U.S. Supreme Court.¹⁶³ The opinion, however, cites liberally from asides in U.S. Supreme Court decisions which are treated as a sort of Bartlett’s Quotations, providing support for the most free-ranging of the court’s conclusions (*Planned Parenthood v. Casey*, *Griswold v. Connecticut*, *Roe v. Wade*, *Lawrence v. Texas*, *Romer v. Evans* and even the interracial adoption case *Palmore v. Sidoti*).¹⁶⁴ In its constitutional analysis the court specifically rejected any role for the history of marriage as a social institution.¹⁶⁵ Instead, the court portrays “civil marriage” as a “wholly secular institution” created by the government.¹⁶⁶ To further stigmatize historical precedent, the court rolls out the anti-miscegenation analogy (some believe marriage has a social meaning that precludes its gender-

156. *Id.* at 948.

157. *Id.*

158. *Id.*

159. *Id.* (quoting *Lawrence v. Texas* 539 U.S. 558, 566 (2003) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992))).

160. *Id.* at 949.

161. *Id.* at 952.

162. *Id.* at 952-53.

163. *Id.* at 948-49, 953.

164. *Id.* at 948, 955, 958, 959, 962, 968.

165. *Id.* at 954 (“Simply put, the government creates civil marriage.”).

166. *Id.* at 954.

neutral redefinition but they used to say the same thing about interracial marriages).¹⁶⁷

The court's constitutional analysis is somewhat difficult to pin down. The opinion says it is assessing the law against constitutional guarantees of both individual liberty and equality but does not separate out the two.¹⁶⁸ The court specifically claims to be employing the very deferential "rational basis" test for determining the law's validity but gives almost no deference to the interests the State asserted in support of the existing marriage law.¹⁶⁹ Indeed, the opinion approvingly cites the U.S. Supreme Court decision in *Romer v. Evans* to support its conclusion that the current marriage law "confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect."¹⁷⁰

To the court, civil marriage is an evolving paradigm."¹⁷¹ The court does note four purposes of marriage laws: (1) encouraging stable relationships over transient ones, (2) providing for orderly property distribution, (3) decreasing the state's obligation to provide for the needy, and (4) providing a way to track important epidemiological and demographic data."¹⁷² In contrast, the court assessed the interests asserted by the State in favor of its marriage law: (1) "providing a 'favorable setting for procreation,'" (2) increasing the number of children who are raised by a mother and father, the optimal setting for child rearing; and (3) preserving state resources.¹⁷³ The court rejects the first because some married couples cannot or do not have children and some same-sex couples do.¹⁷⁴ It rejects the second because the state already recognizes same-sex couple headed households and because it believes that the children raised in these households would be benefited if the couple were receiving marital benefits.¹⁷⁵ It rejects the third interest because same-sex couples are as deserving of state benefits as others and marriage doesn't require dependency between spouses.¹⁷⁶ To this court, marriage seems to be just one of the many arrows in the quiver of public welfare providers.

167. *Id.* at 958.

168. *Id.* at 969.

169. *Id.* at 960.

170. *Id.* at 962.

171. *Id.* at 967.

172. *Id.* at 954.

173. *Id.* at 961.

174. *Id.*

175. *Id.* at 963-64.

176. *Id.* at 964.

In its decision, the court specifically notes its rejection of “centuries” of tradition but suggests that doing so will not harm the value of marriage.¹⁷⁷ Rather, the court believes that “extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities.”¹⁷⁸ The court says that “[t]he marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason.”¹⁷⁹ This, to the court, “suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual.”¹⁸⁰

In its conclusion, the court followed the recent example of the Ontario Court of Appeals, calling their redefinition of marriage a “refine[ment of] the common law.”¹⁸¹ Specifically, the court provided a new official legal definition of marriage in Massachusetts: “the voluntary union of two persons as spouses, to the exclusion of all others.”¹⁸² Having found marriage unconstitutional, the court stayed the effect of its ruling 180 days in which the legislature could “take such action as it may deem appropriate in light of this opinion.”¹⁸³

One of the justices, Justice Greaney, in the majority wrote a separate opinion arguing that the court decided correctly but should have held that marriage was a form of sex discrimination.¹⁸⁴ Justice Greaney’s opinion included a somewhat condescending note to those who disagree: “Simple principles of decency dictate that we extend to the plaintiffs, and to their new status, full acceptance, tolerance and respect. We should do so because it is the right thing to do.”¹⁸⁵

There were also three dissenting opinions. Justice Spina would have held that the definition of marriage is a matter for the legislature to decide.¹⁸⁶ He argued that neither sex is disadvantaged by the marriage law so it is not a form of sex discrimination and that the law does not take into account a person’s subjective sexual orientation.¹⁸⁷ He rejected the anti-miscegenation analogy arguing that the U.S. Supreme Court had invalidated such laws not as a way of protecting personal choice but of

177. *Id.* at 965.

178. *Id.*

179. *Id.* at 968.

180. *Id.*

181. *Id.* at 969.

182. *Id.*

183. *Id.* at 970.

184. *Id.* at 970-78 (Greaney, J., concurring).

185. *Id.* at 973 (Greaney, J. concurring).

186. *Id.* at 974 (Spina, J., dissenting).

187. *Id.* at 974-75 (Spina, J., dissenting).

defeating invalid racial distinctions.¹⁸⁸ He notes that the majority opinion has redefined marriage and that the court's definition is not, as traditional constitutional analysis requires, deeply rooted in our country's history and tradition.¹⁸⁹

In her dissent, Justice Sosman argued that the court was not really using the rational basis test of constitutionality despite its claim to the contrary.¹⁹⁰ Instead the court has assessed the marriage law under higher levels of scrutiny without admitting it.¹⁹¹ She also noted that many people raise children outside of marriage without any claim that they ought to be given the benefits of marriage.¹⁹² She said that it is not for the court to weigh the evidence of the best environment for children, rather that is a legislative function.¹⁹³ She accused the court of allowing the emotional nature of the plaintiffs' claim to distract it from the traditional deference it should give a claim lacking any supporting evidence.¹⁹⁴

Justice Cordy offered the final dissenting opinion. He also would have deferred to the legislature.¹⁹⁵ Specifically, he pointed out the court's implicit assumption that marriage is a unisex institution despite the fact that all previous right to marry cases had accepted the intrinsic nature of marriage as a social institution bringing the sexes together.¹⁹⁶ He strongly criticized the majority's constitutional analysis (the right of privacy can't mean the right to state endorsement, same-sex marriage is not rooted in our country's history and tradition, etc.).¹⁹⁷ Justice Cordy also argued that the state interests in marriage are not irrational, noting that marriage has always been understood as the appropriate context for procreation and child rearing because sexual intercourse between men and women can result in conception (unlike other sexual relationships).¹⁹⁸ He noted that marriage has successfully advanced this interest throughout time and that the relevant social science research comparing children raised by same-sex couples is small, methodologically flawed, and tentative.¹⁹⁹ Thus, the state could rationally decide that it is not ready to redefine marriage.²⁰⁰ He argued that adoption does not defeat the state's interest

188. *Id.* (Spina, J. dissenting).

189. *Id.* at 976-77 (Spina, J., dissenting).

190. *Id.* at 978 (Sosman, J., dissenting).

191. *Id.* at 969-70 (Sosman, J., dissenting).

192. *Id.* at 979. (Sosman, J., dissenting).

193. *Id.* at 980 (Sosman, J. dissenting).

194. *Id.* at 981-82 (Sosman, J., dissenting).

195. *Id.* at 983 (Cordy, J., dissenting).

196. *Id.* at 985 (Cordy, J., dissenting).

197. *Id.* at 983-94 (Cordy, J., dissenting).

198. *Id.* at 985 (Cordy, J., dissenting).

199. *Id.* at 998-99 (Cordy, J., dissenting).

200. *Id.* at 999-1000 (Cordy, J., dissenting).

because a child available to be adopted has already lost the optimal family setting.²⁰¹ He also rejected the court's contention that the state's refusal to ban certain types of family forms means that it cannot favor one type.²⁰² He wrote that if marriage is limited to opposite-sex couples, marriage can continue to offer the message that procreation should take place in marriage.²⁰³

IV. CURRENT CONTROVERSIES

The marriage litigation is by no means over yet. Three prominent cases challenging state marriage laws are pending currently and related controversies may provide for future litigation.

A. *Indiana*

In August 2002, three same-sex couples represented by the Indiana Civil Liberties Union filed a lawsuit in the Marion County Superior Court seeking to compel the county clerk to issue them marriage licenses.²⁰⁴ The couples' complaint also noted that each of the parties had contracted a Vermont civil union and included a plea that those unions be recognized if marriage licenses were not issued.²⁰⁵ The State filed a motion to dismiss and oral arguments were held March 30, 2003.²⁰⁶

On May 7, 2003, Judge S.K. Reid granted the State's motion.²⁰⁷ The court held that the Indiana Constitution does not provide a right to marry a person of one's choice and that the federal right to marry also does not extend that far.²⁰⁸ The decision distinguished anti-miscegenation laws as imposing an extrinsic requirement to marriage in contrast to sex distinctions which are intrinsic to the nature of marriage.²⁰⁹ The court found that the marriage statute easily survives rational basis scrutiny because it furthers three state interests.²¹⁰ The first State interest is encouraging procreation where both biological parents are present to

201. *Id.* at 1000 (Cordy, J., dissenting).

202. *Id.* at 1000-01 (Cordy, J., dissenting).

203. *Id.* at 1001-03 (Cordy, J., dissenting).

204. Beth Rosenberg, *Couples Sue for Same-Sex Unions in Indiana*, EVANSVILLE COURIER & PRESS, Aug. 23, 2002, at B9.

205. *Attorney General Seeks Dismissal of Same-Sex Marriage Suit*, INDIANAPOLIS STAR, Jan. 4, 2003, at B1.

206. Tim Evans, *Lawyers Debate Same-Sex Marriage*, INDIANAPOLIS STAR, Apr. 1, 2003, at B5.

207. *Morrison v. Sadler*, No. 49D13-0211-PL-001946 2003 WL 23119998 (Ind. Super. Ct. May 7, 2003).

208. *Id.* at 7.

209. *Id.* at 8.

210. *Id.* at 9.

raise children.²¹¹ Same-sex couples, by contrast, cannot reproduce.²¹² The second interest identified by the court was the promotion of the traditional family as the basic unit of society.²¹³ The final interest was the protection of the integrity of marriage since the theories underlying same-sex marriage could apply to other situations.²¹⁴ For these same reasons, the court held that the marriage statute does not constitute a due process violation.²¹⁵ In regards to the plaintiffs' equal protection claims, the court held that the State's marriage statute was neutral in regards to the sex of the parties and that the intrinsic difference between same- and opposite-sex couples justifies any differences in legal treatment.²¹⁶ An appeal of that decision is currently pending.

B. New Jersey

While the Massachusetts case was pending, Lambda Legal Defense and Education Fund recruited seven same-sex couples to challenge New Jersey's marriage law.²¹⁷ That case is pending at the trial court level.

C. Nebraska

Just less than a year after the New Jersey case was filed, an unusual case was filed in federal district court in Nebraska. Brought by an advocacy group and five couples represented by the American Civil Liberties Union, it was a facial challenge to a provision of the Nebraska Constitution, Section 29, enacted in 2000, which provided that the State would not recognize same-sex marriages or similar statuses.²¹⁸ The plaintiffs were quick to note they were not seeking marriage licenses, though.²¹⁹ The State moved to dismiss the case on standing grounds and that motion is pending.²²⁰

211. *Id.*

212. *Id.* at 10.

213. *Id.* at 10-11.

214. *Id.* at 12-13.

215. *Id.* at 14.

216. *Id.* at 15.

217. Kate Coscarelli, *Same-Sex Couples Sue for Right to Marry in N.J.*, NEWARK STAR-LEDGER, June 27, 2003, at 17.

218. Todd Cooper, *Suit Filed Over Defense of Marriage Law*, OMAHA WORLD-HERALD, Apr. 30, 2003, at 1B.

219. *Id.*

220. Henry J. Cordes, *Rights Battle Turns to Nebraska*, OMAHA WORLD-HERALD, July 2, 2003, at 1A.

D. Hybrid Claims

At the same time as these cases have challenged the legal view of marriage, two important lines of cases with implications for the issue of redefining marriage have been going on. In the first, plaintiffs seek to gain the benefits associated with marriage without specifically seeking marriage licenses.²²¹ The underpinning of the claim is the use of “disparate impact” analysis, disavowed by the U.S. Supreme Court in Fourteenth Amendment cases, to show that since same-sex couples are disproportionately denied the benefits of marriage, laws which provide for tangible benefits based on marital status are a type of “sexual orientation” discrimination.²²² The first case in which this idea was adopted came out of litigation in which same-sex couples, one of whom was employed by Oregon Health Sciences University, challenged the provision of employment benefits only to spouses of employees.²²³ The court of appeals held that there was no valid justification for the denial of benefits, and thus, that the policy was discriminatory.²²⁴ A New York Court of Appeals decision involving a same-sex couple seeking to live in married student housing at a private university was remanded to the trial court to give the plaintiffs a chance to “establish that [the university’s] policy regarding university-owned housing with non-students disproportionately burdens lesbians and gay men.”²²⁵ If they establish this, the university would have to show (as the New York City Code requires) that the policy bears a “significant relationship to a significant business objective.”²²⁶ Cases making similar claims have been rejected at the trial court levels in Alaska²²⁷ and Montana²²⁸ and are pending on appeal.

The second line of cases arises out of the Vermont Supreme Court’s mandate of civil union benefits. In these cases, plaintiffs seek to gain some recognition in other states of civil unions they contracted in

221. These cases are discussed in Joshua K. Baker, *Status, Benefits, and Recognition: Current Controversies in the Marriage Debate*, 18 BYU J. Pub. L. 569 (2004).

222. See *Nguyen v. I.N.S.*, 533 U.S. 53, 82 (2001) (O’Connor, J., dissenting) (“But facially neutral laws that have a disparate impact are a different animal for purposes of constitutional analysis than laws that specifically provide for disparate treatment. We have long held that the differential impact of a facially neutral law does not trigger heightened scrutiny . . .”).

223. *Tanner v. Oregon Health Scis. Univ.*, 971 P.2d 435, 439 (Or. Ct. App. 1998). For more on this case, see David Orgon Coolidge & William C. Duncan, *Marriage and Democracy in Oregon: The Meaning and Implications of Tanner v. Oregon Health Sciences University*, 36 WILLAMETTE L. REV. 503 (2000).

224. *Id.* at 448.

225. *Levin v. Yeshiva Univ.*, 730 N.Y.S.2d 15, 23 (N.Y. 2001).

226. *Id.* (quoting N.Y.C. Administrative Code § 8-107(17)(a)(2)).

227. *ACLU v. Anchorage, Ak.* Super. Ct. No. 3AN-99-11179 CIV (Nov. 16, 2001).

228. *Snetsinger v. Montana University System*, No. CDV-2002-097 (Mont. Dist. Ct. 2002).

Vermont. In the first, a woman who had been found in contempt of court for violating a custody agreement with her ex-husband by allowing her same-sex partner to stay with her overnight while her children were visiting, asserted that her civil union contracted with the partner in Vermont should be recognized as a marriage in Georgia for purposes of the custody agreement.²²⁹ The court of appeals rejected the claim holding that the civil union was not a marriage and that even if the couple had been able to enter a same-sex marriage, it would not be recognized as legally valid in Georgia given the Georgia state marriage recognition law, the federal Defense of Marriage Act, and the fact that the definition of marriage is a question to be left to the legislature rather than the judiciary.²³⁰

In Connecticut, one partner in a Vermont civil union attempted to get a Connecticut court to dissolve the union.²³¹ The court held that the union was not a marriage and thus could not be dissolved by a Connecticut court.²³² In a similar case, a Texas couple who had contracted a civil union sought a divorce in Beaumont County, Texas.²³³ The judge had initially granted the divorce, but rescinded that order after the state attorney general intervened in the case, at which point the petition was withdrawn.²³⁴

One case of this type has been successful, though. It involved a claim for wrongful death of a partner in a civil union, and the trial court held that the plaintiff's civil union should be treated as a marriage in the narrow context of a wrongful death action.²³⁵

V. OBSERVATIONS ON THREE DECADES OF LITIGATION

At least four trends have contributed to the acceptance of claims for redefining marriage, and have in turn been driven by the increasing acceptance of these claims.

A. *Strategy*

The first trend is the increasing sophistication of the lawsuits being brought to gain the redefinition of marriage. All of the early cases (until the Hawaii litigation) involved only one couple, though often, as has

229. Burns v. Burns, 560 S.E.2d 47 (Ga. Ct. App. 2002).

230. *Id.* at 49.

231. Rosengarten v. Downes, 802 A.2d 170 (Conn. App. Ct. 2002).

232. *Id.*

233. *Judge Dismisses Request for Same-Sex Divorce*, FORT WORTH STAR-TELEGRAM, Apr. 2, 2003, at 9.

234. *Id.*

235. Langan v. St. Vincent's Hosp. of New York, 229 N.Y. L.J. 23 (Apr. 18, 2003).

been noted above, the plaintiffs saw their lawsuit as part of a broader radical agenda. It also does not appear that the forums were chosen for any particular reason or that serious public relations efforts were employed.

Professor Patricia Cain suggests that in the 1970s, gay rights organizations made a conscious choice to pursue a litigation strategy, partly because “lobbying for legislative change could not be supported by tax-deductible contributions, but that litigating for judicial change could be.”²³⁶ Still, marriage did not seem to be on the litigation agenda in a serious way until the 1990s. The shift in strategy is illustrated by the Hawaii litigation which involved three couples chosen by an activist. Similarly, the Vermont case involved three couples, some in long-term relationships, and with a mix of men and women. As Professor Greg Johnson notes, “one thing that distinguishes Vermont is the remarkable amount of planning and coordination which preceded and accompanied the push for equal marriage rights.”²³⁷

Along these same lines, the cases that have been initiated since the 1990s have tended to involve large national or regional organizations with significant litigation experience. Although the American Civil Liberties Union affiliate initially chose not to participate in the Hawaii suit, the Lambda Legal Defense and Education Fund joined the case after the 1993 U.S. Supreme Court decision and Evan Wolfson, director of Lambda’s Marriage Project, became co-counsel.²³⁸ Mary Bonauto of New England’s Gay and Lesbian Advocates and Defenders served as co-counsel in the Vermont and Massachusetts cases.²³⁹ The American Civil Liberties Union and its affiliates have been involved in the Indiana and Nebraska lawsuits as well as all of the suits seeking marital benefits for same sex couples.²⁴⁰ Professor Cain has also noted that these national groups have increasingly been able to coordinate their litigation projects.²⁴¹

The importance of these groups in the marriage litigation cannot be understated. They command significant resources. In 1994, the Lesbian and Gay Rights Project at the ACLU had a budget of nearly \$1 million and “participate[d] in more lesbian and gay rights litigation than any

236. PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 56 (2000).

237. Johnson, *supra* note 5, at 26.

238. *See supra* Part III.A.

239. *See supra* Parts III.C-D.

240. *See supra* Part IV.

241. PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 64 (2000).

other organization in the country.”²⁴² The annual budget of the ACLU today is about \$50 million.²⁴³ In 2002, Lambda received a grant of \$130,000 from the Gill Foundation²⁴⁴ and \$300,000 from the Ford Foundation.²⁴⁵ Lambda Legal’s website notes 110 employers who match employee contributions to the Fund.²⁴⁶ The home page also notes the sponsorship of such corporations as United Airlines, LexisNexis and others.²⁴⁷ Lambda’s budget for fiscal year 2002 indicates \$5,680,400 for legal and education efforts, grants of \$1,448,372 from foundations, and \$3,936,847 from individuals.²⁴⁸

These organizations also benefit from significant cooperation from outside attorneys and law firms.²⁴⁹ Lambda lists financial contributions from ninety-three law firms.²⁵⁰ It also notes pro bono support from thirty-three attorneys or law firms and boasts a cooperating attorney network.²⁵¹

B. Cultural Changes

Obviously though, strategic thinking and plentiful resources alone do not deliver legal victories. Clear cultural shifts have also been at work. While it is obviously beyond the scope of this article to outline all of the changes in public opinion related to sexual behavior, a brief mention of three general legal trends will at least hint at some of the shifts that may have made the effort to redefine marriage seem more reasonable to the courts addressing the issue.

In his significant article on the transformation of family law, Professor Carl Schneider quotes Max Weber as follows:

All systems of ethics, no matter what the substantive content, can be divided into two main groups. There is the “heroic” ethic, which imposes on men demands of principle to which they are generally not

242. *Id.* at 69.

243. *\$8 Million Gift Will Boost ACLU Campaign to Fight Bush Administration’s Assault on Civil Liberties*, ACLU press release Jan. 15, 2003, at <http://www.aclu.org/news>.

244. *Gill Foundation Awards More Than \$1 MILLION in Grants to Support Lesbian, Gay, Bisexual, Transgender (LGBT) Movement, HIV/AIDS Programming*, ASCRIBE NEWS, Apr. 18, 2002.

245. Ford Foundation, *Grants Database* at http://www.fordfound.org/grants_db/view_grant_detail.cfm (last visited May 1, 2004).

246. Lambda Legal, *Matching Gifts* at <http://www.lambdalegal.org/cgi-bin/iowa/join/gifts>.

247. See <http://www.lambdalegal.org> (last visited May 6, 2004).

248. Making It Happen: Lambda Legal Annual Report 2002 at 54-55 (May 28, 2003) at www.lambdalegal.org/binary_data/LAMBA_PDF/pdf/221.pdf (on file with the BYU Journal of Public Law).

249. See Federalist Society, *Pro Bono Activities at the AMLaw 100*, ABA WATCH, Feb. 2001.

250. Making It Happen: Lambda Legal Annual Report 2002 at 58-69 (May 28, 2003) at www.lambdalegal.org/binary_data/LAMBA_PDF/pdf/221.pdf (on file with the BYU Journal of Public Law).

251. *Id.* *The Cooperating Attorney Network* at <http://www.lmabdalegal.org>.

able to do justice, except at the high points of their lives, but which serve as signposts pointing the way for man's endless striving. Or there is the "ethic of the mean," which is content to accept man's everyday "nature" as setting a maximum for the demands which can be made.²⁵²

Professor Schneider notes that there has been an associated change in the nature of moral discourse: namely, a change away from aspirational morality.²⁵³ He contrasts nineteenth century family law which "set a standard of behavior not readily attainable" of "an ideal of lifelong marital fidelity and responsibility" with modern family law which "not only rejects some of the old standards as meaningless, undesirable, or wrong," but "also hesitates to set standards that cannot readily be enforced or that go beyond the minimal responsibility expressed in the can phrase, 'do your own thing, as long as you don't hurt anybody else.'"²⁵⁴ Perhaps the best practical illustration of this shift has been the successful effort to remove fault grounds from the law of divorce (either completely or by coupling them with no-fault grounds).²⁵⁵ Similarly, advocacy for redefining marriage often includes a variation of the theme, "the law should reflect the reality of how people are living."²⁵⁶ The reality of same-sex couples raising children was important to the Vermont Supreme Court in its decision.²⁵⁷ Conversely, the aspirational argument that children deserve the ideal setting for childrearing (a mother and father) did not fare well in the Hawaii trial court.²⁵⁸

Accompanying a decline in the favor shown to normative judgments in family law has been a decline in the "family's institutional strength."²⁵⁹ As Professor Bruce Hafen has noted, "family law now reflects less confidence in the value of marriage- and kinship-based models of family form."²⁶⁰ The growing legal acceptance of nonmarital

252. Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1819 (1985) (quoting letter from Max Weber to Edgar Jaffe).

253. *Id.* at 1820.

254. *Id.*

255. See J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519 (1994).

256. See John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1125 (1999) (describing same-sex marriage as "the ultimate societal vindication of the reality of the lives of gay and lesbian people").

257. *Baker v. Vermont*, 744 A.2d 864, 884-85 (Vt. 1999).

258. *Baehr v. Miike*, Docket No. 91-1394 1996 WL 694235, at *18 (Haw. Cir. Ct. Dec. 3, 1996).

259. Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865, 869 (1989).

260. Bruce C. Hafen, *Individualism in Family Law*, in REBUILDING THE NEST: A NEW COMMITMENT TO THE AMERICAN FAMILY 162 (David Blankenhorn, Steven Bayme & Jean Bethke Elshtain eds., 1990).

cohabitation is an illustration of this crisis of confidence.²⁶¹ With expanding recognition of a variety of new “family” configurations, the law seems to increasingly accept a “functional” definition of the family in which a family is identified not by what it *is*, but by what it *does*.²⁶² This, in turn, makes courts more receptive to the argument that the law needs to reflect the reality of same-sex couple relationships. Thus, the Vermont Supreme Court held that “the essential aspect of [the plaintiffs’] claim is simply and fundamentally for inclusion in the family of state-sanctioned human relations.”²⁶³

Finally, family law increasingly seems to be willing to see marriage and the family in contractual terms based on a primacy of the individual interests of the parties involved rather than the intrinsic value of the status of marriage or family.²⁶⁴ Nowhere is the implication of this trend for the debate over redefining marriage more evident than in the recent decision of the Ontario Court of Appeals which characterized marriage as “without dispute, one of the most significant forms of personal relationships.”²⁶⁵ In fact, the decision in the Alaska marriage case included the judge’s holding that marriage needed to be redefined to comport with a “freedom to choose one’s life partner.”²⁶⁶ In a similar vein, the Vermont decision stated, “[i]n short, the marriage laws transform a private agreement into a source of significant public benefits and protections.”²⁶⁷ The Hawaii court described marriage in explicitly contractual terms as “a partnership to which both parties bring their financial resources as well as their individual energies and efforts.”²⁶⁸

C. State Constitutionalism Movement

As noted above, one factor in the success of recent marriage cases has been the selection of forums thought to be receptive to the claims of

261. See William C. Duncan, *The Social Good of Marriage and Legal Responses to Non-Marital Cohabitation*, presentation at the International Society of Family Law: North American Conference, June 27, 2003, University of Oregon School of Law.

262. See William C. Duncan, “Don’t Ever Take a Fence Down: The “Functional” Definition of Family: Displacing Marriage in Family Law, 3 JOURNAL OF LAW AND FAMILY STUDIES 57 (2001).

263. Baker v. Vermont, 744 A.2d 864, 885 (Vt. 1999).

264. See Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 24-25 (1991).

265. Halpern v. Attorney General, 2003 O.J. No. 2268 (Ont. C.A. Jun 10, 2003).

266. Brause v. Bureau of Vital Statistics, Docket No. 3AN-95-6562 CI 1998 WL 88743, at *4 (Alaska Super. Feb. 27, 1998).

267. Baker v. Vermont, 744 A.2d 864, 883 (Vt. 1999).

268. Baehr v. Lewin, 852 P.2d 44, 58 (Haw. 1993) (quoting Gussin v. Gussin, 836 P.2d 484, 491 (Haw. 1992)). Interestingly, this definition is lifted from the divorce context in which parties’ respective financial resources are in dispute, rather than the context of marriage formation.

plaintiffs. On a practical level, this has involved the selection of states that are seen as likely to be receptive to the claims.²⁶⁹

The attractiveness of these forums, though, has its root in a more fundamental development in legal theory: the movement to extract from state constitutions more expansive rights than the United States Supreme Court has been willing to find in the U.S. Constitution.²⁷⁰ The movement began in the 1970s when Chief Justice Earl Warren was replaced on the U.S. Supreme Court by Chief Justice Warren Burger and largely championed by Justice William Brennan who encouraged state courts to be proactive in finding new constitutional rights in state constitutions rather than accepting the interpretation of the U.S. Constitution by the U.S. Supreme Court.²⁷¹ Though styled as a “revival” of past state court activism, “[w]hen state judges turned to their state declarations of rights in the early 1970s, they were not recovering a tradition but creating one.”²⁷²

Professor Cain notes that the turn to state courts and state constitutional claims has been particularly helpful “in the case of lesbian and gay rights.”²⁷³ This assertion seems to be validated by the success of the marriage litigation in Hawaii, Alaska, and Vermont when compared to the only federal decisions on the question.²⁷⁴ A number of state courts had invalidated sodomy laws even before the U.S. Supreme Court did, as in the instance of Georgia, with particularly unsympathetic fact scenarios.²⁷⁵ The state-claims-only strategy also has the benefit of not provoking federal precedent contradicting a court decision redefining marriage. This reflects a reasonable political calculation that it would be easier to convince a state court in a “progressive” jurisdiction to accept a “right to same-sex marriage” than the more staid U.S. Supreme Court.

269. Cf. Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 819 (1995) (“If a state tends to be more ‘liberal’ or ‘progressive’ on social issues, same-sex marriage is more likely to get serious consideration.”). Professor Brown also suggests (two years before the case was filed) that Vermont would be such a state. *Id.* at 832.

270. See Patricia A. Cain, *The Right to Privacy Under the Montana Constitution: Sex and Intimacy*, 64 MONT. L. REV. 99, 127-28 (2003).

271. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097 (1997).

272. G. Alan Tarr, *The New Judicial Federalism in Perspective*, 72 NOTRE DAME L. REV. 1097, 1117 (1997).

273. Patricia A. Cain, *The Right to Privacy Under the Montana Constitution: Sex and Intimacy*, 64 MONT. L. REV. 99, 128 (2003).

274. See *supra* Parts II.A & II.D.

275. See *Picado v. Jegley*, 80 S.W.3d 332 (Ark. 2002); *Powell v. Georgia*, 510 S.E.2d 18 (Ga. 1998) (defendant convicted of sodomy for sexual relationship with niece); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

D. Elite Legal Opinion

Perhaps the most important reason for the recent successes of the movement to redefine marriage lies in its most basic characteristic: that it has been pursued in the courts rather than through the legislative process. Since 1995, thirty-seven states have enacted legislation that provides that only marriages between a man and a woman will be recognized in that state.²⁷⁶ Three states have constitutional amendments defining marriage as the union of a man and a woman and one has an amendment allowing the legislature to define marriage in that way.²⁷⁷ In 1996, the U.S. Congress passed the Defense of Marriage Act defining marriage as the union of a man and a woman for federal purposes and providing that states cannot be forced under the Full Faith and Credit Clause of the U.S. Constitution, to recognize same-sex marriages contracted in other states.²⁷⁸

In his article on the decline of moral discourse in family law, Professor Carl Schneider hypothesized,

that the trend toward diminished moral discourse is most actively promoted by lawyers, judges and legal scholars who are, relative to the state legislators and judges who would otherwise decide family law questions, affluent, educated and elite. This group's views on family law questions are (relatively) liberal, secular, modern, and noninterventionist.²⁷⁹

276. See ALA. CODE § 30-1-19 (2000); ALASKA STAT. § 25.05.013 (Michie 1998); ARIZ. REV. STAT. ANN. § 25-101 (West 2000); ARK. CODE ANN. § 9-11-107 (Michie 1987); ARK. CODE ANN. § 9-11-109 (Michie 1987); ARK. CODE ANN. § 9-11-208 (Michie 1987); COLO. REV. STAT. § 14-2-104 (2000); DEL. CODE ANN. tit. 13, § 101 (1975); FLA. STAT. ANN. § 741.212 (West 2000); GA. CODE ANN. § 19-3-3.1 (1982); HAW. REV. STAT. § 572-3 (1999); IDAHO CODE § 32-209 (Michie 1996); 750 ILL. COMP. STAT. ANN. 5/212 (West 2000); IND. CODE § 31-11-1-1 (West 1997); IOWA CODE §; IA. 595.2 (1998); KAN. STAT. ANN. § 23-101 (1999); KY. REV. STAT. ANN. § 402.00 (Michie 2000); LA. CIV. CODE ANN. art. § 89 (West 2000) (amended by 1999 LA. Act of July 2, 1999, No. 890 § 1; 19-A); ME. REV. STAT. ANN. tit. X, § 701 (West 2000); MICH. COMP. LAWS ANN. § 551.1 (West 2000); MICH. COMP. LAWS ANN. § 551.271 (West 2000); MINN. STAT. ANN. § 517.01 (West Supp. 2004); MISS. CODE ANN. § 93-1-1 (1999); MONT.; MO. REV. CODE ANN. § 415.022 (Smith 2000); N.C. GEN. STAT. § 51-1.2 (2000); N.D. CENT. CODE § 14-03-01 (1960); OKLA. ST. ANN. tit. 43, § 3.1 (West 2000); x PA. CONS. STAT. ANN. § 1704 (West 2000); S.C. CODE ANN. § 20-1-15 (Law Co-op. 2000); S.D. CODIFIED. LAWS § 25-1-1 (Michie 1968); TENN. CODE ANN. § 36-3-113 (1955); 2003 TEXAS SENATE BILL 7 (ENACTED MAY 27, 2003); UTAH CODE ANN. § 30-1-4 (1953); VA. CODE ANN. § 20-45.2 (Michie 2000); WASH. REV. CODE § 26.04.020 (2000); W. VA. CODE § 48-2-603 (2000).

277. ALASKA CONST. art. I, §, 25; HAW. CONST. art. I, §, 23; NEB. CONST. art. I, §, 29; NEVADA CONST. art. I, § 21.

278. Pub. L. 104-199, 100 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (1997)).

279. Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1821 (1985).

There is significant evidence that this hypothesis is applicable to the same-sex marriage context and that legal elites, particularly judges and academics, are much more sympathetic to the effort to redefine marriage than are the legislators and the general public.

There seems little question that legal elites are more accepting of the claims for legal recognition of homosexual persons and same-sex relationships.²⁸⁰ After the *Lawrence* decision,²⁸¹ a news report quoted Mark Tushnet, president of the Association of American Law Schools, as saying that “clearly, the legal profession and the law professoriate is strongly in favor” of “gay rights” although he did not see any discrepancy between the view of the legal elite and the general public.²⁸² Contrary to Professor Tushnet’s assertion, the massive divide between the way judges and legislators, respectively, have responded to the idea of redefining marriage to include same-sex couples, indicates a significant divergence between elite legal opinion and public opinion. This is underscored by the success of ballot initiatives like those approving the state constitutional amendments noted above. Another commentator explained the willingness of U.S. Supreme Court justices to “follow elite opinion, even when it diverges from public opinion” as “only human” because “[t]he justices’ closest professional collaborators are their extremely bright young law clerks, fresh out of elite law schools where liberalism reigns supreme and the views of ordinary Americans are widely scorned.”²⁸³ He notes that the Justices’ “reputations are shaped by predominantly liberal news media, law professors, lawyers’ groups such as the American Bar Association, women’s groups . . . and other civil-rights groups.”²⁸⁴ Interestingly, Human Rights Magazine, the organ of the ABA’s Section of Individual Rights and Responsibilities, recently published an issue about same-sex couples including only articles favoring greater legal recognition of same-sex relationships, including a call for the repeal of the Defense of Marriage Act from a sitting federal judge.²⁸⁵ There is also research which indicates that while college graduates may be more “liberal” on the question of identifying homosexuals as a discrete class for purposes of discrimination laws than

280. See William C. Duncan, “A Lawyer Class”: Views on Marriage and “Sexual Orientation” in *The Legal Profession*, 15 *BYU J. PUB. L.* 137 (2001).

281. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). Discussed *infra* at Part VI.A.

282. Tony Mauro, *Scalia Lashes Law-Profession Culture*, *LEGAL TIMES* (July 7, 2003) at <http://www.law.com>.

283. Stuart Taylor, Jr., *Veering Left: The Art of Judicial Evolution*, *NATIONAL JOURNAL*, July 7, 2003.)

284. *Id.*

285. See Deborah A. Batts, *Repeal DOMA*, 30 *HUMAN RIGHTS MAGAZINE* 2 (Summer 2003) and the other articles in that issue.

the general public, law students are “slightly more liberal on this social issue than are college graduates as a whole.”²⁸⁶ This same survey indicated that law students “were slightly more supportive of gay rights” after attending law school.²⁸⁷ This was one of only two areas where changes in attitudes were noted as a result of the law school experience.²⁸⁸

To this general favor shown by judges to elite opinion is added the increasing willingness of judges to actively decide social issues once thought to be the province of legislators. As Professor Ted Morton observed in the context of the Ontario decision, “[i]ntoxicated by the power and status of their new self-made roles as Platonic philosopher-kings and social reformers, our judicial elites have abandoned any pretense of neutrality between competing social interests in Canadian society.”²⁸⁹ Similarly, Professor Harvey Mansfield, Jr. notes that “[e]ager judges, unconscious of their own ambition and reckless of the consequences, encouraged resort to the courts and have brought us close to a condition in which a citizen is someone who sues.”²⁹⁰ Again, the dearth of legislative action aimed at redefining marriage, compared to the lawsuits attempting to accomplish the same result, is instructive.

Maybe the most important explanation of the sympathy for the idea of redefining marriage among judges lies in the judicial habit of mind. In his masterful article on constitutional interpretation, Professor Robert Nagel identified the inquiry of much modern constitutional doctrine as “rationalism” as defined by philosopher Michael Oakeshott.²⁹¹ He notes that “the rationalist prefers knowledge that is ‘susceptible of formulations in rules, principles, directions, maxims: comprehensively, in propositions.’”²⁹² Professor Nagel argues that the U.S. Supreme Court, “[i]n its drive to find ever more expansive values in the Constitution” has been “deeply enmeshed in a general intellectual fashion.”²⁹³ He explains the fondness for abstraction by noting that, “[i]f a value is sufficiently abstract it will necessarily seem to have broad relevance to human

286. J.D. Drodgy & C. Scott Peters, *The Effect of Law School on Political Attitudes: Some Evidence from the Class of 2000*, 53 J. LEGAL EDUC. 33, 42 (2003).

287. *Id.* at 43.

288. *Id.*

289. Ted Morton, *Gay Marriage and the Decline of Democracy in Canada*, WINNIPEG FREE PRESS, July 3, 2003, at A9.

290. Harvey C. Mansfield, Jr., *Returning to the Founders: The Debate on the Constitution* in AGAINST THE GRAIN, 439 (Hilton Kramer & Roger Kimball eds., 1995).

291. Robert F. Nagel, *Rationalism in Constitutional Law*, 4 CONSTITUTIONAL COMMENTARY 9, 12 (1987).

292. *Id.* (quoting MICHAEL OAKESHOTT, RATIONALISM IN POLITICS 10 (1962)).

293. *Id.* at 14.

affairs, important or petty.”²⁹⁴ The abstraction favored by the advocates of redefining marriage and accepted by the courts where they have been successful, is the abstract concept of equality. The Hawaii decision invoked equality between the sexes in its opinion.²⁹⁵ That same idea was accepted without question in the Alaska decision.²⁹⁶ The three opinions in the Vermont case all agreed on one point: that equality demanded legal recognition of same-sex couples.²⁹⁷ The majority invoked the Equal Benefits Clause of the Vermont Constitution,²⁹⁸ Justice Dooley favored a measure of equality based on sexual orientation,²⁹⁹ and Justice Johnson would have followed the Hawaii logic.³⁰⁰ The majority opinion in the Massachusetts Supreme Judicial Court decision indiscriminately mixed equality and liberty arguments to reach its decision³⁰¹ and the concurrence would have followed the sex discrimination route.³⁰²

The problem, however, with the rationalist approach is incisively noted by Professor Nagel. It is that “[t]reating social choices as a series of intellectual problems is reassuring to many in the educated classes, but it also tends to denigrate important values and to stunt moral and political discourse.”³⁰³ He notes later that “to the extent that constitutional rationalism forces communities to explain their decisions in terms of relatively remote relationships between policies and objectives, absurd purposes are postulated and important values are unfairly trivialized.”³⁰⁴ To return to the previous discussion of cultural changes, Professor Nagel points out that the “demand for empirical validation . . . skews dialogue away from aspiration.”³⁰⁵ In a recent book describing “gay rights” cases litigated before the U.S. Supreme Court, the authors describe Justice Lewis Powell’s discomfort with an analogy between Court precedent regarding the “sanctity of the home” and sodomy raised in oral argument in the Bowers case.³⁰⁶ Like the difficulty in describing the taste of salt,³⁰⁷

294. *Id.* at 13.

295. *See* Baehr v. Lewin, 852 P.2d 44, 64 (Haw. 1993).

296. *See* Brause v. Bureau of Vital Statistics, 1998 WL 88743, 4-6 (Alaska Super. Ct. Feb. 27, 1998).

297. *See* Baker v. Vermont, 744 A.2d 864 at 886, 893, 898 (Vt. 1999).

298. *See id.* at 878.

299. *See id.* at 890 (Dooley, J., concurring).

300. *See id.* at 905 (Johnson, J., concurring & dissenting).

301. *See* Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 959 (Mass. 2003).

302. *See id.* at 970.

303. *Id.* at 15. As an aside, it is interesting to speculate what modern courts might make of Justice McLean’s comment in his dissent in *Dred Scott v. Sanford*: “A slave is not mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man: and he is destined to an endless existence.” 60 U.S. 393, 550 (1856) (McLean, J., dissenting).

304. Nagel, *supra* note 291 at 16.

305. *Id.* at 19.

306. MURDOCH & PRICE, *supra* note 14, at 295.

Justice Powell initially seemed to sense the incompatibility of a right to nonmarital sexual behavior with the traditional values associated with home and family. In the rationalist account, such a sense would carry little or no weight.³⁰⁸

One of the most obvious targets of this judicial frame of mind is tradition. Professor Nagel argues that “the courts often operate under the assumption that beliefs which originate in tradition (and thus have the advantage, at least, of being time-tested) are impermissible bases for public policy, unless they can be justified by some rational standard extrinsic to the tradition.”³⁰⁹ While some customs and traditions are clearly not necessary, “to envision the Constitution as requiring a presumptive hostility to the past creates the danger that courts will prevent people from building a coherent knowledge and sense of morality.”³¹⁰ The court thus ensures that the laws that most intimately affect the core social institutions of communities become the domain of experts only. There is no place for the moral intuition of the mass of citizens who may lack the empirical tools to sway courts, but who could move majorities of their fellow citizens to enact legislation. Thus, “[h]abitual denigration of traditional values carries the risk that certain groups will come to see the Constitution as an alien document, used by segments of the educated classes to belittle and undermine their way of life.”³¹¹

The irony, as noted by Professor Hadley Arkes is that “judges and political men are never more rigid and moralistic in their teaching as when they are ridiculing moral judgment and professing to free people from the tyranny of moral truths.”³¹² Thus, the equality or civil rights paradigm begins to mow down everything in its path: tradition, marriage, self-government, etc. Or, to use another analogy, the equality paradigm, with which courts seem to view marriage, works as a procrustean bed: what the courts see as extrinsic, like the unique contributions of each sex to marriage, must be lopped off. Given all this, it is interesting to note that the proposed Federal Marriage Amendment pending in the U.S.

307. See BOYD K. PACKER, *TEACH YE DILIGENTLY* 60-61 (1991) (analogy of the taste of salt to religious knowledge).

308. See Nagel, *supra* note 291, at 17 (describing the strange rationale chosen to uphold statutory rape laws and observing “that the serious grounds for the statutory distinction were avoided because of the understanding, shared by all parties, that before the Court those grounds would inevitably seem frivolous.”).

309. *Id.* at 21.

310. *Id.* at 22.

311. *Id.*

312. HADLEY ARKES, *NATURAL RIGHTS AND THE RIGHT TO CHOOSE* 4 (2002).

House of Representatives is explicitly aimed at curbing judicial incursions into the realm of marital benefits.³¹³

VI. IMPLICATIONS AND UNRESOLVED QUESTIONS

With all that has happened, we are still left with some very important unanswered questions. Specifically, (1) what does the U.S. Supreme Court's recent decision invalidating Texas' sodomy law mean for this debate? (2) what are the likely future legal claims? and (3) what will happen to marriage if it is redefined?

A. *Impact of Lawrence v. Texas*

When the U.S. Supreme Court struck down Texas' law prohibiting sodomy between same-sex couples³¹⁴ and overruling *Bowers v. Hardwick*,³¹⁵ the national conversation seemed to turn reflexively to the implications for the definition of marriage.³¹⁶ It would be tempting to say that *Lawrence* will have no effect on the debate over redefining marriage. The majority opinion notes that its holding "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."³¹⁷ More directly, Justice O'Connor, in her concurrence, says that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group" and characterizes "preserving the traditional interest of marriage" as a "legitimate state interest."³¹⁸ Unfortunately, Justice O'Connor did not specify the reasons that would justify the current legal definition of marriage. It is also not clear how this statement squares with her earlier assertion that "[w]e have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships."³¹⁹ Of course, Justice Scalia's dissent undercuts any possibility of consensus on this point. He accuses the majority of making "no effort to cabin the scope of its decision to exclude" same-sex marriage and in reference to

313. U.S. HJR 56 (2004) ("Neither this constitution or the constitution of any state, nor state or federal law, shall be *construed* to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.") (emphasis added).

314. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

315. 478 U.S. 186 (1986).

316. See Evan Thomas, *The War Over Gay Marriage*, NEWSWEEK, July 7, 2003, at 38.

317. *Lawrence*, 123 S. Ct. at 2484.

318. *Id.* at 2487-88 (O'Connor, J., concurring).

319. *Id.* at 2485 (O'Connor, J., concurring).

the disclaimers by the majority and Justice O'Connor regarding marriage laws, says, "[d]o not believe it."³²⁰

There are two possible ways in which the *Lawrence* decision may have an influence on the debate over redefining marriage. First it may contribute to the acceleration of the cultural trends discussed above.³²¹ Twenty years ago, Professor Hafen noted that "a right of sexual freedom cannot reasonably be inferred from the procreative rights recognized by the Court, nor has the Court developed a general right of personal privacy or autonomy broad enough to include sex outside marriage."³²² In contrast, the *Lawrence* decision marks the first time the Supreme Court has recognized sexual rights unrelated to marriage or kinship. Such a development seems very likely to contribute to an increase in the value the law attributes to individualism while further decreasing the law's endorsement of normative ideals.

The second possible influence is that *Lawrence* may signal the Court's willingness to make decisions without constitutional justification even if it means discarding precedent. Whatever the virtue of Justice Scalia's dissent in *Lawrence* as prophecy regarding the marriage situation, he certainly is correct in identifying (1) the lack of rationale for the Court's invocation of floating levels of abstraction in identifying rights and (2) the lack of consistency in the application of its doctrines.³²³ For instance, at one point, the Court seems very close to endorsing John Stuart Mill's "harm principle."³²⁴ At other times, the decision's description of the interests involved is almost metaphysical.³²⁵ In addition, at no point, does the Court use the language of "fundamental rights" although that seems to be implied. The Court avoids any discussion of equal protection analysis, hinting only that the reasoning of *Romer v. Evans*³²⁶ (which is inexplicably called "a case of principal

320. *Id.* at 2497-98 (Scalia, J., dissenting).

321. *See supra* Part IV.B.

322. Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 538 (1983).

323. *See Lawrence*, 123 S. Ct. at 2489 (Scalia, J., dissenting) (noting the irony of the Court's willingness to uphold *Roe v. Wade*, 410 U.S. 123 (1973), in the face of strong criticism, in contrast to their willingness to overturn *Bowers v. Hardwick*, 478 U.S. 186 (1986), partly as a result of such criticism).

324. *See* JOHN STUART MILL, ON LIBERTY 9 (Logman, Roberts & Green eds., 1999) (1869); *Lawrence*, 123 S. Ct. at 2478.

325. *See for example*, the court's statement: "The instant case involves liberty of the person both in its spatial and more transcendent dimensions." *Lawrence*, 123 S. Ct. at 2475. The court also cited the "mystery passage" of *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992), which Justice Scalia derides as the "famed sweet-mystery-of-life passage" and calls "the passage that ate the rule of law." *Id.* at 2481, 2489 (Scalia, J., dissenting). The court also said "[*Bowers*'] continuance as precedent demeans the lives of homosexual persons."

326. 517 U.S. 620 (1996).

relevance” though it is expressly not applied), provides a “tenable argument” for striking down the law at issue.³²⁷ More significantly, the Court twice makes reference to changing attitudes over time.³²⁸ Consider also the Court’s reference to “values we share with a wider civilization” and citation to foreign authority,³²⁹ though the Court leaves completely unclear the contours of this source of authority.³³⁰ In the absence of some limiting factors, it would seem to be entirely at the Justice’s discretion to determine relevant foreign law. These portions of the decision can hardly encourage those who would like to believe that the *Lawrence* decision signals an unwillingness to resolve the marriage issue.

If this reading of the *Lawrence* opinion is correct, it would seem to vindicate the charge, discussed above, that legal elites are becoming more hostile to normative understandings of the family and increasingly capable of comprehending the justifications supporting these understandings. An example might be the Court’s account of the history of sodomy laws. The Court takes a novel view of the historical record to characterize the laws as recently taking on an “anti-homosexual” meaning.³³¹ While the Court is correct to note that sodomy laws did not apply solely to same-sex couples until the 1970s, it is interesting that the Court did not consider the fact that their own marital privacy case law might have had something to do with that.³³² The Court also did not even mention the possibility that these kinds of laws might have less to do with a heterosexual/homosexual dichotomy than with a marital/non-marital dichotomy. To confuse things even more, though, the Court expressly avoided equal protection rationale for its decision in order to avoid some who “might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct between same-sex and different-sex participants.”³³³

B. Future Legal Claims

The next unanswered question is, what does the future hold in terms of marriage litigation? Predictions are inherently provisional, but one thing seems certain: the effort to secure a redefinition of marriage to

327. *Lawrence*, 123 S. Ct. at 2482.

328. *Id.* at 2483-84.

329. *Id.* at 2483.

330. Did they poll the national laws of all foreign countries and side with the majority position? Did they try to reflect European norms? If so, why? And why not Commonwealth countries or former British colonies?

331. *Lawrence*, 123 S. Ct. at 2479.

332. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

333. *Lawrence*, 123 S. Ct. at 2482.

include same-sex couples through litigation will not end anytime soon, at the least because advocates have not run out of “progressive” jurisdictions in which to ply their claims. Any hope that a “compromise” such as civil unions would be seen as sufficient should have been dispelled when, following the Vermont decision, a series of new marriage suits were filed, both strategic (Massachusetts and New Jersey) and spontaneous (Arizona).³³⁴

As has been demonstrated with the Vermont civil union status, once one state provides for same-sex marriage, it is almost assured that couples from other jurisdictions will marry in that state and return home to seek recognition either as a married couple or for some discrete marital benefits.³³⁵ This will require challenging their own state’s marriage law and in the thirty-seven states noted above, the laws that prohibit the recognition of such a marriage.³³⁶ Couples in Alaska, Hawaii and Nevada will have to pursue litigation similar to Nebraska’s in federal court to overcome the constitutional prohibitions in those states. A challenge to a state’s marriage recognition policy may also involve a challenge to the Federal Defense of Marriage Act.

In response to these possible scenarios, the proposed Federal Marriage Amendment aims to end this kind of litigation.³³⁷ Of course, it may engender legal challenges of its own.³³⁸

C. Future of Marriage

Perhaps the most important question, of course, is what a redefinition of marriage would do to marriage itself. Advocates of the change ridicule the idea that marriage will be harmed by redefining it.³³⁹ They sarcastically ask who is going to leave their marriage if same-sex couples are allowed to marry.

The danger, though, is not primarily in luring people out of their marriages but in what same-sex marriage would do to marriage as a *social institution*. As Maggie Gallagher has observed,

Normal marriage is normative. Marriage does not merely reflect individual desire, it shapes and channels it. Marriage as a social

334. See Connie Cone Sexton, *Gay Couple Sue County, State to Wed*, ARIZONA REPUBLIC, July 15, 2003, at B1.

335. See *supra* notes 221-35 and accompanying text.

336. See *supra* note 276.

337. See *supra* note 313.

338. See *e.g.* Idaho v. Freeman, 478 F. Supp. 33 (D. Idaho 1979) (litigation involving an effort by the Idaho and Arizona legislators to obtain a declaratory judgment that the Idaho Legislature had effectively rescinded its ratification of the proposed Equal Rights Amendment).

339. See William N. Eskridge, *Three Cultural Anxieties Undermining the Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 307, 313 (1998).

institution communicates that a certain kind of sexual union is, in fact, our shared ideal: one where a man and a woman join not only their bodies, but also their hearts and their bank accounts, in a context where children are welcome. Of course not everybody wants or achieves this social ideal. In important ways marriage regulates the relationships and sexual conduct even of people who are not married and may never marry. Its social and legal prominence informs young lovers of the end towards which they aspire, the outward meaning of their most urgent, personal impulses. Its existence signals to cohabitators the limitations of their own, as well as their partners', commitment.³⁴⁰

In order for a social institution to have any expectation of fulfilling these channeling and signaling functions, it must have some meaning. As Professor Hafen suggests, "the contribution of family life to the conditions that develop and sustain long-term personal fulfillment and autonomy depends (among many other important factors) upon maintaining the family as a legally defined and structurally significant entity."³⁴¹ The strength of marriage as a social institution can be lost "if the family is simply 'a collection of individuals united temporarily for their mutual convenience and armed with rights against each other.'"³⁴² As Professor Dan Cere has argued, "[i]nstitutions like marriage are about socially embodied meanings and practices, they are not just legal buckets that you can fill as you like."³⁴³

As a constitutional matter, if the right to marry becomes the right to a marriage of one's choosing, hasn't the substance of that right actually been eaten up? The right to a marriage of one's choice is just a subset of a right to radical personal autonomy.

This, then, is the risk of redefining marriage: the potential "collapse of [marriage's] social meaning."³⁴⁴ The social meaning of marriage is not arbitrary:

The law does not impose a pattern by strong norms of social engineering; it protects and reinforces the boundaries of a naturally recurring social institution with social norms that arise out of the need

340. Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773, 790 (2002).

341. Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865, 867 (1989).

342. *Sharon S. v. Superior Court*, 73 P.3d 554, 585 (Cal. 2003) (Brown, J., concurring & dissenting) (quoting Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1859 (1985)).

343. Dan Cere, *Is Polygamy Next? Dan Cere weighs in* (online debate posting), at <http://www.marriagedebate.com/blog/blog.htm> (Aug. 2, 2003, 11:48 a.m.).

344. See Dan Cere, *Give Me Polygamy Rather than the Death of Marriage* (online debate posting), at <http://www.marriagedebate.com/blog/blog.htm> (Aug. 6, 2003, 11:07 a.m.).

to reconcile the differing sexuality of men and women and the personal and social consequences thereof.³⁴⁵

Contrast this with the common argument in favor of redefining marriage: that marriage would help tame some of the promiscuity inherent in male same-sex sexual relationships.³⁴⁶ As one recent commentator has noted, this “argument is a pure piece of social engineering advocacy.”³⁴⁷ It assumes there is no difference between men and women and that marriage has a social role quite apart from its joining of men and women. However, as Maggie Gallagher has written, “[m]en and women are not interchangeable units, sex has a meaning beyond immediate pleasure, society needs babies, children need mothers and fathers, marriage is a word for the way we join men and women to make the future happen.”³⁴⁸ The U.S. Supreme Court has also noted the inherent difference between mixed sex communities and single sex communities.³⁴⁹

The really startling practical innovation same-sex marriage has introduced is the *endorsement* of radically fatherless or motherless homes. Clearly, there is a surfeit of such homes now, but the novelty is in the significant change of removing any sense of concern for these kinds of situations, because same-sex couple homes will be motherless or fatherless by choice. While single people do have children with no intention of marrying, there remains the possibility that they will later marry or at least have a relationship with the child’s father or mother. In a same-sex couple headed family, what would the roles of father and mother even mean?

Whatever the variations in practice, the ideal of marriage is inextricably linked to the reality that men and women become mothers and fathers as a natural result of their relationship. Thus, they are encouraged to commit to one another in a binding relationship for the sake of those children and to further society’s interest in ensuring that those children are provided for. Recognizing and, indeed privileging, marriage is the law’s way of channeling individuals into this

345. Maggie Gallagher, *Marriage Without Women: Maggie responds* (online debate posting), at <http://www.marriedebate.com/blog/blog.htm> (Aug. 7, 2003, 9:09 a.m.).

346. See Andrew Sullivan, *The Conservative Case for Gay Marriage*, TIME, June 30, 2003, at 76.

347. Melik Kaylan, *The Way We Live Now*, WALL ST. J., Aug. 8, 2003, at A8.

348. Maggie Gallagher, *The Future of Gay Marriage*, at <http://www.uexpress.com/maggiegallagher> (Aug. 5, 2003).

349. “Physical differences between men and women, however, are enduring: ‘The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.’” United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946)) (internal citations omitted).

relationship.³⁵⁰ Without this message, marriage seems less like a social institution than a term of convenience for intimate adult relationships. If the law's channeling function is impaired, other institutions may be called on to provide that function, but without the resources, authority and common currency inherent in legal norms, these institutions will be significantly less effective in channeling individuals toward, and channeling behavior within, marriage. At best, they can provide the function only for their own members.

Already, the litigation to redefine marriage is producing a bankrupt account of marriage's meaning. The best example comes from the Ontario Court of Appeals decision:

Marriage is, without dispute, one of the most significant forms of personal relationships. . . . Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.³⁵¹

Other examples from the United States have already been noted.³⁵²

The so-called "sexual revolution" of the 1960s helped to speed the decline in the strength of marriage as a social institution by removing the stigma from many alternative arrangements. Though this may have precipitated a rise in non-marital cohabitation,³⁵³ the ideal of marriage has been surprisingly resilient. To extend the revolution analogy, the redefinition of marriage would be the Great Leap Forward,³⁵⁴ purging the last remnants of social meaning and connection to children from marriage.³⁵⁵

350. See generally, Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

351. *Halpern v. Attorney General*, 2003 O.J. No. 2268. This might be the first judicial endorsement of marriage as a self-esteem builder.

352. See *supra* Parts IV.A-C.

353. See Larry L. Bumpass, *What's Happening to the Family? Interactions Between Demographic and Institutional Change*, 27 DEMOGRAPHY 483, 486 (Nov. 1990).

354. See PAUL JOHNSON, MODERN TIMES 550 (1983) (describing Mao Tse-tung's effort to "move to Communism in one bound").

355. See William C. Duncan, *Whither Marriage in the Law?*, 15 REGENT U. L. REV. 119 (2003) (comparing the social meaning of marriage to a stack of blocks which may fall if certain key blocks are removed and identifying the nature of marriage as a male-female institution as one of those key blocks).

VII. CONCLUSION

Regardless of an individual's opinion on the substantive issues raised by the effort to redefine marriage through litigation, it certainly is an interesting story so far. It is also not over by any means. The events of the next months and years will provide some clues as to what the future will hold and crucial questions about society's most central institution will continue to be debated. Proponents will continue to assert that equality is being deprived and opponents will continue to assert that a radical change to the institution of marriage is fraught with danger. The continuing civil dialogue engaged in by those on either side will be of great value.

As an opponent, I think the following comment by Maggie Gallagher in testimony before the Massachusetts Legislature provides some important perspective:

Will gays and lesbians suffer if marriage remains an opposite-sex union? The Census Bureau indicates that about one-half of one percent of households now consist of same-sex partners. How many of these wish to marry is unknown. About half of all opposite-sex cohabiters marry. If the proportion of cohabiters that want marriage is the same among same-sex as among opposite-sex partners, the upper bound of the demand for marriage is one-quarter of one-percent of households. Meanwhile, forty percent of children go to sleep in fatherless households. The sexual liberty interests of adults in choosing their own family forms should not trump the interest of state and society in trying to strengthen marriage, and reverse trends towards family fragmentation.³⁵⁶

In a previous article, I referenced a quote attributed to G.K. Chesterton: "Don't ever take a fence down until you know the reason why it was put up."³⁵⁷ In a time of family upheaval when many legal policymakers seem to have "lost the plot about family life"³⁵⁸ the danger is that judges will be tempted to remove a fence protecting marriage by discarding its social meaning in an effort at social engineering in the name of equality or autonomy. This would be a serious mistake. Better to invigorate the understanding of the social meaning of marriage. Maybe, ironically, this will be the ultimate outcome of the same-sex marriage litigation.

356. Maggie Gallagher, Testimony on the Marriage Affirmation and Protection Amendment (H3190), Massachusetts Statehouse, Apr. 28, 2003.

357. JOHN BARTLETT, FAMILIAR QUOTATIONS 918 (14th ed., 1968). See William C. Duncan, *Don't Ever Take a Fence Down: The "Functional" Definition of Family: Displacing Marriage in Family Law*, 3 J. L. & FAM. STUD. 57 (2001).

358. Bruce C. Hafen, *The Importance of Motherhood*, AUSTRALIAN FAM. 11 (Apr. 2000) (Professor Hafen makes this comment in reference to the United Nations).