

THE PERFECT STORM OF CONSTITUTIONAL LAW: A LEGAL AND BUSINESS ANALYSIS OF SAME-SEX MARRIAGE

by

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Had those who drew and ratified the Due Process Clauses of the Fifth or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.¹

I. Introduction

In the United States, the issue of who should be permitted to marry is not a new question. Indeed, throughout history, a debate has swirled over whether non-Christians, Native Americans, and persons of different races should be permitted to marry.² Currently, the marriage debate focuses on whether gays and lesbians should have a right to marry in the traditional sense, namely in the way currently afforded only to heterosexual couples.

The constitutional winds that are blowing this debate across the United States flow from a variety of legal fronts—the Due Process Clause, the Equal Protection Clause, and the Full Faith and Credit Clause, thereby creating a “perfect storm” of constitutional law. Many states have chosen to step directly into the storm by amending their constitutions to prohibit same-sex marriage, and other states have attempted to seek shelter from the storm by passing “domestic partner” laws to give same-sex couples the “rights and privileges of marriage” without calling the relationship a “marriage.”

Because of the fierce, multi-front nature of the same-sex marriage storm, there is no doubt that this issue will blow to the steps of the Supreme Court. The debate belongs in the Supreme Court because same-sex marriage is not an issue that should be framed by “religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.”³ Rather, the issue must be framed by whether it is constitutionally permissible for the majority [to] use the power of the State to enforce those views [against same-sex marriage] on the whole society”⁴

This Article argues that there is no constitutional justification to deny gays and lesbians the right to marry.⁵ In fact, to the contrary, it is a denial of substantive Due Process and Equal Protection to deny same-sex couples the right to enter into a legal marriage. In addition, we will discuss the Full Faith and Credit Clause and its applicability in the discussion of same-sex marriage. Next, after providing an analysis of Domestic Partner laws and registries throughout the 50 states, we will argue that Domestic Partner laws, while good in theory, are not a constitutional substitute for the right to participate in a traditional marriage ceremony. Furthermore, we will debate the constitutionality of the federal Defense of Marriage Act and its state counterparts. Finally, we will discuss the business implications associated with same-sex marriage.

II. The *Lawrence* Case

In 1986, the Supreme Court ruled that a Georgia sodomy statute was constitutional—that it was constitutionally permissible to criminalize adult, consensual, homosexual conduct because the Constitution did not recognize a “fundamental right” to engage in homosexual sodomy.⁶ Gays and lesbians have not fared well in other areas of the law either. Indeed, there is no federal protection against sexual orientation discrimination in employment under Title VII of the 1964 Civil Rights Act.⁷ Furthermore, gays and lesbians may be lawfully excluded from the military,⁸ parades,⁹ and private groups, such as the Boy Scouts.¹⁰

In 2003, in *Lawrence v. Texas*, the United States Supreme Court was called upon to determine the constitutionality of a Texas sodomy statute.¹¹ Justice Kennedy began the Court’s opinion by stressing that the case was not about homosexual sodomy but about liberty and an “autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”¹² The Court analyzed the Texas statute under the Due Process Clause of the Fourteenth Amendment and, as part of that inquiry, was forced to revisit its holding in *Bowers v. Hardwick*.¹³

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In its opinion, the Court pointed out that, in many opinions, there are “broad statements of the substantive reach of liberty under the Due Process Clause”¹⁴ After a discussion of several cases, the Court summarized that, over the past few decades, it has upheld the rights of individuals to make “certain decisions about sexual conduct.”¹⁵ Moreover, the Court stated that “our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.”¹⁶

From this broad pronouncement, the Court acknowledged that it “fail[ed] to appreciate the extent of the liberty at stake” in *Bowers*.¹⁷ Indeed, the Court held that the issue was not whether the “Federal Constitution confers a right upon homosexuals to engage in sodomy” but how far states can go in proscribing “the most private human conduct, sexual behavior, and in the most private of places, the home.”¹⁸ The Court answered this issue by stating

[i]t suffices for us to acknowledge that adults may choose to enter upon this [homosexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.¹⁹

In revisiting *Bowers*, the Court stated that Justice Stevens’ dissent in that case should have been controlling.²⁰ In his *Bowers* dissent, Justice Stevens had written that “[o]ur prior cases make two propositions abundantly clear. First, the fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice”²¹ Justice Stevens then went on to write that the second “proposition” made clear by the case law was that “individual decisions . . . concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.”²² Indeed, Justice Stevens had eloquently stated that the “essential ‘liberty’ that animated the development of the law in cases like *Griswold*, *Eisenstadt*, and *Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.”²³ According to the majority in *Lawrence*, the analysis contained in Justice Stevens’ dissent should have been controlling in 1986 and is now considered to be the correct view of the “liberty” afforded by the Due Process Clause.

III. Due Process Clause, Equal Protection, and Same-Sex Marriage

The Due Process clauses of the Fifth²⁴ and Fourteenth²⁵ Amendments bar “certain government actions regardless of the fairness of the procedures used to implement them.”²⁶ Indeed, the Due Process Clause ensures that “all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.”²⁷ On the other hand, the Equal Protection Clause requires that no group be denied equal protection of the laws,²⁸ as the “Constitution neither knows nor tolerates classes among citizens.”²⁹ Essentially, this clause is a “directive that all persons similarly situated should be treated alike.”³⁰

Although the Due Process Clause and the Equal Protection Clause constrain federal and state action, they are not a complete bar to all legislative action. Indeed, depending on the nature of the right at issue, the courts will apply a particular “level of scrutiny” when analyzing a statute. For example, Due Process prohibits the federal and state governments from infringing upon “fundamental” liberties, unless the infringement is “narrowly tailored to serve a compelling state interest.”³¹

The analysis under the Equal Protection Clause is somewhat more complicated. “Conventional equal protection analysis under the Fourteenth Amendment employs three ‘tiers’ of judicial review based upon the nature of the right or the class affected.”³² The most exacting analysis, strict scrutiny, is used when a statute “classifies by race, alienage, or national origin” or “when state laws impinge on personal rights protected by the Constitution.”³³ When a state regulates the exercise of a fundamental right, under the strict scrutiny analysis, the state must show that any “classification which serves to penalize the exercise of that [fundamental] right” is “necessary to promote a compelling governmental interest.”³⁴ If, however, a fundamental right is not at issue but rather a “suspect class,” such as gender, the courts use an “intermediate” level of scrutiny and require that the regulation “bear a close and substantial relationship to important governmental objectives.”³⁵ Finally, if a “law neither burdens a fundamental right or targets a suspect class, [the Court] will uphold the legislative classification so long as it bears a rational relation to a legitimate end.”³⁶

The difficult issue with the Equal Protection Clause and same-sex marriage is the level of scrutiny that the Court will use to evaluate same-sex marriage bans. If marriage is a fundamental right, the state must show that same-sex marriage bans are narrowly tailored to promote a compelling state interest. On the other hand, if bans on same-sex marriage are seen as a “gender” issue, then states will have to demonstrate that the bans support important interests. Finally, it is possible that the courts will view the issue as one concerning “gay rights” and use a rational basis review.

Indeed, in a recent case, *Romer v. Evans*, the Court, in evaluating an amendment to the Colorado Constitution that prohibited the State as a whole from enacting any law that would enable homosexuals to sue for discrimination,³⁷ used a “rational basis” review. Specifically, the Court held that it would uphold the Amendment if “it bears a rational relation to some legitimate end.”³⁸ As part of its analysis, the Court found that the Amendment “identifies persons by a single trait and then denies them protection across the board.”³⁹ Moreover, the Court reasoned that the Colorado Amendment classified “homosexuals not to further a proper legislative end but to make them unequal to everyone else. . . . A State cannot so deem a

class of persons a stranger to its laws.”⁴⁰ Indeed, the “desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”⁴¹ Thus, the law was struck down as it violated the Equal Protection Clause.

In a similar fashion, in her concurring opinion in the *Lawrence* case, Justice O’Connor, used a “more searching form of rational basis review” to invalidate the Texas sodomy statute, as it “exhibit[ed] such a desire to harm a politically unpopular group.”⁴² Under this standard, Justice O’Connor found a violation of the Equal Protection Clause. She noted that the Texas sodomy law was “directed toward gay persons as a class.”⁴³ As such, echoing the words of *Romer*, the Amendment was unconstitutional as “[m]oral disapproval of a group cannot be a legitimate governmental interest”⁴⁴

Notwithstanding the level of scrutiny employed—from strict scrutiny to rational basis—for both a Due Process Clause and Equal Protection Clause analysis, the “state interests” asserted to buttress same-sex marriage bans become the focus of the analysis. To set forth such an “important” or even “compelling” state interest argument, States assert that marriage should be restricted to opposite-sex couples because marriage is the foundation of procreation and child rearing—tasks suited to heterosexuals. In addition, states assert the need to preserve the concept of “traditional marriage.” When these arguments—procreation, childrearing, and the preservation of tradition—are analyzed, however, they do not justify restricting the right to marry to heterosexual couples. To put it differently, these reasons do not amount to important, compelling, or even legitimate, state interests that justify the denial of the exercise of a fundamental right to a group on the basis of their sexual orientation.

A. Marriage as a Fundamental Right

Assuming arguendo that marriage is a fundamental right or liberty, states can justify denying the right to homosexuals only if the denial is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”⁴⁵ Perhaps the beauty, or at least the definition of marriage, is in the eyes of the beholder. One author⁴⁶ has listed the “benefits” of traditional marriage to include: stability and security for children, encouragement of heterosexuality, socialization of adults, promotion of human “flourishing,”⁴⁷ promotion of gender and class equality, and the promotion of economic growth.⁴⁸ St. Augustine, an early Catholic theologian, wrote that there are three “goods” associated with marriage: companionship, fidelity, and lifelong unity.⁴⁹

“[F]or all the joy and solemnity that normally attend a marriage, governing entrance to marriage is a licensing law.”⁵⁰ A legal marriage transforms a relationship between two individuals into a tripartite relationship, namely one that includes the state. Indeed, the state defines the legal parameters of the relationship and sets forth the rights and obligations of each of the parties.⁵¹ Furthermore, the marriage, once formed, may be terminated only by invoking a formal procedure set up by the state. In addition to formalizing a commitment between two persons, the “benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death.”⁵²

The Supreme Court has had numerous opportunities over the years to make pronouncements about marriage as an institution. “The leading decision of [the Supreme Court] on the right to marry is *Loving v. Virginia*.”⁵³ In *Loving*, an interracial couple challenged Virginia’s prohibition on interracial marriage, and the Court held that Virginia’s laws “arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry.”⁵⁴

Many years after *Loving*, the Supreme Court had occasion to review its marriage decisions in *Zablocki v. Redhail*.⁵⁵ In *Zablocki*, a father challenged a state law that prohibited non-custodial parents from marrying unless they could prove that they were current on child support obligations for any children of previous marriages and unless they could demonstrate that any children of any such prior relationship would not become “public charges.”⁵⁶ In its opinion, the Court reviewed and summarized its past holdings on the nature and character of the right to marry. Specifically, the Court noted that it had classified marriage as “the most important relationship in life,”⁵⁷ “a central part of the liberty protected by the Due Process Clause,”⁵⁸ and a “personal decision[] protected by the right to privacy.”⁵⁹ The Court went on to explain that “[i]t is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships.”⁶⁰ In reaching its decision in the case, the Court noted that it was “reaffirming the fundamental character of the right to marry,”⁶¹ and it invalidated the state law.⁶² Thus, throughout a long strand of decisions, the Court has been quite clear in expressing its view that marriage is a fundamental right.

B. Interests Advanced by the States to Support Same-Sex Marriage Bans

1. Procreation

Those who support restricting the right to marry to heterosexual couples argue that “procreation is marriage’s central purpose” and that it is “rational” for a state to “limit marriage to opposite-sex couples who, theoretically, are capable of procreation.”⁶³ This argument, however, is easily countered. Indeed, if procreation was a *requirement* of marriage, many heterosexual couples would be denied the right to marry. Fertility is not a requirement for a marriage license; nor is infertility a ground for divorce.⁶⁴ Perhaps marriage between heterosexual couples has been viewed as a means to promote procreation because, “until very recently unassisted heterosexual relations were the only means short of adoption by which children could come into the world, and the absence of widely available and effective contraceptives made the link between

heterosexual sex and procreation very strong indeed.”⁶⁵ Today, however, there is growing evidence that “increasing numbers of same-sex couples are employing increasingly efficient assisted-reproductive techniques to conceive and raise children.”⁶⁶ Indeed, there has been a “gay baby boom” of sorts, “34.3 percent of female same-sex households and 22.3 percent of male households have children nationwide These rates are not that much below the national rate for married opposite-sex couples of 45.6 percent and of unmarried opposite-sex couples of 43.1 percent.”⁶⁷

Even Justice Scalia, in his *Lawrence* dissent, recognized that procreation is not a legitimate (let alone compelling) state interest in support of marriage: “what justification could there possibly be for denying the full benefits of marriage to homosexual couples exercising ‘the liberty protected by the Constitution’? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.”⁶⁸ Thus, restricting the right to marry to heterosexual couples based upon the state’s interest in procreation can not be justified on the basis that it supports a compelling, important, or rational state interest in “procreation.”

2. Child-rearing

There is no doubt that states have an interest in ensuring that children grow up in stable, loving homes that adequately provide for their needs.⁶⁹ To promote this state interest, states argue that they must restrict the right to marry to opposite-sex couples. However, such a restriction can actually harm children, not help them. Indeed, the face of the “average” or “typical” American family has changed dramatically over the years: 32% of all children live with only one parent,⁷⁰ it is “difficult to speak of an average American family.”⁷¹ Thus, the idea that all children are raised by both parents in their home at the same time is just not accurate. The reality is that parents in a same-sex relationship can be every bit as good, or as bad, at parenting as parents in an opposite-sex relationship.

It should be noted that some may be concerned that children living with gay or lesbian parents will develop a homosexual sexual orientation themselves. Such a fear, however, is not supported by the wealth of research that currently exists and is based upon the “incorrect assumption that children develop their own sexual orientation by mimicking their parents.”⁷² Furthermore, this fear is belied by the fact that many states permit gays and lesbians to adopt children, namely these states do not view the sexual orientation of the adoptive parent in a negative light when considering whether the adoption will be in the best interest of the child.⁷³

Thus, there is no rational or legitimate reason for states to argue that childrearing must be done exclusively by heterosexual couples. “Excluding same-sex couples from civil marriage will not make children of same-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of a ‘stable family structure in which children will be reared, educated, and socialized.’”⁷⁴ Indeed, [i]f anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against.⁷⁵ As such, states cannot justify bans on same-sex marriage by arguing that they have a compelling, important, or rational basis for doing so under the guise of “child-rearing.”

3. The Preservation of Traditional Marriage

To justify restrictions on the right to marry, states often assert that they have an interest in promoting and preserving “traditional marriage.” Traditional marriage, however, is never defined by the state or by the courts. Instead, many courts just conclude, not explain or analyze, that “[r]estricting marriage to the union of one man and one woman is deeply rooted in the [state’s] legal tradition and practice.”⁷⁶

Courts, and litigants arguing to preserve “traditional marriage,” however, should be careful about what they wish for. Indeed, *traditional* marriage included a view of the wife as being unequal to her husband. Prior to the turn of the 20th century, women had no legal right to hold property (even property that she held prior to the marriage) and no legal right to custody of her children in the event of a divorce.⁷⁷ In addition, the law held that married women could not bring charges of rape against their husbands since, when a man raped his wife, he was “merely using his property.”⁷⁸ Such views persisted into the 1970’s, even in California, which has a reputation for being a “liberal state:”

In 1970, California law recognized the husband as the head of the family. He had the sole power to manage the community property, except for the wife’s earnings. A married woman who did not work outside the home and who had no separate property could not obtain credit in her own name without her husband’s consent, even though she owned an undivided one-half interest in the community property. A wife had no clear legal remedies available to her during the marriage to prevent her husband’s mismanagement of their property, and no clear right even to know the extent or location of the community assets.⁷⁹

Is this the “traditional” marriage that so many seek to preserve? Furthermore, as we continue in the third millennium, can anyone say that “traditional marriage” really exists?

a. Divorce American Style

The law giveth and the law taketh away. Although marriage is seen as a cornerstone of the American way of life, as the “foundation of the family and of society, without which there would be neither civilization nor progress,”⁸⁰ in reality, marriages are often something short of a life-long commitment, something short of an enduring bond between two persons. For a variety of reasons that are constantly under debate,⁸¹ the divorce rate in the United States is quite high. Recent statistics show that, in 2003, there were approximately 7.5 marriages and 3.8 divorces per 1000 people.⁸² Thus, in 2003, there were 2,185,500 marriages, and 1,107,320 divorces.

b. From Fault to No-Fault and Back Again

As a result of the less-than-lifelong commitment of marriage, just as a state provides for the coming together of a couple through marriage, all states also provide detailed statutory schemes for the dissolution of such bonds. Divorce law, as it developed in the 1700s, “was fault based, much like its Protestant counterparts, and was permitted on grounds of adultery, desertion (five years), impotence, fraudulent contract, consanguinity, and bigamy.”⁸³ Divorce laws continued to evolve in the United States:

During the first half of the twentieth century, existing grounds were expanded and additional grounds were implemented to the fault based regime. For example, cruelty was extended in most states to include mental cruelty. New grounds included nonsupport, insanity, voluntary separation, and incompatibility. Moreover, uncontested cases increased in number. In general, divorce became increasingly popular in the United States, where divorce rates were significantly higher than in Europe.⁸⁴

Fault-based divorce statutory schemes began to lose their luster following World War II, and critics of the fault-based systems “gained a wider audience (or their voices grew louder).”⁸⁵ No fault systems became more acceptable for a variety of reasons including: the changed role of women, changed attitudes about premarital sex, dissatisfaction with the cost of fault divorce, and a “decreased role for religion in defining the nature and incidents of marriage.”⁸⁶ Thus, against this backdrop of growing dissatisfaction with fault-based divorce, on September 5, 1969, “Governor Ronald Reagan signed the Family Law Act of 1969 making California the first no-fault divorce state in the nation.”⁸⁷ The country as a whole was quick to follow California’s lead; “[n]early every state enacted some form of no-fault divorce in the following decade.”⁸⁸ Thus, in the United States, it may take two to get married, but it only takes one to get a divorce.

Perhaps because of the no-fault divorce laws, or notwithstanding their existence,⁸⁹ the high rate of divorce in the United States has caused some to comment that the divorce statistics denote a “marital emergency” and a “culture of divorce.”⁹⁰ In response to this situation, many states have proposed several alternatives to the no-fault system. Thus, many states seek to roll back the hands of time and make it more difficult for a couple to divorce. To justify such a change in their legislative schemes, these states point to the myriad of dire statistics of the harm inflicted on ex-spouses and children that may associated with divorce. For example,

- “Children of divorce are 70 percent more likely to have been expelled or suspended from school”⁹¹
- “Children from single-parent families score somewhat lower on intelligence tests”⁹²
- “Living in a mother-only family decreases a child’s chances of completing high school by over 40 percent for whites, and 70 percent for blacks.”⁹³
- “[C]hildren from divorced families are two to three times as likely to have emotional or behavioral problems compared to those who have both their father and mother present.”⁹⁴
- “The rate of child poverty is five times higher for children living with single mothers than for children in intact families.”⁹⁵
- “Divorced women die prematurely at higher rates than married women and are more prone to acute conditions such as infections and parasitic diseases, respiratory illnesses, digestive-system illnesses, and severe injuries and accidents.”⁹⁶
- “The premature death rate from cardiovascular disease for divorced men is twice that of married men. The premature death rates due to pneumonia and suicide for divorced white men are four and seven times, respectively, than those of their married counterparts.”⁹⁷

Some of the changes proposed to the no-fault systems include the elimination of “irreconcilable differences” as a reason for divorce as well as requirements to attend pre-marital counseling as a condition precedent to obtaining a marriage license or for parents and children to attend post-marital counseling prior to obtaining the divorce decree.⁹⁸

c. Covenant Marriages

In yet another attempt to hold onto the concept of a “traditional marriage,” some states have enacted laws that have changed the nature of marriage itself.⁹⁹ Specifically, “[i]n a recent crusade to protect the integrity of marriage, Louisiana, Arizona, and Arkansas have passed laws that are designed to accentuate the lifelong character of marriage by permitting parties to enter into what are called ‘covenant’ marriages.”¹⁰⁰ A covenant marriage “may be viewed as a premarital contract

that evidences not only the present, mutual intent of the parties to be married, but the common agreement and expectation that such a marriage will endure under circumstances which would justify legal termination of other marriages.”¹⁰¹

To enter into a covenant marriage, the parties must state their intent to do so, receive premarital counseling, and acknowledge that they understand the “lifelong” nature of their commitment.¹⁰² A couple who has entered into a covenant marriage “may not obtain a divorce without consideration of fault.”¹⁰³ Furthermore, prior to divorcing, the couple must receive counseling and live apart for two years.¹⁰⁴ Couples may also convert an existing marriage into a covenant marriage.¹⁰⁵ Proponents of covenant marriages support the concept as a way to strengthen marriage, curb the divorce rates, and protect children who would otherwise be the “victims” of divorce.¹⁰⁶ Opponents of covenant marriage argue that it is a “threat to individual freedom” and may “prolong[] a marriage in which divorce is inevitable . . . [thereby] exacerbate[ing] the discord . . . leading to a more contentious divorce and complicated settlement negotiations.”¹⁰⁷

In reality, the cold, hard truth is that a large percentage of couples will divorce, regardless of whether their state employs a no-fault divorce statutory system, a fault system, or offers covenant marriages.¹⁰⁸ Clearly, the idea of a “traditional marriage” reflecting an enduring, harmonious bond is an urban legend. Same-sex couples will not be the reason that “traditional marriage” will change, for “traditional marriage” exists only on television and in the movies. It does not exist in the vast majority of homes. Thus, states cannot assert the “preservation of traditional marriage” as a compelling, important, or rational basis upon which to justify bans on same-sex marriages.

IV. The Case for Flexibility and Evolution of the Law

Those who argue that the concept of marriage cannot change stand diametrically opposed to one of the cornerstones of American jurisprudence, namely the flexibility of the law. This is not to say that the law can change upon a whim. Rather, the law is meant to evolve over time to complement the country’s growing understanding of freedom and democracy. Due to this evolution of legal theory, we are the beneficiaries of many rights and legal doctrines that did not exist in Colonial times or even prior to the 1900s. Indeed, due to nothing more than the passage of time and the fine-tuning of legal doctrine, we, as a country, now accept that Congress is authorized to pass laws governing working conditions and hours in private industry;¹⁰⁹ supporting a person’s right to unionize in the private sector;¹¹⁰ and prohibiting discrimination on the basis of age, race, color, national origin, religion, sex, and disability.¹¹¹ Likewise, in a similar vein, at one time, staunch segregationists in the South argued that segregation was moral and that it was authorized, even mandated, by biblical teaching. However, we, as a country, no longer believe that states can, in accord with the Constitution, require that blacks and whites go to different schools, eat at separate lunch counters, or ride in separate sections of public transportation.¹¹² In addition, we, as a country, have become more “sophisticated” in our assessment of the worth of women. Thus, to argue that common thought, history, or “deep rooted” traditions do not permit the concept of marriage to evolve to include same-sex partners is to embrace a static legal philosophy, one out-of-sync with the reality of American jurisprudence.

Furthermore, to analyze marriage in a legal or constitutional sense, the concept of a civil marriage should be “divorced” from the concept of a religious marriage. While a “church” marriage and a “civil” marriage may be similar in some respects, they are not synonymous, nor should they be. Churches fashion rules relating to the persons eligible to marry, the function of marriage, and the dissolution of marriage according to their own doctrines—doctrines that may not resemble civil law at all. Indeed, a state may permit the marriage of a couple whom a church would not marry. For example, the Catholic Church, which views marriage as a sacrament representing the couple’s “participation in Christ’s indissoluble union with the Church,”¹¹³ will not permit a person who has procured a civil divorce, but not an annulment, to marry again in the Church. Such a person, however, would *not* be denied the right to marry in a civil ceremony. In a similar fashion, no state is required to recognize a marriage that has been sanctioned by a church but that is against the laws of the state.¹¹⁴ Furthermore, “[n]o religious ceremony has ever been required to validate a [state] marriage.”¹¹⁵ Marriage, under the laws of the various states, is a “wholly secular institution.”¹¹⁶ Thus, the notion of religion or a conjuring up of some amorphous religious values have no place in the discussion of the constitutionality of marriage, including the constitutionality of same-sex marriage.¹¹⁷

V. The States Weigh in on Same Sex Marriage and Civil Unions¹¹⁸

Because of the fierce nature of the constitutional storm of same-sex marriage, many states have stepped into the storm by tackling the issues of same-sex marriage, civil unions, domestic partner registries, and domestic partner laws. What has resulted is a patchwork of different laws, a mosaic of the different pronouncements of the state legislatures in their efforts to define and articulate their position on gay and lesbian rights.

A. Vermont and Civil Unions

In 1999, the Supreme Court of Vermont held that, pursuant to the Vermont State Constitution, same-sex couples could not be denied the legal benefits associated with marriage.¹¹⁹ The Court, however, did not mandate that the legislature provide these benefits through the granting of marriage licenses.¹²⁰ In response to this challenge from the Vermont Supreme Court, the Vermont Legislature passed a civil union statute.¹²¹

In passing the civil union statute, the Legislature acknowledged that many gay and lesbian couples had “formed lasting, committed, caring and faithful relationships with persons of their same sex,” even though they may have faced “numerous obstacles and hardships” in the formation and maintenance of those relationships.¹²² The civil union statute was meant to alleviate such hardships and to advance the state’s “interest in promoting stable and lasting families, including families based upon a same-sex couple.”¹²³

Under this statutory scheme, a “civil union” is formed by two, unrelated persons of the same sex who are not currently a party to another civil union or to a marriage.¹²⁴ The rights, obligations, and benefits associated with a civil union are the same as those “granted to spouses in a marriage,”¹²⁵ including *but not limited to* the following: rights regarding rights regarding testamentary succession, adoption, workers’ compensation benefits, and victim’s compensation; access to insurance coverage, public assistance benefits, family leave benefits, and spousal abuse programs; and a testimonial privilege.¹²⁶ In addition, parties to a civil union are “responsible for the support of one another,”¹²⁷ and the “law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance” apply to civil unions.¹²⁸ Thus, in Vermont, a civil union is meant to be the “legal equivalent” of marriage—a “separate but equal” statutory system meant to mimic the benefits and obligations of marriage for same-sex couples. Many same-sex couples are exercising their rights to form a civil union: “[n]early 5,700 same-sex couples had entered into Vermont civil unions as of June 29, 2003.”¹²⁹ Moreover, folks are coming from far and wide to participate in these ceremonies, “a whopping 85 percent of those who had obtained a Vermont civil union license in the first three years were out-of-staters.”¹³⁰

B. Connecticut and Civil Unions

On April 20, 2005, Connecticut’s governor signed a Civil Union bill into law that goes into effect on October 1, 2005. Connecticut’s law permits two same-sex individuals who are not related and who are over the age of 18¹³¹ to apply for a civil union license.¹³² Parties to a “civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage, which is defined as the union of one man and one woman.”¹³³

C. Massachusetts and the Right to Marry

On November 18, 2003, the Massachusetts Supreme Court ruled that the State could not, consistent with the Massachusetts Constitution, deny same-sex couples the right to marry.¹³⁴ The Court stayed its opinion for 180 days “to permit the Legislature to take such action as it may deem appropriate in light of [the] opinion.”¹³⁵ While the entry of judgment was stayed, the Legislature propounded a question on the Supreme Court, asking whether Senate Bill No. 2175, a proposed civil union statute, would be constitutionally sufficient and would comport with the Court’s ruling in *Goodridge*.¹³⁶ In response to this question, the Court recognized that the Legislature intended for the proposed bill to provide “a legal status equivalent to marriage.”¹³⁷ Notwithstanding the fact that the bill would provide gays and lesbians with all of the “same benefits, protections, rights and responsibilities under law as are granted to spouses in marriage,” the Massachusetts Supreme Court responded that a civil union bill would *not* be constitutionally sound.

Specifically, because the bill retained language stating the Legislature’s intent to “preserve the traditional, historic nature, and meaning of the civil institution of civil marriage,”¹³⁸ the Court held that the bill relegates gays and lesbians to “second-class status.”¹³⁹ Thus, the Court answered that bill “maintains an unconstitutional, inferior, and discriminatory status for same-sex couples.”¹⁴⁰ In sum, the Court held that only “marriage” was equal to marriage for same-sex couples.

Thus, on May 17, 2004, the State of Massachusetts began issuing marriage licenses to same-sex couples. Massachusetts joins Canada, Belgium, Zurich, and the Netherlands in legalizing same-sex marriage.¹⁴¹ Furthermore, after the Massachusetts Supreme Court’s original decision in November, “officials in San Francisco; New Paltz, N.Y.; and Multnomah County, Ore., granted marriage licenses to same-sex couples. Each of those processes has since been interrupted.”¹⁴² The marriage law in Massachusetts, however, is not without its critics. In fact, the Legislature started off 2005 with a debate continued from last year on a constitutional amendment that would bar same-sex marriage and convert the 5,000 same-sex marriages that have already been performed into civil unions.¹⁴³ Massachusetts lawmakers must “pass the measure a second time, either this year or next, before it can reach the statewide ballot in November 2006.”¹⁴⁴ Furthermore, many neighboring states are not pleased with Massachusetts’ open marital borders: New Hampshire recently adopted a law that invalidates any marriage performed outside of its borders that “does not conform to its definition of marriage as the union of one man and one woman.”¹⁴⁵ Thus, the issue of same-sex marriage in Massachusetts is far from settled.

D. Domestic Partner Registries and Laws

There is a substantive difference between Domestic Partner Registries and Domestic Partner Laws. Domestic Partner Registries, at the most, provide the means for gays and lesbians to “register” their partners and then to have those partners eligible for certain benefits, such as insurance coverage. The registries themselves create no rights and, in many instances,

provide nominal benefits at best. On the other hand, Domestic Partner Laws are statutory schemes that establish and protect certain rights for gays and lesbians and their partners.

1. Domestic Partner Registries

Domestic Partner Registries permit gays and lesbians to “register” their partners and thereby make the partners eligible for certain benefits. However, there is no uniformity in the benefits that flow from such registration from state to state or from county to county. Indeed, registry in certain counties in Colorado, Florida, Georgia, Hawaii, Illinois, Iowa, Maine, Michigan, New York, North Carolina, Oregon, Washington, and Wisconsin, makes domestic partners eligible for health insurance coverage¹⁴⁶ or grant other nominal benefits such as the right to visit a partner in a hospital.¹⁴⁷ On the other hand, registry in Hartford County in Connecticut is symbolic only; registry in St. Louis County in Missouri enables the partners eligible to visit each other in a county jail;¹⁴⁸ and registry in Tucson, Arizona guarantees the partners visitation rights at medical centers operating within the city limits.¹⁴⁹ Thus, more often than not, Domestic Partner Registries are a means for gay and lesbian couples to announce their commitment to the rest of the community; they do not bestow and rights, privileges, or obligations.

2. Domestic Partner Laws

There are two states that provide a comprehensive statutory scheme for domestic partners, California and New Jersey. In essence, these states have provided gays and lesbians with the ability to form a union that is the legal equivalent of marriage, namely the ability to form a “civil union” ala Vermont, but without the fanfare or the celebratory requirement. Indeed, perhaps it is the stealth nature of these laws that have garnered them far less attention than was generated in Vermont and Connecticut upon the passage of their civil union statutes.

a. New Jersey

As of July 10, 2004, “the New Jersey Domestic Partnership Act (the “N.J. Act”) provides same-sex couples (and heterosexual couples over the ages of 62) access to certain rights and benefits previously only accorded to married couples.”¹⁵⁰ In passing the N.J. Act, the Legislature declared that the State intended to “recognize and support the many adult individuals in this State who share an important personal, emotional and committed relationship with another adult.”¹⁵¹ The Legislature also recognized that “these [same-sex] familial relationships assist the State by establishing a private support network for the financial, physical, and emotional health of their participants.”¹⁵²

To form a domestic partnership under the N.J. Act, the unrelated parties who are not married or in another partnership and who share a common residence and are “otherwise jointly responsible for each other’s common welfare as evidenced by joint financial arrangements,”¹⁵³ must file an Affidavit of Domestic Partnership with the local registrar.¹⁵⁴

Once a domestic partnership is formed, the parties are entitled to “certain rights and benefits that are accorded to married couples under the laws of New Jersey.”¹⁵⁵ These rights and benefits include the following: statutory protection against discrimination based upon the domestic partner status; “visitation rights for a hospitalized domestic partner and the right to make medical or legal decisions for an incapacitated partner;” a personal tax exemption; and the “transfer inheritance tax on the same basis as a spouse.”¹⁵⁶ The benefits of the N.J. Act, however, “fall[] short of conferring [the full range of] rights now enjoyed by marital partners. For instance, it does not provide for rights of inheritance; it does not provide that support obligations continue based the termination of the partnership; and it does not provide that partners are liable to third parties for each other’s debts.”¹⁵⁷

To terminate the partnership, the parties must file a termination proceeding and make a showing to the Court that the partnership should be dissolved.¹⁵⁸ The statute provides that the Court shall terminate the partnership upon a showing of any of the following: that one of the partners has had sexual intercourse with someone other than his or her registered partner; that there has been “willful and continued desertion for a period of 12 or more consecutive months;” that there has been “extreme cruelty,” drug addition, institutionalization for mental illness for 24 or more consecutive months, separation for 18 or more consecutive months with no prospect of reconciliation, and/or imprisonment for 18 or more consecutive months.¹⁵⁹ In a similar fashion, opposite-sex couples in New Jersey must make the same showing to the court to dissolve their “bond of matrimony.”¹⁶⁰

b. California

As of January 1, 2005, California’s Domestic Partner Act (the “Act”) went into effect.¹⁶¹ In passing the act, the California Legislature declared the following:

This act is intended to help California move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in Section 1 and 7 of the California Constitution by providing all caring and committed couples, regardless of their gender or sexual orientation, the opportunity to obtain essential

rights, protections, and benefits and to assume corresponding responsibilities, obligations, and duties and to further the state's interests in promoting stable and lasting family relationships, and protecting Californians from the economic and social consequences of abandonment, separation, the death of loved ones, and other life crises.¹⁶²

In sum, the Act is meant to provide domestic partners with the “legal rights, protections and benefits, as well as all of the responsibilities, obligations, and duties to each other, to their children, to third parties and to the state, as the laws of California extend to and impose upon spouses.”

To form a domestic partnership pursuant to the Act, the parties must be an unrelated, same-sex couple, where both of the parties share a common residence, are over the age of 18, and are not already married or in another domestic partnership.¹⁶³ The partnership is established as soon as the couple files a Declaration of Domestic Partnership with the Secretary of State.¹⁶⁴ Once formed, the partners have all of the rights and obligations as spouses in a marriage;¹⁶⁵ moreover, these obligations, as in a marriage, continue post-termination of the partnership.¹⁶⁶ To terminate a domestic partnership, the parties, if there are no minor children, if the partnership has been formed for less than five years, if the parties have executed a settlement agreement regarding property, if the parties waive support, and if there are no outstanding debts, may file a “Notice of Termination of Domestic Partnership” that is signed by and agreed to by both parties.¹⁶⁷ If the previously mentioned conditions are not met, then, to terminate their partnership, the parties must file a dissolution petition and follow the procedures set up to terminate a marriage.¹⁶⁸

Almost immediately after California's Domestic Partner law went into effect, it was challenged as being in violation of California's Proposition 22, a voter-initiative statute which succeeded in defining marriage in the State Family Code as being a union between a *man and a woman*.¹⁶⁹ The Sacramento County Superior Court judge, Loren McMaster, who heard the case held that the Domestic Partner law was indeed constitutional.¹⁷⁰ After he issued his ruling, he became the subject of a judicial recall campaign by the Campaign for California Families, an organization upset with the Judge's ruling.¹⁷¹ Recently, the case was decided by the Third District Court of Appeals which upheld McMaster's ruling that the Domestic Partner law is constitutional, finding that the law does not bestow “marital benefits” on same-sex partners, as they are not permitted to file joint state tax returns nor are the partnerships recognized outside of California.¹⁷² The decision regarding the Domestic Partner law is likely to be appealed to the California Supreme Court.

On a related note, California's Proposition 22 is itself being challenged—it was recently annulled by a San Francisco Superior Court judge who held that “same-sex marriage cannot be prohibited solely because California has always done so before.”¹⁷³ The decision will be appealed and could likely lead to additional legislative action by State lawmakers or other political groups.¹⁷⁴ Indeed, there are many groups who are currently working to amend the State Constitution, via a popular vote to take place in as early as 2006, to *prohibit* same-sex marriage.¹⁷⁵ On the other hand, many state lawmakers seek to pass a law to *permit* same-sex marriage, ala Massachusetts.¹⁷⁶ The fight in California, on both sides of the issue, is far from settled.

VI. Defense of Marriage Acts & Article IV of the United States Constitution

A. Defense of Marriage Acts

In 1996, Congress passed the federal Defense of Marriage Act (“DOMA”). In Section one of the DOMA, a “marriage,” for purposes of federal law, is defined as “a legal union between one man and one woman.”¹⁷⁷ In Section two, states are told that they shall not be “required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex”¹⁷⁸

Following the lead of the federal government, since 1996, 40 states have passed laws or amended their constitutions to prohibit recognition of same-sex marriages and/or to “define” marriage as an act that can only occur between one man and one woman.¹⁷⁹ Eleven of these state constitutional bans, including bans in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Oregon, and Utah, were passed by voters in November 2004.¹⁸⁰ Furthermore, in the next year, it is expected that voters in Alabama, Indiana, South Dakota, Tennessee, Virginia, and Wisconsin will consider ballot initiatives to amend their state constitutions to ban same-sex marriage.¹⁸¹

B. The Full Faith and Credit Clause

The Full Faith and Credit Clause¹⁸² “is a ‘nationally unifying force’ which is designed to make the several states ‘integral parts of a single nation.’”¹⁸³ Because, by virtue of our federalist system, states become part of a larger whole, many of their “local policies” must “give way.”¹⁸⁴ That is the “price” of being a member state in the federal union.¹⁸⁵ An interesting issue arises in association with the federal DOMA and its state counterparts, namely how are these statutes impacted, if at all, by the Full Faith and Credit Clause? Resolution of this issue requires an analysis of the judicial and statutory treatment of marriage and divorce—the former involves “choice of law issues and the latter . . . full faith and credit.”¹⁸⁶

In general, a judgment of a state court, when the court had both subject matter and personal jurisdiction, is entitled to “‘not some, but full’ faith and credit from sister states.”¹⁸⁷ Giving full faith to pronouncements of divorce is especially important,

as divorce “is of concern not merely to the immediate parties. It affects personal rights It creates a new status”¹⁸⁸ When the validity of an entry of divorce is questioned, the only inquiry that a sister state can make is to determine whether or not the court issuing the judgment had jurisdiction.¹⁸⁹

In contrast, statutes are treated differently under the Full Faith and Credit Clause. Specifically, the issue of whether marriages are valid across state lines is a choice-of-law issue. Indeed, the Supreme Court has held that marriages “not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the State where entered into, be recognized as valid in every other jurisdiction.”¹⁹⁰ There is no legal dilemma where a couple is domiciled and married in one state. The situation is less clear, however, when couples move and/or are married across state lines.

For example, imagine a couple who is domiciled in State A but who get married in State B, and the laws regarding the validity of marriage *differs* from State A to State B (“Marriage I”).¹⁹¹ In the example of Marriage I, even if the laws of State B had been complied with, the couple, when they return to their domicile in State A, will not have their marriage recognized, as the marriage violates the “strong public policy” of State A, which “had the most significant relationship to the spouses and the marriage at the time of the marriage,” even though the marriage was celebrated in another jurisdiction.¹⁹²

In contrast, imagine a couple who is domiciled and married in State C. They live in State C for many years and then decide to move to State D. State D would not have permitted the couple to marry (assume the couple are too closely related for State D’s consanguinity limitations). However, State D must recognize the marriage, notwithstanding its own laws and public policy.¹⁹³ Thus, a state may impose its own laws and policies on those who are domiciled within the state. However, those laws only have a territorial effect—a state may not refuse to recognize a marriage, validly celebrated in another state by persons domiciled in that other state, when those persons move into the more restrictive jurisdiction. Under this view, same-sex couples who are domiciled in Massachusetts, who marry in Massachusetts, and then, after a period of time, move to another state, should have their marriages recognized in their new home state.

Some might argue, however, that the settled choice-of-law rules discussed above have been altered by the DOMA, namely, that by passing the DOMA, Congress altered the choice-of-law rules to permit states to refuse to recognize valid marriages that have been celebrated outside of the state’s borders.¹⁹⁴ This view of the DOMA would imply that Congress narrowed the scope of the Full Faith and Credit Clause to permit states to ignore certain “public acts” of sister states. However, the DOMA contains no statements about choice-of-law issues. Indeed, “an examination of the language of the DOMA reveals that no choice-of-law rules are even suggested.”¹⁹⁵

Assuming arguendo that Congress meant to alter settled choice-of-law rules to permit states to refuse to recognize same-sex marriages that are valid in the state in which the marriage was performed, the “Supreme Court has suggested that a choice-of-law rule which grossly upsets settled expectations may violate Due Process.”¹⁹⁶ There is little doubt that a heterosexual couple married in accordance with the laws of their state expect that their marriage will follow them should they decide to move at a later date.¹⁹⁷ Thus, to deny same-sex couples this expectation violates Due Process and Equal Protection.

Indeed, with same-sex marriage, the analysis does not involve choice-of-law or Full Faith and Credit issues, but instead involves a substantive Due Process and Equal Protection analysis. On this point, the *Loving*¹⁹⁸ case is instructive. In *Loving*, Richard Loving, a white man *domiciled* in Virginia, was married in the District of Columbia to an African-American woman, Mildred Jeter.¹⁹⁹ This marriage was valid in D.C., but not in Virginia. The Court did not decide *Loving* based upon the Full Faith and Credit Clause, but on the Equal Protection and Due Process Clauses, namely it had to determine whether a state could deny the right to marry based upon race.²⁰⁰ “Had it been constitutional for Virginia to have prohibited interracial marriages, it would also have been constitutional for the state *not to have recognized* a marriage of one of its domiciliaries, void in the domicile, which was recognized elsewhere in the United States.”²⁰¹ Arguably, in *Loving*, the Court would have framed its analysis in Due Process and Equal Protection terms even if the case had involved a couple *domiciled and married* in D.C. who then moved to Virginia.

In sum, an analysis of the Full Faith and Credit Clause is not applicable to the federal DOMA, its state counterparts, or to same-sex marriage in general. Indeed, it is not applicable because state bans that prohibit same-sex marriage are not constitutional, even if those state bans allegedly reflect the state’s idea of morality, public policy, or the general will. As such, they may not be used to justify non-recognition of an out-of-state same-sex marriage. Unconstitutional laws are not entitled to “Full Faith or Credit” under the Constitution, no matter how broadly or narrowly that Clause is interpreted.

VII. Civil Unions are Not an Adequate Substitute for the Right to Marry

As discussed above, Vermont, Connecticut, New Jersey, and California have adopted statutory schemes aimed at providing same-sex couples with the ability to form relationships that are the equivalent, or near-equivalent, of marriage. In passing these acts, the legislatures have found that there is a strong interest in protecting and promoting stability in same-sex relationships.²⁰² While these laws are well-intentioned and, perhaps, a “good start,” they are not constitutional substitutes for the right to marry. Indeed, these laws, while they may provide many of the concrete benefits of an opposite-sex marriage, deny same-sex couples the “intangible” benefits associated with marriage, namely the “security, safe haven, and connection [with another] that express our common humanity”²⁰³ As such, by excluding gays and lesbians from the persons who are eligible to marry, they are relegated to a “second-class status,” and a “stigma of exclusion,” prohibited by the Due Process and Equal Protection Clauses of the United States Constitution,²⁰⁴ is “foster[ed] and maintain[ed].”²⁰⁵

Many have argued that the civil union and domestic partner statutory schemes are akin to the “separate but equal” systems associated with racial segregation.²⁰⁶ Indeed, the parallels are there. By fashioning a separate legal system by which to formalize their unions, gays and lesbians are told that they are “inferior”²⁰⁷ as compared to heterosexuals; this “badge of inferiority” or “message of humiliation”²⁰⁸ has a “detrimental effect,” the impact of which is “greater when it has the sanction of the law.”²⁰⁹

In sum, the denial of the right to marry is not ameliorated by providing gays and lesbians with a parallel statutory scheme, namely civil unions or domestic partnerships. Indeed, the debate over “civil unions” versus “marriage” is not a “squabble over [a] name,”²¹⁰ but the embodiment of the constitutional dilemma associated with the denial of a fundamental right.

VIII. Business Implications of Same-Sex Marriage

“Same-sex marriage may seem revolutionary, but for American business, the idea truly is evolutionary.”²¹¹ As our nation’s political and religious leaders debate the moral and constitutional aspects of same-sex marriage, human resource directors and employers are left struggling with a more practical question: what to do if an employee in a same-sex relationship presents a marriage certificate and demands to be granted the benefits, rights and privileges accorded to an opposite-sex couple? This portion of the article will discuss relevant federal and state statutes as they relate to same-sex marriage and the impact the extension of the right to marry might have on businesses.

According to the U.S. Census Bureau 2000, there are at least 105.5 million households in the United States, of which 52 percent were maintained by married couples (54.5 million).²¹² There were 5.5 million couples who self-identified themselves as living together but who were not married (up from 1990’s 3.2 million).²¹³ While a majority of those unmarried-partner relationships had partners of the opposite sex (4.9 million), approximately 1 in 9 (594,000) had partners of the same sex.²¹⁴

Putting this into perspective, if the nearly 600,000 same-sex couples that identified themselves in the census were to legally marry tomorrow, they would make up fewer than one in 100 married couples in the United States.²¹⁵ Such households raising children under the age 18 number 150,000.²¹⁶ In essence, then, there are at least 1.3 million people that are direct stakeholders in the gay marriage controversy. These are not “new” people; these are individuals whose lives are impacted every day by the lack of a recognizable status.

Civil marriage is an institution that has been built into the laws and customs of our country on many levels.²¹⁷ When two people marry, they agree, in a contractual sense, to a powerful set of obligations and are bestowed certain rights that have economic implications on every aspect of their lives.²¹⁸ When denied the right to marry, same-sex couples are also denied access to these obligations and rights. Married couples receive 1,049 distinct rights, benefits and responsibilities under federal law alone.²¹⁹ Same-sex couples get zero. Under state law, relatively few employers are required to provide equal benefits for same-sex partners and spouses, so same-sex couples are at an even larger disadvantage.

Because the current state of the law does not provide for universal recognition or protections for gay couples, the challenge for them is to find other means of establishing and protecting their rights vis-à-vis their relationships. Part of that strategy involves using private contracts to address such issues as parental, property, and inheritance rights.²²⁰ Drafting contracts, however, is not an airtight solution. Before such agreements may be written, same-sex couples need to determine whether such a contract will be recognized by the couple’s home state.²²¹ Several states, including Georgia, Illinois, and Ohio still have case law that invalidates contracts in which the consideration is the person’s sex.²²² Additionally, many benefits of marriage, such as employer medical benefits, pensions, and tax deductions simply cannot be gained by private contract.²²³ Pending legislation, court decisions,²²⁴ and constitutional amendments have made drafting such documents difficult—the rules are constantly changing.²²⁵

With marriage licenses available to same-sex couples in Massachusetts, the definition of “spouse” has changed. From an employer’s standpoint, how does that impact eligibility for “spousal” benefits?²²⁶ How does this impact compliance with federal employment or welfare statutes? How do payroll systems adjust to treat same-sex spouses as “spouses” on the state level,²²⁷ yet leave them as “unmarried” on the federal level under the DOMA?²²⁸

Transferring employees to or from different states has now become more complicated.²²⁹ Truly, in our global economy the workforce of multi-state or multi-national corporations may spread from jurisdiction to jurisdiction – from domestic partner states to common law marriage states, from nation-states that fully endorse same-sex benefits²³⁰ to the State of Virginia whose laws explicitly prohibit companies from providing such benefits, regardless of where the marriage was performed or recognized.²³¹ Such complexity of compliance is causing employers to reevaluate their existing policies as they relate to employee health packages, access to leave programs, retirement and survivor policies to remain within legal constraints.²³² The following sections discuss exactly those issues.

A. Employee Health Insurance

In general, employers are not required by law to provide health benefits to employees, much less to employees’ spouses. When such benefits are offered,²³³ employees’ “marital spouses” and children may be covered as well. Employees often prefer to receive part of their compensation in the form of benefits, in part, because they are not required to pay income tax on such benefits.²³⁴ Likewise, benefits for “marital spouses” are “tax-free.” Although currently employees in same-sex

relationships may be offered the ability to cover their partners, the benefits provided are not the same as benefits provided to marital “spouses.” For instance, employees whose domestic partners are covered by employer health insurance plans are required to pay income taxes on the employer contribution for the coverage.²³⁵ After the *Goodridge* decision, Massachusetts employers in particular were looking at their benefit plans and employment practices, reviewing their definitions of “spouse,” “marriage,” and “domestic partner” and how they were used for non-ERISA benefits.²³⁶ Fully-insured plans such as group medical, dental, life and disability plans that extend insurance coverage to spouses will most likely need to be provided to same-sex spouses. Additional perks, such as relocation packages for example, should follow suit simply to avoid allegations of discrimination.

A major concern for employers in offering health benefits is quite simply, cost.²³⁷ The rate of growth for health care premiums continues to grow, although by a somewhat slower pace over the past one year. In 2004, the percentage of *all* workers receiving health coverage from their employer fell from 65% in 2001 to 61%.²³⁸

Two factors drive the cost issue: (1) how many new enrollees the plan can expect to receive during a particular time period; and (2) what risks are likely to be associated with those individuals. What effect would legalizing same-sex marriage have on health care costs looking at these two factors? In a 2000 study of domestic partner benefit plans, Hewitt Associates found that on average only 1.2 percent of eligible employees offered domestic partner health plans actually elected to take it.²³⁹ Using the most recent Census 2000 statistics and 2003 Employer Health Benefits survey information, one study showed that, at most, 190,000 businesses out of the approximately 2.9 million U.S. firms that provide health benefits would experience the health plan enrollment of a new spouse.²⁴⁰ In a large company with one thousand employees, that translates into seven employees with new spouses to cover.²⁴¹ The vast majority of small businesses (0-19) will see no changes in costs at all.²⁴² Indeed, some studies have shown that, in fact, more than 96 percent of firms would face no additional costs for healthcare benefits if they were to offer same-sex benefits because not all gay and lesbian employees in same-sex relationships would choose to marry their partners (if the option were legal).²⁴³

Further, Hewitt found that employers are no more at risk when adding domestic partners than they are for adding opposite-sex spouses.²⁴⁴ Studies reflect that the employees eligible for domestic partner plans tend to be younger and as a result, healthy. Enrollment in such plans is also low because most often domestic partners already have coverage through their own employers.²⁴⁵ Finally, same-sex domestic partners have a very low risk of pregnancy which offsets any increased risk of AIDS.²⁴⁶ Recent studies show that it costs a company about 1 percent of its overall health insurance costs to add same-sex domestic partners.²⁴⁷

Although the Presidential election intensified the gay marriage debate, it did not spark an outcry from employees for same-sex benefits. In fact, only 15% of HR managers polled for the Society for Human Resource Management said inquiries about same-sex benefits increased in the six months prior to the election.²⁴⁸ By comparison, 20% noted an increase in the number of inquiries regarding opposite-sex domestic partner benefit plans.²⁴⁹

Interestingly, although they have no legal obligation and in spite of rising insurance costs, thousands of employers have voluntarily decided to offer spousal benefits to the same-sex partners of employees.²⁵⁰ This movement seems to stem directly from the desire to attract a diverse, quality workforce²⁵¹ that stays put.²⁵² Indeed, in 1982, the *Village Voice*, a New York City weekly, became the first U.S. employer to offer domestic partner benefits to its gay and lesbian employees.²⁵³ In 1992, Lotus Development Corporation, now a division of IBM, became the first publicly traded company to offer such benefits.²⁵⁴ From August 1999 to August 2001, the number of employers providing domestic partner benefits doubled—from 2,856 employers to 4,285.²⁵⁵ In addition, continuing their recognition of issues facing gay and lesbian employees, currently more than 83 percent of the Fortune 500 companies include sexual orientation in their non-discrimination policies and 54 include gender identity.²⁵⁶

Although health benefit coverage is an expensive perk (regardless of the sexual orientation of the employee), it makes good business sense that an employer continue to be offer such benefits and do so without bias. Competitive employers know that quality employees are attracted to positions that offer health benefits and other perks.²⁵⁷ Employee morale and productivity increase when they believe their services are valued resulting in lower turnover.²⁵⁸ Employee retention is an important economic consideration for employers, as some studies have estimated the cost of recruiting a new employee to be as high as \$75,000.²⁵⁹

B. Family Medical Leave Act

The Family and Medical Leave Act (FMLA)²⁶⁰ was enacted in 1993 with the purpose of protecting employees²⁶¹ who need time off from work for family or medical reasons. Generally, the FMLA requires employers who have fifty or more employees²⁶² to provide employees with up to twelve weeks of family or medical leave during any twelve-month period.²⁶³ Such leave is generally granted without compensation.²⁶⁴ Medical or family leave is mandated for the following reasons: for the birth of a son or daughter of the employee; for the adoption or foster care of a son or daughter; in order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition; or because of a serious health condition that makes the employee unable to perform the functions of the position of the employee.²⁶⁵

Since 1993, over 35 million employees have taken leave under the Act.²⁶⁶ Almost 41 million Americans are not covered by the Family and Medical Leave Act simply because they work for private employers not covered by the Act—this amounts to more than 40 percent of the private sector workforce nationwide.²⁶⁷ Perhaps not surprisingly, this statute could have tremendous implications for businesses should same-sex marriage be legalized and/or the definition of “spouse” changed. Arguably, costs would go up. One study revealed that complying with the FMLA cost employers \$21 billion in 2004.²⁶⁸ Currently, the Department of Labor’s FMLA regulations provide that “spouse” means a “husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides.”²⁶⁹ Thus, in a state that recognizes same-sex marriage, a gay or lesbian employee would be able to take FMLA leave to care for his or her same-sex spouse. It is possible, however, that the DOMA could trump this regulatory definition in states where it has been enacted.²⁷⁰ Many employers have leave of absence policies that track FMLA requirements without expressly limiting their scope to that of the FMLA. While it appears the FMLA encourages employers to provide more generous leave plans, there may be unintentional consequences. For example, an employee who takes leave to care for a same-sex partner under his or her employer’s generous personal leave policy for twelve weeks would remain entitled to take up to another twelve weeks of leave during the same year under the FMLA for another reason since the same-sex partner would not “count” as the employee’s FMLA leave entitlement under federal law. The statute is clear that an employee’s usage of FMLA leave cannot result in the loss of any employment benefit²⁷¹ that the employee earned or was entitled to before using FMLA leave.²⁷² Finally, although an employer must “approve” of the leave, it is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by FMLA.²⁷³

C. ERISA.

Under the Employee Retirement Income Security Act of 1974 (ERISA),²⁷⁴ employers are not required to offer employee benefits. If an employer chooses to provide benefits, it is generally free to define who is entitled to benefits under an employee benefit plan - employees, their dependents, spouse and other beneficiaries. Employers may elect to provide benefits to same-sex spouses or domestic partners, but they are not required to do so under ERISA. Because ERISA generally preempts state laws affecting employee benefits, employers who choose to limit spousal benefits to traditional opposite-sex spouses should be able to do so under prevailing law. This will be true even in jurisdictions like Massachusetts and Vermont that recognize same-sex marriages or civil unions. Claims that a traditional opposite-sex spouse-only provision would violate state laws prohibiting discrimination based upon marital status or sexual orientation would arguably be preempted by ERISA to the extent that the employee seeks benefits under an ERISA-covered plan. Employers who limit benefits to opposite-sex couples still risk litigation in those jurisdictions that prohibit discrimination based on sexual preference (or arguably marital status), however.²⁷⁵

There are also limits to ERISA’s preemption of state law. In particular, employee benefit plans maintained by a governmental or church employer normally fall outside of ERISA entirely.²⁷⁶ Moreover, ERISA does not preempt state laws that “regulate insurance.”²⁷⁷ Health insurance policies issued in Massachusetts, for example, as well as state-regulated health maintenance organizations (HMOs), will not be permitted by Massachusetts law to distinguish between same-sex and opposite-sex partners in providing coverage or underwriting risk in that state. State insurance laws may impact who an insured medical plan (or plan option) must cover.

Recently, the Supreme Court held, for a law to “regulate insurance,” it “must specifically be directed toward entities engaged in insurance” and “must substantially affect the risk pooling arrangement between the insurer and the insured.”²⁷⁸ If courts were to find that Massachusetts insurance law regarding same-sex spouses “regulates insurance,” then ERISA would not preempt the Massachusetts law, and employers with insured employee benefit plans could be required to cover same-sex spouses.

Finally, not all employee benefits are governed by ERISA. For example, paid time off arrangements, adoption assistance programs, educational assistance programs and uninsured short-term disability plans generally are not governed by ERISA. In these situations, state and local laws will not be preempted, and employers will be subject to state and local coverage requirements. Employers would need to treat same-sex spouses the same as they do opposite-sex spouses for purposes of these types of benefits.

ERISA requires that employers abide by the terms of their employee benefit plan documents. Thus, the plan document’s definition will be critical to determining who is eligible for spousal or dependent benefits under the plan. Many plans define “spouse” by reference to state law. For multi-jurisdictional corporations, one plan will not “fit” all.

D. Workers’ Compensation and Social Security Survivor Benefits

Employers are required by law to provide a workplace that is “free from recognized hazards that are causing or likely to cause death or serious physical harm.”²⁷⁹ While the Federal Occupational Safety and Health Act insists upon workplace safety, employees who are injured or disabled on the job while within the scope of employment file are provided with fixed monetary awards based on state Workers’ Compensation laws. Workers’ Compensation statutes ensure that employees injured on the job are rightfully compensated while eliminating the need for litigating against their employers. Any monetary

payment associated with a workplace injury goes directly to the injured or disabled employee, not to the employee's spouse (regardless of how "spouse" is defined).

In addition to state statutory schemes, there are federal worker's compensation statutes, such as the Federal Employment Compensation Act, which provides compensation to non-military, federal employees who are injured or disabled on the job.²⁸⁰ Railroad employees likewise have their own version of a federal workman's compensation statute under The Federal Employment Liability Act (FELA).²⁸¹ As with state workers' compensation statutes, monetary awards are made directly to employees, not to their spouses.

The only true issue that arises in Workers' Compensation or Social Security cases relevant to same-sex marriage would be in determining the "rightful survivor" that would receive a deceased employee's benefits. Again, "spouse" is defined as "husband" or "wife." This inequity would most definitely impact the domestic partner and/or any children in the household more than it would impact business *per se*.²⁸² For Workers' Compensation Survivor Benefits, it is prudent to recall that such issues only arise when an employee is fatally injured on the job which is not often. The U.S. Department of Labor recorded 5,559 fatal work injuries in the United States for the year 2003.²⁸³ Essentially, this is 4 fatalities per 100,000 workers.²⁸⁴

E. Positive Business Impacts

While the moral debates continue, creative business minds pondered how they could "cash in" on this "new market"²⁸⁵ and whether in fact, allowing same-sex marriages would have a positive impact on the economy. In May, a UCLA Law School study actually found that same-sex marriages would result in gains to California's state budget of \$22.5 to \$25.2 million a year.²⁸⁶ The California study also predicted increases in tourism dollars and tax revenues--\$100 million per year in increased business revenues and \$10 million in sales tax. Similar findings have resulted from studies of same-sex marriage in New Jersey, Vermont, and Connecticut.²⁸⁷

The rush to marry in Massachusetts may provide various business sectors with some indication of what may lie ahead should same-sex marriage be held constitutional on a nationwide basis. During the six-month period prior to same-sex marriage becoming legal, Provincetown, Massachusetts, (boasting a record 13.2% of households whose occupants were unmarried partners of the same sex) welcomed several new businesses: two new florists, a videographer, and wedding planners.²⁸⁸ In addition, catering businesses expanded; buildings were painted; and even the local museum was spruced up for marketing itself as a spot for wedding receptions.²⁸⁹ While Provincetown has been a summer destination spot for gays since the 1960's, after the Supreme Judicial Court ruling, townspeople were looking at an increased business lasting well into October.²⁹⁰

Clearly, legalizing same-sex marriages could bring a tremendous windfall to the wedding and tourism industries.²⁹¹ Canada's gay-friendly atmosphere is estimating that their "new international image" could draw more than \$1 billion over the next three years,²⁹² using Toronto, Montreal and Vancouver as a basis for projection.²⁹³ Forbes Magazine estimates that if the same-sex marriage laws were changed, gay couples currently living together would "collectively spend over \$16.8 billion" on wedding-related expenses.²⁹⁴

Entrepreneurial thinking has led to gay television programming and it is certain that advertising dollars will follow. A Los-Angeles-based cable TV channel called here!, specializing in gay programming, announced that it totaled \$15 million in the first year and it is spending \$50 million this year on original programming and on obtaining rights to run films and special series. Time Warner Cable in New York City, Los Angeles, Boston, Milwaukee and San Antonio began carrying here! programming late last year as a non-subscription video-on-demand for \$3.95 per three-hour viewing. Cablevision Systems Corporation began giving its digital customers monthly subscriptions to here! for \$6.95.²⁹⁵ If the national trend of affection for reality shows holds true, then gay customers can look forward to the planned series of reality shows "focusing on gay cops in New York, gay ocean-liner cruises and dream weddings for gay couples."²⁹⁶

IX. Conclusion

Each state has an interest in promoting stable unions between two persons through civil marriage. However, there is no rational reason to deny same-sex couples the right to marry. States must recognize that they should support a same-sex marriage for the same reasons that they support opposite-sex marriages—because they want to promote stable, healthy relationships between adults for the benefit of society in general. Such a goal is not dependent on the genders of the parties in the relationship.

There is no doubt that the Supreme Court will soon address the issue of same-sex marriage. Indeed, same-sex marriage is the perfect storm of constitutional law—it encompasses Due Process, Equal Protection, and the Full Faith and Credit Clause. These strong, and varied constitutional winds will blow this issue to the steps of the Supreme Court. Thus, the question is not "if" the Supreme Court will take up this issue, but "when." When the Court does "consider[] this question, then, [the Justices] must never forget that it is a constitution [they] are expounding."²⁹⁷ As such, the hope is that the Court will

interpret the Constitution in a way that provides Due Process and Equal protection for all, regardless of sexual orientation.

Footnotes

¹ Lawrence v. Texas, 539 U.S. 558, 578-79 (2003)

² See Charles J. Ried, Jr., *The Augustian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 BYU J. OF PUB. LAW 449, 469 (2004).

³ See, e.g., Lawrence v. Texas, 539 U.S. 558, 571 (2003).

⁴ *Id.*

⁵ This article, in harmony with the prevailing medical views, considers sexual orientation to be an immutable characteristic. “Homosexuality is no longer a disease or disorder. ‘In 1973, the American Psychiatric Association took homosexuality off its list of mental disorders. ‘In one fail swoop, 15 million gay people were cured!’” Phong Duong, *A Survey of Gay Rights Culminating in Lawrence v. Texas*, 39 GONZ. L. REV. 539, 548 (2003/2004). Soon after the American Psychiatric Association’s pronouncement, the “American Psychological Association adopted similar measures and resolved to devote significant resources to understanding gay experience in a psychological context consistent with contemporary clinical thought.” Steve Susoeff, *Assessing Children’s Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 U.C.L.A. L. REV. 852, 872 (1985).

⁶ Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

⁷ See, e.g., Spearman v. Ford Motor Co., 231 F.3d 1080, 1084 (7th Cir. 2000) (“nothing in Title VII protects a person because of sexual or perceived sexual orientation”); see also Suzanne Lee, *Employment Non-Discrimination Act Moves Forward in Senate*, Apr. 25, 2002, available at civilrights.org (The Employment Non-Discrimination Act, which would extend protection against employment discrimination on the basis of sexual orientation has been “brought up for consideration every Congressional session since its introduction in 1994”).

⁸ 10 U.S.C. § 654(b)(1) (mandating discharge from the armed forces for any service member who engages or intends to engage in homosexual acts).

⁹ Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995).

¹⁰ Boy Scouts of America et al. v. Dale, 530 U.S. 640 (2000).

¹¹ Lawrence v. Texas, 539 U.S. 558 (2003).

¹² *Id.* at 562.

¹³ 478 U.S. 186 (1986).

¹⁴ *Lawrence*, 539 U.S. at 564.

¹⁵ *Id.*

¹⁶ *Id.* at 573.

¹⁷ *Id.* at 567.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 578.

²¹ Bowers v. Hardwick, 478 U.S. 186, 216 (Stevens dissenting).

²² *Id.*

²³ *Id.* at 218.

²⁴ “No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. IV.

²⁵ “No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

²⁶ Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 846 (1992).

²⁷ *Id.* at 847.

²⁸ U.S. CONST. amend. XIV.

²⁹ Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan dissenting).

³⁰ Lawrence v. Texas, 539 U.S. 558, 579 (O’Connor concurring) quoting Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985).

³¹ Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

³² Baker v. Vermont, 744 A.2d 864, 871 n.3 (Vt. 1999), referencing City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-41 (1985).

³³ City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

³⁴ Shapiro v. Thompson, 394 U.S. 618, 635-37 (1969) (a state residency requirement, that impedes on the fundamental right to travel, must be evaluated under strict scrutiny. Thus, the residency requirement must support a *compelling* state interest. Under this standard, the waiting-period requirement for eligibility for benefits violates the Equal Protection Clause).

³⁵ Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 273 (1979).

³⁶ Romer v. Evans, 517 U.S. 620, 631 (1996).

³⁷ Colorado’s Amendment 2 read as follows: “Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.” *Romer*, 517 U.S. at 624.

³⁸ *Id.* at 631.

³⁹ *Id.* at 632.

⁴⁰ *Id.* at 635.

⁴¹ *Id.*

⁴² *Lawrence*, 539 U.S. at 580. Justice Scalia, in his dissent, states that this “more searching level of rational basis review” means that “laws exhibiting ‘a . . . desire to harm a politically unpopular group’ are invalid even though there may be a conceivable rational basis to support them.” *Id.* at 540.

⁴³ *Id.* at 583.

⁴⁴ *Id.* It should be noted that Justice O’Connor did imply that a possible “legitimate” state interest might be to “preserv[e] the traditional institution of marriage.” *Id.* at 585. As argued herein, however, preserving the “traditional institution of marriage” is not a legitimate, valid state interest.

⁴⁵ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

⁴⁶ George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 *BYU J. PUB. L.* 419 (2004).

⁴⁷ By this term, the author means that married people “live longer and enjoy better physical and psychological health and greater wealth.” *Id.* at 435.

⁴⁸ *Id.* at 428-435.

⁴⁹ Charles J. Reid, Jr., *The Augustinian Goods of Marriage: The Disappearing Cornerstone of American Law of Marriage*, 18 *BYU J. PUB. L.* 449 (2004).

⁵⁰ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003).

⁵¹ See *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

⁵² See *Goodridge*, 798 N.E.2d at 955.

⁵³ *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978), discussing *Loving v. Virginia*, 388 U.S. 1 (1967).

⁵⁴ *Id.*

⁵⁵ 434 U.S. 374 (1978).

⁵⁶ *Id.* at 375.

⁵⁷ *Zablocki*, 434 U.S. at 383, quoting *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

⁵⁸ *Zablocki*, 434 U.S. at 384, quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

⁵⁹ *Zablocki*, 434 U.S. at 384 (“Cases subsequent to *Griswold* and *Loving* have routinely categorized the decision to marry as among the personal decisions protected by the right of privacy.”)

⁶⁰ *Id.* at 386.

⁶¹ *Id.* at 387.

⁶² The Court based its decision on the Equal Protection Clause. The Court held that, because marriage was a fundamental right, the state statute could withstand constitutional scrutiny only if it was “supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Id.* at 388.

⁶³ *Goodridge v. Dep’t of Pub. Health*, 14 *Mass. L. Rep.* 591, *48 (May 7, 2002), vacated by *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁶⁴ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

⁶⁵ *Id.* at 961 n.23.

⁶⁶ *Baker v. Vermont*, 744 A.2d 864, 881 (1999).

⁶⁷ Jay Weiser, *Foreword: The Next Normal--Developments Since Marriage Rights for Same-Sex Couples in New York*, 13 *COLUM. J. GENDER & L.* 48, 49 (2004).

⁶⁸ *Lawrence v. Texas*, 539 U.S. 558, 543 (2003) (Scalia dissenting). Justice Scalia also writes that “If [sexual] autonomy is to be taken seriously, . . . then each individual’s appreciation and definition of what is, for them, a valuable sexual act or sexual/emotional relationship must—within the limits of consent—be respected.” Thus, he argued that states might have to accept other marriages—incestuous, polygamous, and/or bestiality—if they accept same-sex marriage. Such a prediction, however, is meant to inspire fear and is not based upon reason. Indeed, although a state should not require that persons in a marriage be of opposite sexes, it could require that a civil marriage may be entered into only two, natural persons, who are not related and who consent to the union. To argue that allowing same-sex marriage will necessitate state recognition of a marriage between a child and her father, between a man and ten women, or between a man and his dog, is to skew the issue and to make people recoil in fear.

⁶⁹ “It is beyond dispute that the State has a legitimate and long-standing interest in promoting a permanent commitment between couples for the security of their children.” *Baker v. Vermont*, 744 A.2d 864, 881 (1999). “Protecting the welfare of children is a paramount State policy.” *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003).

⁷⁰ FORUM ON CHILD AND FAMILY STATISTICS, *Population and Family Characteristics*, available at <http://childstats.gov/ac2004/pop.asp>

⁷¹ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003).

⁷² Steve Susoeff, *Assessing Children’s Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 U.C.L.A. L. REV. 852, 881-82 (1985). In this article, the author cites no less than 10 journal articles that support the conclusion that gay and lesbian parents do not “convert” their children or otherwise influence them to adopt a gay or lesbian lifestyle. *Id.* at n.192.

⁷³ For example, California recognizes “second parent” adoptions, and this “practice accords with the national trend. As of 2001, at least 21 American jurisdictions had recognized second parent adoption. . . . The highest state courts in Massachusetts, New York and Vermont expressly have permitted second parent adoption without requiring termination of the birth parent’s rights. . . . The remainder have permitted second parent adoptions at intermediate appellate and lower court levels.” Sharon S. v. Annette F., 2 Cal. Rptr. 3d 699, 719 n.21 (Cal. 2003), *cert. den.* 124 S. Ct. 1510 (2004) (internal citations omitted).

⁷⁴ *Id.* (internal citations omitted).

⁷⁵ *Baker v. Vermont*, 744 A.2d 864, 882 (1999).

⁷⁶ *Goodridge v. Dep’t of Pub. Health*, 14 Mass. L. Rep. 591, *37 (May 7, 2002), *vacated* *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁷⁷ “During the period immediately following the Civil War, the status of women’s civil rights improved in some states, but deteriorated in others. . . . For example, after the war, an 1860 New York law that had granted women the right to equal guardianship of their children was amended so that it merely prohibited the father from giving away the children without the mother’s written permission.” Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment Under the Fourteenth Amendment*, 1 DUKE GENDER L. & POL’Y 89, 102 (1994).

⁷⁸ Alexandra Wald, *What’s Rightfully Ours: Toward a Property Theory of Rape*, 30 COLUM. J.L. & SOC. PROBS. 459, 488-89 (1997) (internal citations omitted).

⁷⁹ Herma Hill Kay, *An Appraisal of California’s No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 293-94 (1987).

⁸⁰ *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

⁸¹ These reasons include the advent of the no-fault laws themselves, women’s career opportunities, and changes in social values. *See* Wald, *supra* note 78, at 132.

⁸² Center for Disease Control, National Vital Statistics Reports, *Births, Marriages, Divorces and Deaths: Provisional Data for 2003*. U.S. Dep’t of Health and Human Services, Vol. 52, Number 22, June 10, 2004. These statistics list the population base as 291,400,000.

⁸³ Shaakirrah R. Sanders, *The Cyclical Nature of Divorce in Western Legal Tradition*, 50 LOY. L. REV. 407, 421 (2004).

⁸⁴ *Id.* at 422.

⁸⁵ *Id.* at 429.

⁸⁶ Chauncey E. Brummer, *The Shackles of Covenant Marriage: Who Holds the Keys to Wedlock?*, 25 U.ARK. LITTLE ROCK L. REV. 261, 271 (2003).

⁸⁷ Donna S. Hershkowitz & Drew R. Liebert, *The Direction of Divorce Reform in California: From Fault to No-Fault . . . And Back Again?*, Assembly Judiciary Committee, California State Legislature, Nov. 6, 1997, at 130.

⁸⁸ *Id.* at 132.

⁸⁹ There is much debate about the reasons behind the high rate of divorce in the United States. These reasons include the advent of the no-fault laws themselves, women’s career opportunities, and changes in social values. *See* Wald, *supra* note 78, at 132.

⁹⁰ Kristina E. Zurcher, *“I do” or “I Don’t”? Covenant Marriage After Six Years*, 18 ND J. L. ETHICS & PUB POL’Y 273, 273 (2004).

⁹¹ Donna S. Hershkowitz & Drew R. Liebert, *The Direction of Divorce Reform in California: From Fault to No-Fault . . . And Back Again?*, Assembly Judiciary Committee, California State Legislature, Nov. 6, 1997, at 138 (internal citations omitted).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 139 (internal citations omitted).

⁹⁷ *Id.*

⁹⁸ *See, e.g., id.* at 139-141.

⁹⁹ “Covenant marriage legislation came about as a strong reaction to America's transformation of marriage into an institution focused more on individual well-being and based on an easily abandoned contract.” Cynthia DeSimone, *Covenant Marriage Legislation: How the Absence of Interfaith Religious Discourse has Stifled the Effort to Strengthen Marriage*, 52 CATH. U.L. REV. 391, 401 (2003).

¹⁰⁰ Chauncey E. Brummer, *The Shackles of Covenant Marriage: Who Holds the Keys to Wedlock?*, 25 U.ARK. LITTLE ROCK L. REV. 261, 262 (2003).

¹⁰¹ *Id.* at 263.

¹⁰² *Id.* at 275. The covenant marriage laws of Louisiana, Arizona, and Arkansas are, for the most part, similar in their requirements and obligations. *See, e.g., id.* at 274-78.

¹⁰³ *Id.* at 275. “Fault” may take many forms including: adultery, a felony conviction, abandonment, physical or sexual abuse, and drug or alcohol abuse. *See, e.g.,* at 275-76.

¹⁰⁴ *Id.* at 275.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 277.

¹⁰⁷ *Id.* at 292-93.

¹⁰⁸ “Post-divorce disputes comprise fifty-nine percent of litigation, and divorce has come to be recognized as a ‘growth industry’ with custody the most vigorously contested aspect of many dissolution proceedings.” Steve Susoeff, *Assessing Children’s Best Interests When a Parent is Gay or Lesbian: Toward a Rational Custody Standard*, 32 U.C.L.A. L. REV. 852, 861 (1985).

¹⁰⁹ *United States v. Darby*, 312 U.S. 100 (1941) (Fair Labor Standards Act upheld), *overruling* *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (Congress is not authorized to pass laws that prohibit the transportation of goods in interstate commerce manufactured by child labor).

¹¹⁰ *See* *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (National Labor Relations Act upheld), *overruling* *Schechter Corp. v. United States*, 295 U.S. 495 (1935) (National Industrial Recovery Act, a precursor to the NLRA, is found to exceed Congress’ power under the Commerce Clause).

¹¹¹ *See, e.g.,* *Heart of Atlanta Hotel, Inc. v. United States*, 379 U.S. 241 (1964) (Public Accommodations provisions of the 1964 Civil Rights Act are constitutional).

¹¹² *See, e.g.,* *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955).

¹¹³ Cynthia DeSimone, *Covenant Marriage Legislation: How the Absence of Interfaith Religious Discourse has Stifled the Effort to Strengthen Marriage*, 52 CATH. U.L. REV. 391, 396 (2003).

¹¹⁴ *See, e.g.,* *Reynolds v. United States*, 98 U.S. 145, 161 (1879) (Religious belief cannot be accepted as a justification of an overt act made criminal by the law of the land).

¹¹⁵ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

¹¹⁶ *Id.*

¹¹⁷ This Article stresses that churches are, and should remain, free to set their own rules regarding who may marry and when.

¹¹⁸ There are some authors who argue that, although “same sex couples may gain valuable and unique benefits from entering marriage, [o]ther couples . . . will face the sometimes subordinating effect of marriage laws across gender, race, and class lines.” Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 618 (May 2004). Thus, there are some that question the wisdom of same-sex marriage, but for reasons other than those usually asserted by the States.

¹¹⁹ *Baker v. Vermont*, 744 A.2d 864, 887 (Vt. 1999).

¹²⁰ *Id.*

¹²¹ VT. STAT. ANN. tit. 15, § 1201 *et seq.* (Supp. 2000).

¹²² VT. STAT. ANN. tit. 15, § 1201, Legislative Findings.

¹²³ *Id.*

¹²⁴ *Id.* at §§ 1202-03.

¹²⁵ *Id.* at § 1204(a).

¹²⁶ *See id.* at § 1204(e)(1)-(24).

¹²⁷ *Id.* at § 1204(c).

¹²⁸ *Id.* at § 1204(d).

¹²⁹ Jay Weiser, *Foreword: The Next Normal--Developments Since Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 48, 50-51 (2004).

¹³⁰ *Id.*

¹³¹ Connecticut General Assembly - January Session, 2005, Public Act No. 05-10, Substitute Senate Bill No. 963, §§1-3.

¹³² *Id.* at §7(a) & (b).

¹³³ *Id.* at §14.

¹³⁴ *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941 (Ma. 2003).

¹³⁵ *Id.* at 970.

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- ¹³⁶ Opinions of the Justices to the Senate, 802 N.E.2d 565, 566 (Ma. 2004).
- ¹³⁷ *Id.* at 568.
- ¹³⁸ *Id.* at 569.
- ¹³⁹ *Id.* at 570.
- ¹⁴⁰ *Id.* at 572.
- ¹⁴¹ Jay Weiser, *Foreword: The Next Normal--Developments Since Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 48, 50 (2004).
- ¹⁴² Alan Cooperman and Jonathan Finer, *Gay Couples Marry in Massachusetts; Hundreds Tie Knot on Day One, but Questions Remain*, WASHINGTON POST, May 18, 2004, at A1. On a related note, the California Supreme Court recently unanimously ruled that the City of San Francisco "exceeded its authority in performing marriages not recognized by state law." Pam Smith and Mike McKee, *By 5-2 Vote, Justices End 4,000 Marriages, Hint at Future Plans*, THE RECORDER, Aug. 13, 2004, at p.1.
- ¹⁴³ Margo Williams, *Anti-Gay Marriage Vote Looms in Massachusetts*, 365Gay.com, available at <http://www.365gay.com>; see also *Mass Court to Hear Bid to Stop Same-Sex Marriages*, May 2, 2005, available at <http://aproundtable.org>.
- ¹⁴⁴ *Mass Court to Hear Bid to Stop Same-Sex Marriages*, May 2, 2005, available at <http://aproundtable.org>.
- ¹⁴⁵ Nina J. Easton, *Mass Landmark Ruling Pushed onto Ballots*, BOSTON GLOBE, May 15, 2005, at A18.
- ¹⁴⁶ LAMBDA LEGAL, *Partial Summary of Domestic Partner Registry Listings*, available at <http://www.lambdalegal.org>.
- ¹⁴⁷ In New York, a registered domestic partner may not be denied the right to visit his/her domestic partner in the hospital. N.Y. PUB. HEALTH LAW § 2805-q (2004).
- ¹⁴⁸ *Id.*
- ¹⁴⁹ Oscar Abeyta, *101 Local Couples Sign Domestic Partner Registry, Get Nominal City Benefits*, TUCSON CITIZEN, Dec. 10, 2003, available at <http://www.tucsoncitizen.com>.
- ¹⁵⁰ Myrna L. Wigod & Tammy L. Meyer, *The New Domestic Partnership Act; Implications for Family Law Practitioners*, NEW JERSEY L. J., Aug. 16, 2004.
- ¹⁵¹ See N.J. STAT. ANN. § 26:8A-2(a).
- ¹⁵² *Id.* at § 26:8A-2(b).
- ¹⁵³ *Id.* at § 26:8A-4(b).
- ¹⁵⁴ *Id.* at § 26:8A-4(a).
- ¹⁵⁵ *Id.* at § 26:8A-2(d).
- ¹⁵⁶ *Id.*
- ¹⁵⁷ Myrna L. Wigod & Tammy L. Meyer, *The New Domestic Partnership Act; Implications for Family Law Practitioners*, NEW JERSEY L. J., Aug. 16, 2004.
- ¹⁵⁸ See N.J. STAT. ANN. § 26:10.
- ¹⁵⁹ *Id.* at § 26:8A-10(a)(2)(a)-(g).
- ¹⁶⁰ *Id.* at § 2A:34-2.
- ¹⁶¹ California had a previous version of this act, originally passed in 1999. The act was amended three times prior to the current amendments that went into effect on January 1, 2005. With each expansion, the rights of gay and lesbians couples increased in the State. See, e.g., Lee Romney, *Though They Can't Wed, Gays May Now Divorce; Law Expanding Rights and Responsibilities for State's Domestic Partners Takes Effect Today*, L.A. TIMES, Jan. 1, 2005, at A1.
- ¹⁶² CAL. FAM. CODE § 297, Historical Note, (2004).
- ¹⁶³ CAL. FAM. CODE § 297(b)(1)-(6). A domestic partnership can also be formed by an opposite-sex couple where at least one of the parties is over the age of 62. *Id.* at § 297(b)(5)(B).
- ¹⁶⁴ *Id.* at § 297(a).
- ¹⁶⁵ *Id.* at § 297.5(a).
- ¹⁶⁶ *Id.* at § 297.5(b).
- ¹⁶⁷ See *id.* at § 299(a)(1)-(10).
- ¹⁶⁸ *Id.*
- ¹⁶⁹ CAL. FAM. CODE §308.5.
- ¹⁷⁰ Ramon Coronado, *Judge is Target of Recall Effort*, SACRAMENTO BEE, November 13, 2004, at B1.
- ¹⁷¹ *Id.*
- ¹⁷² Lee Romney, *Court Denies Challenge to Domestic Partners Law*, LA TIMES, April 5, 2004, at B7.
- ¹⁷³ Herbert A. Sample, *Gay Marriage Bans Rejected S.F. Judge Rules that the State's Legal Limits are Unconstitutional*, SACRAMENTO BEE, March 15, 2005, at A1.
- ¹⁷⁴ *Id.*
- ¹⁷⁵ John M. Hubbell, *Coalition Seeks Male-Female Marriage Definition*, SF CHRONICLE, Apr. 28, 2005. The group, ProtectMarriage.com, seeks to amend the California Constitution to prohibit same-sex marriage.
- ¹⁷⁶ Jim Sanders, *Gay Marriage Measure Doomed by Democrats*, SACRAMENTO BEE, June 3, 2005, at A1. On June 1 and again on June 3, 2005, the California Assembly rejected AB 19, which would have permitted gays and lesbians to marry.

¹⁷⁷ 1 U.S.C. § 7.

¹⁷⁸ 28 U.S.C. § 1738C.

¹⁷⁹ See, e.g., ALA. CODE 30-1-19 (2003); ALASKA STAT. 25.05.011 (Michie 2002); ARIZ. REV. STAT. ANN. 25-101 (West 2000); ARK. CODE ANN. 9-11-107, -109, -208 (Michie 2002); CAL. FAM. CODE 308.5 (Deering Supp. 2004); COLO. REV. STAT. 14-2-104 (West Supp. 2003); DEL. CODE ANN. TIT. 13, 101 (1999); FLA. STAT. ANN. 741.212 (West Supp. 2004); GA. CONST. art. I, at IV, para. I (2004); HAW. REV. STAT. ANN. 572-3 (Michie 1999); IDAHO CODE 32-209 (Michie 1996); 750 ILL. COMP. STAT. ANN. 5/212 (West 1999); IND. CODE ANN. 31-11-1-1 (West 1997); IOWA CODE ANN. 595.2, .20 (West 2001); KAN. STAT. ANN. 23-101 (1999); KY. CONST. § 233a (2004); LA. CIV. CODE ANN. ART. 3520 (West Supp. 2004); ME. REV. STAT. ANN. TIT. 19-A, 701 (West 1998); MICH. COMP. LAWS ANN. 551.1, .271-.272 (West Supp. 2003); MINN. STAT. ANN. 517.01 (West Supp. 2004); MISS. CODE ANN. 93-1-1 (1999); MO. ANN. STAT. 451.022 (West 2003); MONT. CODE ANN. 40-1-401 (2003); NEB. CONST. ART. 1 29; NEV. CONST. ART. 1 21.; N.C. GEN. STAT. 51-1.2 (2003); N.D. CENT. CODE 14-03-08 (Supp. 2003); OH. CONST. art. XV, § 11 (2004); OKLA. STAT. ANN. TIT. 43, 3.1 (West 2001); 23 PA. CONS. STAT. ANN. 1704 (West 2001); S.C. CODE ANN. 20-1-15 (Law. Co-op. 2003); S.D. CODIFIED LAWS 25-1-38 (Michie Supp. 2003); TENN. CODE ANN. 36-3-113 (2001); TEX. FAM. CODE ANN. 2.001 (Vernon 1998); UTAH CONST., art. I, § 29 (2004); VA. CODE ANN. 20-45.2 (Michie 2000); WASH. REV. CODE ANN. 26.04.020 (West Supp. 2004); W. VA. CODE ANN. 48-2-603 (Michie 2001).

¹⁸⁰ Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, Nov. 3, 2004, available at Stateline.org.

¹⁸¹ Nina J. Easton, *Mass Landmark Ruling Pushed Issue onto Ballots*, BOSTON GLOBE, May 15, 2005, at A18.

¹⁸² “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” U.S. CONST. Art. IV, § 1.

¹⁸³ Mark Strasser, *DOMA and the Two Faces of Federalism*, 32 CREIGHTON L. REV. 457, 465 (1998), quoting *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943) (nationally unifying force); and *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935) (integral parts of a single nation).

¹⁸⁴ *Sherrer v. Sherrer*, 334 U.S. 343, 355 (1948) (internal citations omitted).

¹⁸⁵ *Id.*

¹⁸⁶ Strasser, *supra* note 183, at 458.

¹⁸⁷ *Williams v. North Carolina*, 317 U.S. 287, 294 (1942) (Williams I), quoting *Davis v. Davis*, 305 U.S. 32, 40 (1938).

¹⁸⁸ *Williams v. North Carolina*, 325 U.S. 226, 230 (1945) (Williams II).

¹⁸⁹ See *Williams II*, 325 U.S. at 234.

¹⁹⁰ *Loughran v. Loughran*, 292 U.S. 216, 223 (1934).

¹⁹¹ Of course, if the laws of State A and State B do not conflict, there is no legal issue or dilemma.

¹⁹² Strasser, *supra* note 183, at 464.

¹⁹³ *Id.* at 462-63.

¹⁹⁴ *Id.* at 469.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 470, quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985).

¹⁹⁷ *Id.* at 470.

¹⁹⁸ *Loving v. Virginia*, 388 U.S. 1, (1967).

¹⁹⁹ *Id.* at 2.

²⁰⁰ *Id.* at 11-12.

²⁰¹ Strasser, *supra* note 183, at 464-65 (emphasis added).

²⁰² See VT. STAT. ANN. tit. 15, § 1201, Legislative Findings; N.J. STAT. ANN. § 26:8A-2(a) & (b); CAL. FAM. CODE § 297, Historical Note, (2004);

²⁰³ Opinions of the Justices to the Senate, 802 N.E.2d 565, 567 (Ma. 2004).

²⁰⁴ See Section III *supra*.

²⁰⁵ See Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Ma. 2004).

²⁰⁶ See, e.g., Michael Mello, LEGALIZING GAY MARRIAGE, 157 (2004).

²⁰⁷ See *Brown v. Board of Education*, 347 U.S. 483, 494 (1954) (stating that, when children are segregated due to their race in schools, the children feel inferior).

²⁰⁸ Mello, *supra* note 206, at 162.

²⁰⁹ See *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

²¹⁰ See Opinions of the Justices to the Senate, 802 N.E.2d 565, 567, 572 (Ma. 2004) (Sosman, dissenting).

²¹¹ Bob Witech & Gary Gates, *Same-Sex Marriage*, Urban Institute, July 21, 2004 at

<http://www.urban.org/urlprint.cfm?ID=8931>.

²¹² U.S. Census 2000 Special Report, *Married Couple and Unmarried Partner Households: 2000*, U.S. CENSUS BUREAU, Washington, D.C., Feb. 2003.

²¹³ *Id.* This type of relationship was identified on the census form as “being maintained by people who were sharing living quarters and who also had a close personal relationship with each other.” *Id.*

²¹⁴ *Id.* It should be noted that numerous research sources are quite cautious about the actual number of same-sex partnerships in existence, including the Census Report. Concerns about the confidentiality of their responses may have led many gay and lesbian couples to indicate a different status. Other couples might have felt that “unmarried partner” or “husband/wife” did not accurately define their relationship. Estimates from a number of studies indicate that the true count is 10 percent to 50 percent higher than census figures. See Gary J. Gates & Jason Ost, *The Gay and Lesbian Atlas*, URBAN INSTITUTE (Washington, D.C. 2004). Of these, 301,000 had male partners and 293,000 had female partners. *Id.*

²¹⁵ See Gates & Ost, *supra* note 214.

²¹⁶ U.S. Census 2000 Special Report, *Current Population Survey: 2000*, U.S. CENSUS BUREAU, Washington, D.C., Feb. 2003. The great majority of children being raised by same-sex parents in this country live in states that have not recognized “second-parent” or joint adoption. Nor may they enjoy the limited protections that come with having a legal relationship with their parents. As a result, such children cannot rely on financial support from both parents in the event of their separation. They cannot count on both parents having the ability to authorize medical treatment in cases of emergency. Further, they could be denied dependent status for purposes of Social Security Survivor Benefits or Workers’ Compensation Survivor Benefits in the event of the death of the parent who was unable to secure a legal relationship with the child. See M.V. Lee Badgett & Gary Gates, *The Business Cost Impact of Marriage for Same-Sex Couples*, A JOINT PUBLICATION OF THE HUMAN RIGHTS CAMPAIGN AND THE INSTITUTE FOR GAY AND LESBIAN STRATEGIC STUDIES, 2004, at <http://www.hrc.org/Content/ContentGroups/Publications1/busimpact.pdf>.

²¹⁷ *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (“marriage as now defined is deeply rooted in our society.”).

²¹⁸ As Professor Scott FitzGibbon has stated, those who marry “form a relationship which embraces obligation as a fundamental component.” Scott FitzGibbon, *Marriage and the Good of Obligation*, 47 AM. J. JURIS. 41 (2002). A rather interesting approach might be to attack the deprivation of a marriage license as interfering with the constitutional right to contract. This issue is beyond the scope of this article.

²¹⁹ See Jill Schachner Chanen, *The Changing Face of Gay Legal Issues*, ABA JOURNAL, July 2004, at 48. As a summary, the following provides a flavor of how detailed these marital rights are. Unmarried partners cannot file joint returns or receive smaller capital-gains breaks when they sell their homes. Transfers of property to a spouse are not taxable, while transfers to domestic partners are. Unemployment for unmarried people with children under 18 was 9.1 percent in 2002. It was only 3.8 percent for married workers with kids. Many married people can collect unemployment benefits if they quit their jobs to move in with a relocated spouse, but domestic partners cannot. Everyone pays taxes but surviving spouses can collect half of a deceased workers’ benefits, whereas domestic partners cannot collect anything. Social Security benefits are essentially off-limits to a domestic partner as well. From U.S. Immigration sponsorship of a foreign “spouse” to the equitable division of property in a “divorce,” same-sex couples are at a distinct disadvantage.

²²⁰ *Id.* at 49.

²²¹ Same-sex couples can draft wills to ensure care for the surviving partner upon the other’s death, they can seek powers of attorney to gain legal decision-making rights should one partner require medical intervention, and they could draft pre-nuptial agreements for division of property in the event of a “divorce.” When more than two are involved, complications begin adding up quickly. In particular, adoption and parenting contracts are problematic. “Second-parent adoptions” (whereby a child born to one parent is adopted by the nonbiological or nonlegal other parent) have become popular as same-sex couples have children via sperm donors. Florida, however, expressly prohibits individuals who are gay or lesbian from becoming adoptive parents. FLA. STAT. ANN. § 63.042(3) (West 2004). Utah prohibits anyone who is cohabitating in a relationship outside of marriage from adopting. See *Tucker v. Tucker*, 881 P.2d 948, 952 (Utah Ct. App. 1994), *rev’d*, 910 P.2d 1209 (Utah 1996) (holding that a homosexual mother was morally unfit not because of her homosexuality but rather because she cohabited with another person while still married. *Id.* at 1217). Mississippi prohibits “adoption by couples of the same gender.” MISS. CODE ANN. § 93-17-3 (2004).

²²² See Chanen, *supra* note 219 at 49. See *e.g.*, *Samples v. Monroe*, 183 Ga.App. 187, 358 S.E.2d 273 (1987).

²²³ See Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 786 (1995).

²²⁴ At the time of this writing, same-sex marriage lawsuits are working their way through courts in at least nine states. The nine states are: California, Florida, Indiana, Maryland, New Jersey, New Mexico, New York, Oregon, and Washington state. Lisa Keen, *Ban on Out-of-State Couples To Be Heard by Massachusetts Supreme Court*, AMERICAN POLICY ROUNDTABLE, Mar. 7, 2005 at http://www.ohioroundtable.org/news/newsindividual.cfm?news_ID=249&issuecode=marriage. In fact, the same Court that inflamed the nation with their decision upholding same-sex marriage as to residents within Massachusetts has agreed to hear arguments this year on whether the state may allow out-of-state residents to obtain marriage licenses in Massachusetts. *Id.* Across the country, the results are mixed and difficult to keep up with. For example, in *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005) three same-sex couples sought an injunction requiring county clerks to issue marriage licenses to them, alleging that the state’s Defense of Marriage Act violated various provisions of the Indiana State Constitution, primarily the Equal Privileges and Immunities Clause, Due Process Clause, and Right to Privacy. *Id.* The Court disagreed, holding that Indiana’s DOMA did not violate the State Constitution because “...opposite-sex marriage furthers the legitimate state interest in encouraging opposite-sex couples to procreate responsibly and have and raise

children...Regardless of whether recognizing same-sex marriage would harm this interest, neither does it further it.” *Id.* at 33. *But see* *Hernandes v. Robles*, No. 103434/2004, 2005 WL 363778 (N.Y. Sup. Feb. 4, 2005), where five same-sex couples sought an injunction requiring county clerks to issue marriage licenses to them, alleging that the New York State’s Domestic Relations Law (DRL) violated the New York State Constitution’s Due Process and Equal Protection Clauses. *Id.* at *2. These couples contended that New York City’s Domestic Partnership registration program was not “equal” to that of marriage. *Id.* at *4. The Court held, *inter alia*, that the right to marriage was a fundamental right entitled to due process protection, that the New York DRL violated due process to the extent it barred same-sex couples from obtaining a marriage license; and that a denial of marriage licenses to same-sex marriages discriminated against them on the basis of sexual orientation, in violation of equal protection. *See* *Hernandes*, 2005 WL 363778, at *13-14, *17-18, *21. Further, Justice Ling-Cohan enjoined the New York City clerk from “denying a marriage license to any couple, solely on the grounds that the two persons in that couple are of the same sex.” *Id.* at 26

²²⁵ *See id.* “Anyone who says they have the answers is deluding themselves,” states Washington, D.C. attorney Peter Petesch. *See* Karyn Siobhan Robinson, *HR Begins to Confront Workplace Implications of Same-Sex marriages*, HR MAGAZINE, May 2004 @Furl.net

²²⁶ *See* *Married Lesbians Seek Benefits in Rhode Island*, THE ADVOCATE, Jan. 3, 2005, at http://www.advocate.com/print_article.asp?ID=14720&sd=01/03/05, reporting that the Tiverton School Committee in Rhode Island as asked a superior court judge whether it can extend family health care coverage to the same-sex spouse of a retired high school teacher. Cheryl McCullough, 60, and Joyce Boivin, 54, were married in Massachusetts one month after it became the first state to legalize same-sex marriage. Immediately thereafter, they returned to Rhode Island only to request that they be treated the same as all other married employees. This case is somewhat unique in that the state law of Rhode Island has no clear policy as to the validity of any marriage or civil union between individuals of the same sex performed elsewhere. It is also unique in that McCullough’s health benefit package was initially negotiated between the school department and a labor union, the National Education Association/Rhode Island. *Id.*

²²⁷ “In its application of the tax laws there has been a consistent deference by Congress to state laws...[M]arital allowances are available only if the man and woman taxpayers are legally married under the laws of the state in which they reside.” *Ensminger v. Comm’r*, 610F.2d 189, 191 (4th Cir. (1978); *John T. Untermann*, 38 T.C. 93 (1962). *See* Section 152(b)(5) of the Internal Revenue Code which provides: “An individual is not a member of the taxpayer’s household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law.” *Id.* The regulation of marriage and domestic affairs “has long been regarded as a virtually exclusive province of the States.” *See* *Sosna v. Iowa*, 419 U.S. 393 (1975); *Pennoyer v. Neff*, 95 U.S. 714, 734-35 (1878). Yet, virtually every federal statute giving benefits to “spouses” uses “male-female” language. *See e.g.*, 26 U.S.C. §6013 “Joint Returns of Income Tax by Husband and Wife” “...if an individual has filed a separate return...for which a joint return could have been made by *him* and *his spouse*...” *Id.* (*emphasis added*). This was true even before the Defense Of Marriage Act was enacted.

²²⁸ *See infra* Section VI. Recall that under DOMA, a “marriage,” for purposes of federal law, is defined as “a legal union between one man and one woman.” 1 U.S.C. § 7. Theoretically, all federal statutes would need to comply with this definition.

²²⁹ More than 22 percent of Americans reported voluntarily looking for another job during the year 2002, according to a study by Gallup Organization for the National Survey of Working America. *See* Lisa Pickoff-White, *Americans Change Jobs Frequently*, Vol. 6, No. 32, Feb. 18, 2005 at www.applesforhealth.com/HealthyBusiness/acjf6.html

²³⁰ On December 9, 2004, New Zealand passed a law that gives gay couples the same legal rights as married heterosexual couples. *See* Jonathan Underhill, *New Zealand Passes Law*, Dec. 9, 2004, at <http://www.bloomberg.com/apps/news?pid=71000001&refer=australia&sid=aWfSgloilvvo>. The law became effective as of April 26, 2005. *Id.* Seven of Canada’s ten provinces and one territory have deemed gay marriage constitutional, and gay couples have been marrying in Canada since the Ontario courts allowed them to beginning in 2001. Last December, Canada’s Supreme Court handed down an advisory giving permission to the Parliament to pass legislation legalizing gay marriage throughout the country. This federal law made Canada the third country, behind the Netherlands (2001) and Belgium (2003), to declare gay marriage legal nationwide. *Canada’s Highest Court Backs Same-Sex Marriage*, WALL ST. J., Dec. 9, 2004 available at <http://online.wsj.com/article/0,,DB110260479205895638,00.html>. On October 1, 2004, the Spanish Socialist government approved a bill to legalize same-sex marriage. The bill also allows same-sex couples to officially adopt children, a provision not found in similar bills passed in other countries. The bill was presented to Parliament on December 31, 2004. *See* *Spain Moves Closer to Legalizing Gay Marriage*, CBC NEWS, Dec. 31, 2004 at <http://www.cbc.ca/story/world/national/2004/12/31/spain-samesex041231.html> (site accessed May 30, 2005). On April 21, 2005, Spain’s lower house of Parliament approved the bill. Needing only final approval from the Spanish Senate, the bill is expected to pass easily making Spain the fourth European country to legalize same-sex marriage. *Id.* On November 18, 2004, the United Kingdom Parliament passed the Civil Partnership Act, which will come into force December 5, 2005, and will allow same-sex couples to register their partnership. Although it is not “same-sex marriage,” the rights and duties of partners under this Bill will be almost exactly the same as for married. *See* Civil Partnership Act 2004, c. 33 § 1 (2004) (Eng).

²³¹ Bob Witech & Gary Gates, *Same-Sex Marriage: What's at Stake for Business?*, July 21, 2004 at <http://www.urban.org/urlprint.cfm?ID-8931>. See Va. Code Ann. § 20-45.3 (2004) stating "Any civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited." *Id.* Further, "Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state...shall be void...and any contractual rights created thereby shall be void and unenforceable." *Id.* See also Jill Schachner Chanen, *Marriage Law Could Reach Contracts*, ABA JOURNAL, July 16, 2004, available at <http://www.abanet.org/journal/ereport/jv16nonmarry.html>

²³² "Forward-thinking companies are all thinking about this right now," says Marc Lewis, North American president of Morgan Howard Worldwide, an executive search firm. Stephanie Armour, *Gay Unions May Affect Benefits*, USA TODAY, Mar. 24, 2004, at 3B. "The questions are coming more and more. There's a lot of confusion," says Tom Greene, a Boston employment lawyer. *Id.*

²³³ Three percent of employers provide additional benefits or compensation to employees who opt for single rather than family coverage. See Kaiser Family Foundation and Health Research and Educational Trust EMPLOYER BENEFITS SURVEY, 2004 Annual Survey available at <http://www.kff.org/insurance/7148/summary/index.cfm>

²³⁴ The cost of health insurance benefits provided by employers to their employees (and family members) is generally exempt from federal income taxation under Sections 105 and 106 of the Internal Revenue Code. DOMA makes clear that this exemption will not apply to a same-sex spouse, unless the spouse is also a tax "dependent: of the employee under Section 152 of the Code. Thus, an employee who elects health insurance coverage for their same-sex spouse will have taxable income equal to the value of the coverage. Pity the employer who must report and withhold at the federal level only to omit it from reporting and withholding at the state level in Massachusetts.

²³⁵ If the domestic partner qualifies as a tax dependent of the employee, a very strict requirement that few partners or spouses meet, then the domestic partner benefits are not taxable. Furthermore, while premiums paid by the employee to cover a "spouse" can be paid with pre-tax dollars, premiums paid by the employee to cover a domestic partner are taxed. See *supra* note 234. As of February 26, 2004, 7,360 employers offered domestic partner benefits. *Domestic Partner Benefits: Facts and Background*, EMPLOYEE BENEFIT RESEARCH INSTITUTE, Mar. 2004 available at <http://www.ebri.org>.

²³⁶ Lynn Gresham, *The Decision Heard Round the Country*, EMPLOYEE BENEFIT NEWS, June 15, 2004, available at <http://www.benefitnews.com>. This can be particularly complicated as federal regulations prohibit employees from using pre-tax dollars to pay for coverage of a domestic partner. See also Siobhan-Robinson, *supra* note 225.

²³⁷ "Controlling health plan costs is still the leading concern for benefits decision-makers" citing the 2004 EBN-Hays Benefits Management Survey. Michael Carter & Lynn Gresham, *Health Costs Control Still Top of Mind*, EMPLOYEE BENEFIT NEWS, Dec. 1, 2004, available at <http://www.benefitnews.com>.

²³⁸ 2004 Kaiser Family Foundation Annual Survey, *supra* note 233. It has been speculated that this decrease reflects years of high premium growth and a slow economy. *Id.* The percentage of small (3-199) firms offering health insurance packages has decreased from 68% in 2001 to 63% in 2004. *Id.* One of the reasons for the decrease in the percentage of employers offering traditional benefits packages is that many employers have begun to encourage consumer-directed health plan arrangements. *Id.* Twenty-one percent of the EBN Hays Survey respondents reported they are now using a defined contribution approach for either the health plan or the total benefits package. See EBN Hays Benefits Survey, *supra* note 233.

The largest group of survey respondents—47%—said their coverage costs for premiums for employer-sponsored health insurance rose by 11.2% between the spring of 2003 and spring of 2004. See 2004 Kaiser Family Foundation Annual Survey, *supra* note 233. The trend seems to indicate that the more employees an employer has, the more likely it is that the employer will offer health benefits. See *id.* Nearly all firms with 50 or more employees offer health benefits, compared to 52% of the smallest companies (3-11) offering benefits. *Id.*

²³⁹ Hewett Associates, *Survey Findings: Domestic Partners 2000*, HEWITT ASSOCIATES (Lincolnshire, IL, 2000).

²⁴⁰ See M.V. Lee Badgett & Gary Gates, *supra* note 216.

²⁴¹ *Id.*

²⁴² *Id.* For the purposes of this study, it was assumed that all same-sex couples would marry. This is quite unlikely. It is estimated that roughly half would marry. *Id.*

²⁴³ David R. Francis, *The Dollars and Cents of Gay Marriage*, THE CHRISTIAN SCIENCE MONITOR, Aug. 30, 2004, at <http://www.csmonitor.com/2004/0830/p17s01-cogn.html>.

²⁴⁴ See Hewett Associates, *supra* note 239. Comparatively speaking, recent estimates of the lifetime costs of treating a person with an HIV disease ranges from \$71,143 to \$424,763. The cost of a kidney transplant can be as high as \$200,000. See *Domestic Partner Benefits: Facts and Background*, *supra* note 235.

²⁴⁵ In 2001, a Kaiser Employer Benefits Survey revealed that 16 percent of workers had employers whose health insurance benefits covered same-sex partners. See Kaiser Family Foundation and Health Research and Educational Trust, EMPLOYER BENEFITS SURVEY, 2001 Annual Survey, p. 57.

²⁴⁶ See *Domestic Partner Benefits*, *supra* note 235.

²⁴⁷ See Tammy Joyner, *Home Depot to Add Same-Sex Benefits*, ATLANTA J AND CONSTIT., Sept. 3, 2004, at <http://www.ajc.com> (interviewing Ken McDonnell, a research analyst with the Employee Benefit Research Institute). The Human Rights Campaign, the nation's largest homosexual activist groups, contends that studies of the cost to businesses of domestic partner benefits show that businesses' health insurance costs rise around 1-2 percent when they extend benefits to same-sex partners. *Id.* Research studies conducted by the Institute for Gay and Lesbian Strategic Studies found that most employers offering domestic partner benefits found expenses to increase only 1 percent; those that offered them to same- and opposite-sex partners had expenses rise to no more than 2 percent. See also *FAQ on Domestic Partner Benefits*, HEIGHTS FAMILIES FOR EQUALITY, at <http://www.heightsfamilies.org/background/faq.html>

²⁴⁸ Tom Anderson, *Contracting Laws Push Domestic Partner Benefits*, EMPLOYEE BENEFIT NEWS, Oct. 1, 2004, available at <http://www.benefitnews.com>

²⁴⁹ *Id.*

²⁵⁰ A total of 414 companies in the Fortune 500—or 83 percent—include sexual orientation in their non-discrimination policies and 54 include gender identity. See *ExxonMobil Shareholders Vote in Record Numbers to Include Sexual Orientation in Non-Discrimination Policy*, HRC PRESS RELEASE, May 25, 2005, at www.hrc.com. The trend among the Fortune 500 companies seems to show that the higher a company's rank, the more likely it is to offer domestic partner benefits. During 2001, while 20 percent of the Fortune 500 companies provided domestic partner benefits, 54 percent of those in Fortune 50 offered the benefits. See *FAQ on Domestic Partner Benefits*, HEIGHTS FAMILIES FOR EQUALITY, at <http://www.heightsfamilies.org/background/faq.html>. Although not required by law, many employers that extend health benefits to employees' domestic partners, also make COBRA benefits available as well. See *Domestic Partner Health Insurance: Issues and Concerns*, AFSCME Research and Collective Bargaining at <http://www.afscme.org/wrkplace/domestic.htm>

But see Elizabeth M. Gillespie, *Microsoft Criticized for Reversal on Gay Rights Bill*, MINN. STAR TRIB., April 28, 2005, at D6 reported that Microsoft Corporation (who four years ago received an award for its progressive stance in supporting domestic partner benefits) allegedly rescinded its longstanding support for gay rights legislation in its home state of Washington. Critics claimed Microsoft yielded to a national boycott threat by walking away from a bill that banned discrimination against homosexuals in employment, housing and insurance, it once supported. The bill failed by one vote in the state's Senate. *Id.* Microsoft Chairman and CEO Bill Gates promptly responded to the employee backlash, promising to "continue to have discussions on the issue." and will move to address concerns that have been raised." He alleges that the company had previously decided to be neutral on this issue, focusing more on other legislative issues. *Id.* Microsoft officials, however, acknowledge meeting twice with the church minister of a nearby prominent evangelical church. The minister of that church, Mr. Ken Hutcherson, alleges that he threatened in those meetings to organize a national boycott of Microsoft products: "I told them I was going to give them something to be afraid of Christians about." See Sarah Kershaw, *Microsoft Comes Under Fire for Reversal on Gay Rights Bill*, N.Y. TIMES, April 22, 2005 available at <http://www.nytimes.com/2005/04/22/national/22gay.html>.

²⁵¹ Recruiting quality employees will remain a challenge with a national unemployment rate at 5.4%. Employers added 2.2 million jobs in 2004, the best showing in five years. The Bush Administration hopes to add another 2.1 million jobs in 2005. 41,000 jobs were created at the professional and education level. See *Payrolls See Modest Growth of 157,000 Jobs in December*, WALL ST. J., Jan. 7, 2005 at http://www.online.wsj.com/article_print/0,,SB110510324810319962,00.html

²⁵² A recent management survey showed recruiting/retention to be the top second concern for employers. See 2004 EBN-Hay Benefits Management Survey, *supra* note 233.

²⁵³ See *FAQ on Domestic Partner Benefits*, HEIGHTS FAMILIES FOR EQUALITY, at <http://www.heightsfamilies.org/background/faq.html>

²⁵⁴ *Id.*

²⁵⁵ *Id.* (citing the HRC WorkNet's 2001 edition of the 'The State of the Workplace' report).

²⁵⁶ See *ExxonMobil Shareholders*, *supra* note 250.

²⁵⁷ Domestic partner benefits were ranked as the No. 1 most effective recruiting incentive for executives and the No. 3 most effective recruiting incentive for managers and line workers. See 1999 Society for Human Resource Management/Commerce Clearing House Recruiting Practices Survey, HUMAN RESOURCES MANAGEMENT: IDEAS & TRENDS, Chicago, No. 460, June 16, 1999. See also Employee Benefit Research Institute, *Domestic Partner Benefits: Facts and Background*, Mar. 2004 available at <http://www.ebri.org>, stating "[t]he attraction to employees of a comprehensive benefits package that offers health and retirement coverage is well-documented." *Id.*

²⁵⁸ A 2004 survey by Aon Consulting reported that employers perceive the five greatest risks to their businesses today in the following order: 1) business interruption, 2) employee accidents, 3) general product or manufacturing liability, 4) the failure of their company to change/adapt, and 5) property damage. Aon 2004 Risk Management and Risk Financing Benchmark Survey at http://www.aon.com/us/busi/risk_management/publications/2004_rm_benchmark/2004_rm_greatestrisks.jsp (site visited Jan. 5, 2005). Survey responses were gathered from 376 organizations within 28 business sectors. *Id.* Employee turnover is a major contributor to business interruption.

²⁵⁹ See *Why Employers Offer domestic Partner Benefits*, HUMAN RIGHTS CAMPAIGN, at <http://www.hrc.org>. This dollar amount includes the cost of advertising, interviewing, testing, training, relocation expenses, recruiting incentives and lost productivity. *Id.*

²⁶⁰ 29 U.S.C. §§ 2601, 2611-2619, 2651-2654 (2004).

²⁶¹ “Employees” generally refers to private sector workers; however, note that if a “company” is a “public agency,” it is subject to FMLA regardless of the number of employees it employs. All schools, whether private or public, are considered public agencies as are most governmental units. *Id.*

²⁶² 29 U.S.C. § 2611(4)(A)(i) (2005).

²⁶³ 29 U.S.C. § 2612(a)(1)(A-D) (2005).

²⁶⁴ 29 U.S.C. § 2612c (2005).

²⁶⁵ 29 U.S.C. § 2612(a)(1)(A-D) (2005).

²⁶⁶ See *Balancing the Needs of Families and Employers: The Family and Medical Leave Surveys 2000 Update*, U.S. DEP’T OF LABOR, at <http://www.familyleavesurvey.homestead.com/FMLAStats.html>.

²⁶⁷ *Id.*

²⁶⁸ See Stephanie Armour, *Family, Medical Leave Act at Center of Hot Debate*, USA TODAY, June 6, 2005, at <http://usatoday.com> (citing the 2004 Employment Policy Foundation Study).

²⁶⁹ See 29 U.S.C. § 2611(13) (2005).

²⁷⁰ The federal version of the Family and Medical Leave Act 29 U.S.C. § 2611 *et. seq.* generally requires private sector employers of 50 or more employees to provide up to 12 workweeks of unpaid, job-protected leave to care for, *inter alia*, one’s “spouse” as defined by state law. *Id.* DOMA would require the “spouse” to be an opposite-sex spouse. Note that many parallel state statutes mandating the same type of leave require fewer employees. As it stands today, the FMLA does not affect any other federal or state law which prohibits discrimination, nor supersede any state or local law which provides greater family or medical leave protection. Nor does it affect an employer’s obligation to provide greater leave rights under a collective bargaining agreement or employment benefit plan. *Id.*

²⁷¹ “Employment benefits” means all benefits “provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an “employee benefit plan” as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).” 29 C.F.R. 828.800

²⁷² 20 C.F.R. § 825.220(c) (2005).

²⁷³ 29 C.F.R. § 825.220(a)(1) (2005).

²⁷⁴ 29 U.S.C. Sections 1001 *et seq.*

²⁷⁵ Title VII actions based on disparate treatment or disparate impact theories based on gender or sexual orientation, although certainly a business implication is beyond the scope of this article but will be discussed in a subsequent article.

²⁷⁶ 29 U.S.C. § 1003 (b)(2) (2005).

²⁷⁷ 29 U.S.C. § 1002(32) (2005) (“government plan”).

²⁷⁸ *Kentucky Ass’n of Health Plans, Inc. v. Miller*, 123 S. Ct. 1471, 1479 (2003).

²⁷⁹ The Occupational Safety & Health Act of 1970, 29 U.S.C. § 654(a)(1)(1999); 29 C.F.R. § 1903.1 (1999).

²⁸⁰ 5 U.S.C. §§ 8101-8193 (2004)

²⁸¹ 45 U.S.C. §§51-60 (2004).

²⁸² Most state statutes provide surviving spouses and the employee’s legal dependents (children under age 18) a lump sum payment upon death plus weekly workers’ compensation benefits for a set period after death. For example, Minnesota statutes provide a \$60,000 payment to the employee’s dependent surviving spouse (or to their estate) upon death. See MINN. STAT. § 176.111 (2005). Additionally, if there are no dependent children, the surviving spouse receives 50 percent of the deceased weekly wage “at the time of injury for a period of ten years.” *Id.* If the deceased employee leaves behind a surviving spouse and one dependent child, a payment of 60 percent of the daily wage at the time of death is paid until the dependent child is no longer a dependent, which is 18 years of age or 25 if attending college full-time. *Id.* This would not be the case if the surviving partner is not a “spouse” as defined by a state law that prohibits same-sex marriage.

²⁸³ See U.S. Department of Labor, *Fatal Work Injuries in 2003*, BUREAU OF LABOR STATISTICS, at <http://www.bls.gov/pub/otpub/ted/2004/sept/wk3/ar04.htm>.

²⁸⁴ *Id.*

²⁸⁵ See C. Ford Runge, *Economics of Same-Sex Marriage*, MINNEAPOLIS STAR TRIB., Sept. 12, 2004, News, at 5AA, finding that if Minnesota’s share of gay marriages were proportional to its population of 5.1 million, the weddings benefit would be \$247 million.

²⁸⁶ *Id.* Note that savings would come mainly by causing the income of a person’s married partner to be included when determining eligibility for state benefit programs. *Id.*

²⁸⁷ See *Id.*

²⁸⁸ Fred Bayles, *Massachusetts Preparing for a Rush of Gay Weddings*, USA TODAY, May 13, 2004, at 15A

²⁸⁹ *Id.*

²⁹⁰ *See id.*

²⁹¹ The Island of St. Croix is currently proposing legalizing same-sex marriage on the island in an effort to create an “immediate influx of visitors and economic development.” Already, there is a movement to promote St. Croix as “the gay Virgin” in hopes of cashing in on the fastest-growing segments of the economy—the gay-friendly traveler. Don Buchanan, *Same-Sex Marriage Eyed as a Boon for St. Croix*, ST. CROIX BUSINESS GUILD, July 21, 2004 at <http://www.gotostcroix.com> (site accessed Oct. 20, 2004). Other businesses, such as TwoBrides.com have also picked up sales since 2000. <http://www.twobrides.com/index>

²⁹² Rita Trichur, *Gay Marriage Worth \$1 Billion to Canada*, CANADIAN PRESS, Jan. 4, 2005 at <http://www.365gay.com>

²⁹³ *Id.* Toronto’s “Gay Pride” parade week poured about \$60 million into the city’s economy in 2004 with over one million people attending. *Id.*

²⁹⁴ Aude Lagorce, *The Gay-Marriage Windfall: \$16.8 Billion*, FORBES, April 5, 2004 at http://www.forbes.com/commerce/2004/04/05/cx_al_0405gaymarriage.html

²⁹⁵ The service was launched in 2003 by film producer Regent Entertainment and is now available in one form or another in more than 30 million cable and satellite TV homes nationwide. *See* Harry Berkowitz, *Cable Warming to Gay TV Fare*, NEWSDAY, Jan. 5, 2005, at A26

²⁹⁶ *Id.*

²⁹⁷ *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819).