

February 28, 2010

Currency Of Love: Customary International Law And The Battle For Same –Sex Marriage In The United States

Sonia B Green, *John Marshall Law School*

**CURRENCY OF LOVE:
CUSTOMARY INTERNATIONAL LAW
AND THE BATTLE FOR SAME-SEX MARRIAGE IN THE UNITED STATES**

Sonia Bychkov Green¹

“Let’s redesign the goings-on...Hey optimism anyone? We believe the currency of love. We believe the push and pull’s enough. Carefree, the beat’ll pass it on. Please believe the currency of love.”²

INTRODUCTION:

THE IMMEDIACY OF THIS DEBATE

PART ONE: LAWS ABOUT MARRIAGE MATTER

PART TWO: THE DEBATE OVER SAME-SEX MARRIAGE IN THE UNITED STATES

- A. Laws Regarding Same-Sex Marriage In The United States Vary Greatly.
- B. Judicial Decisions And Pending Cases Underscore The Importance Of The Debate.
- C. The Debate To Date Has Not Included International Custom.

PART THREE: SAME-SEX MARRIAGE AS CUSTOMARY INTERNATIONAL LAW

- A. Same-Sex Marriages Are Protected Under Some International Documents.
- B. Same-Sex Marriages Are A Modern Trend.
- C. State Justifications For Allowing Same-Sex Marriage Show A Sense Of Legal Obligation.

PART FOUR: CUSTOMARY INTERNATIONAL LAW MATTERS IN THE UNITED STATES

- A. Customary International Law Is An Historical Part Of Our Legal System.
- B. Customary International Law Is Used Currently As Well.
- C. Customary International Law Can Be Used To Interpret Issues Of Human Rights.

**CONCLUSION: CUSTOMARY INTERNATIONAL LAW SUPPORTS LEGALIZATION AND
RECOGNITION OF SAME-SEX MARRIAGE IN THE UNITED STATES**

APPENDIX I: STATE-BY-STATE SUMMARY OF THE STATUS OF SAME-SEX MARRIAGE

APPENDIX II: COUNTRY-BY-COUNTRY SUMMARY OF THE STATUS OF SAME-SEX MARRIAGE

¹ Associate Professor of Law, The John Marshall Law School (Chicago). I would like to thank the JMLS administration, and in particular, Associate Dean Ralph Ruebner, for all of the support given to our scholarly endeavors. I would also like to thank my colleagues at JMLS for their comments and support. Five JMLS students provided great help on this article: thank you to John Blatt, Joe Miller, Marisa Kraig, Amy Olson and, for the second article in a row, the inestimable Stephanie Potter. Thanks also to Elise Linden and Gerre Anne Harte for last minute cite checking help. My sons – Harrison, Holden, Langford and Davis - provided laughter and love, and Harrison even helped with formatting. This is for my husband, Colby Green, who makes marriage worth fighting for.

² SILVERSUN PICKUPS, CURRENCY OF LOVE (Dangerbird Records 2009) (not a song about same-sex marriage, but the lyrics fit here well). Evan Wolfson expressed the idea of marriage as a currency: “[Marriage] is a known commodity; no matter how people in fact conduct their marriages, there is a clarity, security, and automatic level of respect and legal status when someone gets to say, ‘That’s my husband’ or ‘I love my wife.’” EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY AND THE GAY PEOPLE’S RIGHT TO MARRY 5 (Simon & Schuster 2004).

INTRODUCTION: THE IMMEDIACY OF THIS DEBATE

The struggle for same-sex marriage will likely be the civil rights issue of this decade. The debate on the issues has touched all levels of government and society and people throughout the world. United States courts have seen their share of arguments on both sides and it is very likely that soon, the Supreme Court will have to weigh in on this important battle. So far, the legal arguments have ranged from constitutional protection to reproductive rights and procreation issues and have included divergent notions of morality and social justice. This article presents a new argument in favor of same-sex marriage: that both recognition and legalization are supported by customary international law.³

In the last year, the world has seen some remarkable changes in this area. In Argentina, the first Latin American same-sex wedding was performed in December 2009⁴. Shortly before that, Sweden became the seventh country to legalize same-sex marriage⁵. In the United States, California roiled through the granting and then taking away of same-sex marriage, and now faces challenges to Proposition 8 in federal court⁶. And, at the same time, 2009 saw the enactment of a draconian law in Nigeria that would impose severe, sometimes even capital, punishment on same-sex couples who dare engage in affection⁷ – and a strong Human Rights Watch and Amnesty International response to this law⁸. The voters in Maine denied same-sex couples the right to marry⁹, while New

³There has been some wonderful scholarship in this area already. See, e.g., Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years From Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589 (2004) (discussing the debate and laws generally and explaining how international law fits in); Renée M. Landers, *A Marriage Of Principles: The Relevance Of Federal Precedent And International Sources Of Law In Analyzing Claims For A Right To Same-Sex Marriage*, 41 NEW ENG. L. REV. 683 (2007) (arguing that the state courts should take into account federal decisions and the decisions of foreign courts and legislatures to find protections for same-sex couples); Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61 (1996) (finding an growing trend that disallows governments from discriminating on the basis of sexual orientation); Aaron Xavier Fellmeth, *State Regulation Of Sexuality In International Human Rights Law And Theory*, 50 WM. & MARY L. REV. 797 (2008) (evaluating international practice in regard to sexual freedoms and arguing that the trend toward recognition of sexual privacy rights remains aspirational); Vincent J. Samar, *Throwing Down The International Gauntlet: Same-sex Marriage as a Human Right*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 1 (2007) (analyzing the relationship between constitutionalism and human rights through the prism of same-sex marriage); WILLIAM N. ESKRIDGE, JR., CASE FOR SAME SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 1 (Powell's Books 1996). These and other scholarly works are cited throughout this article. Although some have already argued that international law documents provide protections for same-sex couples as enforceable treaties or customary international law, this article adds the argument that both the current trend and state justifications for legalizing same-sex marriage are additional evidence that same-sex marriages are supported by customary international law, and further explains how this can be important for the current debate.

⁴ Michael Winter, *2 Argentine Men Wed in Latin America's First Gay Marriage*, USA TODAY, Dec. 28, 2009 (Pg. Unavail. Online), available at <http://content.usatoday.com/communities/ondeadline/post/2009/12/2-argentine-men-wed-in-first-gay-marriage-in-latin-america-/1>.

⁵ *Sweden Allows Same-Sex Marriage*, BBC NEWS, April 2, 2009, <http://news.bbc.co.uk/2/hi/7978495.stm>.

⁶ Maura Dolan, *Prop. 8 Trial to Include Unprecedented Testimony*, Los Angeles Times, Jan 11, 2010, at ____

⁷ *Nigeria: Reject 'Same Gender' Marriage Ban*, HUMAN RIGHTS WATCH, Jan. 26, 2009, <http://www.hrw.org/en/news/2009/01/26/nigeria-reject-same-gender-marriage-ban>.

⁸ *Letter to Nigerian President Yar'Adua Regarding the 'Shame Gender Marriage Bill'*, HUMAN RIGHTS WATCH, Jan. 23, 2009, <http://www.hrw.org/en/news/2009/01/23/letter-nigerian-president-yaradua-regarding-same-gender-marriage-bill>.

⁹ Kevin Miller & Judy Harrison, *Gay Marriage Repealed in Maine*, BANGOR DAILY NEWS, Nov 4, 2009 (Pg. Unavail. Online), available at <http://www.bangordailynews.com/detail/128048.html>.

Hampshire started allowing gay marriages at the start of 2010¹⁰. At the legislative level, some ninety U.S. representatives proposed a complete repeal of the federal Defense of Marriage Act (“DOMA”)¹¹ and several federal lawsuits were filed¹², thus pushing the issues inevitably toward the Supreme Court.

Through all of this, in the United States and all over the world, the debates about same-sex marriage reached all levels of society, introducing a plethora of arguments both for and against.

This article examines the debate from the perspective of conflicts of law analysis and comparative law, and argues that US courts and lawmakers must consider what is happening in the rest of the world as they formulate decisions about same-sex marriage. The article is organized into four main sections. First, the article addresses the relevance and importance of the institution of marriage – to married people, to people excluded from that institution, and to society in general. Next, the article provides a current and comprehensive summary of the state of same-sex marriage in the United States, looking at both what is allowed and what the debate is surrounding legalization and recognition of same sex marriages. The article then examines same-sex marriages throughout the world and demonstrates how such marriages have risen to, or at least are rising to, the level of a norm of customary international law through international protections and national justifications. Following this, the article reviews the use of customary law in the United States generally and argues that international custom is, and should be, part of the United States’ legal system, taken into consideration by both federal and state courts, and details how courts can use international custom.

The author harbors no illusion that either premise – that same-sex marriage is customary international law, or that the U.S. courts should use such law – is an easy or uncontroversial position. However, whether the U.S. is ready or not, the debate about same-sex marriage is only escalating and is heading to legislatures and the highest courts. This article hopes to make a contribution to that debate.

¹⁰*New Hampshire Now 5th State to Allow Same-Sex Marriage*, CNN.COM, Jan. 1, 2010, <http://www.cnn.com/2010/POLITICS/01/01/new.hampshire.same.sex/index.html>.

¹¹ Respect for Marriage Act of 2009, H.R. 3567, 111th Cong. (2009).

¹² See, e.g., Complaint, Gill v. Office of Personnel Management, No. 1:09-cv-10309 JLT, (D. Mass. Mar 3, 2009), *available at* <http://www.glad.org/uploads/docs/cases/gill-complaint-03-03-09.pdf>; Complaint, Massachusetts v. U.S. Dep’t of Health and Human Services, No. 1:2009cv11156, (D. Mass. July 8, 2009), *available at* <http://www.boston.com/news/politics/politicalintelligence/DOMA%20Complaint%20FINAL.pdf>; Complaint, Smelt v. United States, No. 8:09-CV-00286-DOC-MLG, (C.D. Cal. Mar. 9, 2009), *available at* <http://www.scribd.com/doc/15097245/Smelt-v-United-States-of-America-Notice-of-Removal>.

PART ONE: LAWS ABOUT MARRIAGE MATTER

*“Marriage: Personal Commitment. Pillar of Civilization. Spiritual convention. Legal bond. Political football. Source of social status. Site of gender inequality. Tool of sexual regulation. Dying institution. Partnership for reproduction and childbearing. Path to material gain. Reflection of divine love. Legalized prostitution.”*¹³

This article begins from the premise that marriage is important. There has been much debate about this: what is the significance of the term, what is the importance of status, and what is marriage generally. In reality, marriage is, of course, many things. It is a social construct, a religious ideal, a celebration and a declaration of love. This article is in pre-submission final edits as Valentine’s Day 2010 rolls around, and love is, indeed, “all around”. Advertisements idealizing love are everywhere, and just as present are the diamonds ads, and subtle reminders that marriage is at the end of the rainbow of love.¹⁴

However, it should be noted that the gay and lesbian communities do not unanimously endorse marriage: in fact, some argue strongly that imposing marriage on same-sex couples would assimilate the “queer” culture into the heterosexual community, thereby diminishing valuable differences that distinguish the two groups¹⁵. One law professor made the following strong critique of the struggle for marriage: “The desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, and effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.”¹⁶ At the same time, others have argued that same-sex marriage would actually change and improve the institution of marriage by discarding traditionally oppressive gender roles.¹⁷

While recognizing that views are not uniformly pro-marriage and that there are strong and heartfelt arguments on both sides, this article will not address that particular debate, leaving that to other

¹³ KATHLEEN E. HULL, *SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW* 1 (Cambridge University Press 2006).

¹⁴ The playground rhyme about a couple sitting in a tree seems to state the obvious: “first comes love, then comes marriage . . .” Much more serious is the reality that society often pushes this norm on all people, gay or straight or unsure, from the moments they first hear about love. One gay man interviewed for a book about marriage stated, “I’d always wanted to be in a marriage and I wanted to have a wedding. I never dreamed growing up that I wanted to have a union ceremony. I didn’t want to have a commitment ceremony, I wanted to have a wedding . . .” HULL, *supra* note 13, at 37. Wolfson notes the denial of that dream in his book,

One night – I couldn’t have been more than eleven or twelve . . . I remember saying to mom, in what might have seem an out-of-the-blue declaration, ‘I don’t think I’ll get married.’ I don’t remember if, or how, my mom responded. But I do remember that I realized I might be excluded from the joys of married life, and felt there was something in the picture society showed me that I didn’t fit into, before I could tell me my mom or even fully understand that I was gay.

WOLFSON, *supra* note 2, at 15-16.

¹⁵ See HULL, *supra* note 13, at 78-84.

¹⁶ Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay And Lesbian Marriage Will Not ‘Dismantle The Legal Structure Of Gender In Every Marriage*, 79 VA. L. REV. 1535, 1536 (1993).

¹⁷ See Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 17 (1991).

sources. For purposes of this article, the will address why marriage is important as a status so that the later sections about why same-sex marriage¹⁸ is important will be in context.

Marriage affects many aspects of society, and informs social relations and governmental privileges and responsibilities. The federal government has identified 1,138 “federal statutory provisions ... in which marital status is a factor in determining or receiving benefits, rights, and privileges”.¹⁹ In the end, marriage is a legal construct and it this status matters in a variety of ways.

Many summaries have been done of the significance of marriage²⁰, but one of the best ones is found in Evan Wolfson’s aptly titled book, *Why Marriage Matters*²¹. Here are some of the key areas where marriage matters, organized alphabetically by broad category, as suggested in his book²².

Debts

Unmarried partners are usually not responsible for each other debts: thus, society should favor marriage as a way of ensuring fewer unanswered-for legal and financial obligations.²³

Death

Married couples have easier access to bereavement leave, social security claims, inheritance of real and personal property.²⁴ Additionally, wrongful death claims can be brought for the benefit of married persons, but not for unmarried partners.²⁵ Pensions – recoverable by married persons upon the death of one partner – are often unavailable to even long term same-sex partners.²⁶

Divorce

Couples who are not legally married do not have access to the courts for divorce.²⁷ While on the surface this may seem like an odd reason for endorsing marriage, formal dissolution of relationships can actually be critical when it comes to property, spousal support and child support.²⁸ This creates another distinction between opposite sex and same-sex couples because the Supreme Court has also established that traditional divorces must be recognized across state lines as well.²⁹ Additionally, the Parental Kidnapping Prevention Act (“PKPA”)³⁰ mandates full faith and credit for child custody

¹⁸ The terms used in this article are meant to simplify discussion. This article uses “gay marriage” and “same-sex marriage” interchangeably, and includes in the terms “gay” and gay men, lesbians and bisexuals. “Heterosexual” and “opposite-sex” are used interchangeably as well.

¹⁹ U.S. GENERAL ACCOUNTING OFFICE, GAO-04-353R DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT, (2004), <http://www.gao.gov/new.items/d04353r.pdf>.

²⁰ Some courts have even listed all the areas in which marriage status is significant. See, e.g., *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

²¹ WOLFSON, *supra* note 2, at 194-97. See also Evan Wolfson, *For Richer, For Poorer: Same-Sex Couples and the Freedom to Marry as a Civil Right*, [website name or organization], June 2003, http://www.freedomtomarry.org/resources_new.asp?node=58; fact sheets from Freedom to Marry partner organizations, www.freedomtomarry.org/national_partners.asp?doc_id=1025 (last visited on February 25, 2010)

²² See WOLFSON, *supra* note 2, at 13-15.

²³ See WOLFSON, *supra* note 2, at 13.

²⁴ *Id.*

²⁵ See, e.g., 740 ILL. COMP. STAT. 180/2 (2008) (providing that any recovery in an wrongful death action shall be “for the exclusive benefit of the surviving spouse and next of kin” of the decedent).

²⁶ See, e.g., Jane A. Marquardt, *A Will - Not A Wish - Makes It So*, 20 SUM FAM. ADVOC. 34 (1997) (listing other significant estate planning issues that are uniquely problematic for same-sex couples.)

²⁷ See WOLFSON, *supra* note 2, at 13-15.

²⁸ *Id.*

²⁹ *Williams v. North Carolina*, 317 U.S. 287, 303-04 (1942).

³⁰ 28 U.S.C.A. § 1738A (Westlaw 2010).

orders for the purpose of preventing parental kidnapping—‘the taking, retention or concealment of a child by a parent . . . in derogation of the custody rights . . . of another parent or family member . . . [with intent to] keep the children indefinitely or to have custody changed.’³¹ However, there is concern that the Defense of Marriage Act³², which notes that recognition need not be given to “a right or claim arising from [a same-sex] relationship”³³ could also mean that the PKPA does not protect children of divorced same-sex couples.³⁴

Family Leave

Couples who are not married do not necessarily have a legal right for a leave to care for a sick partner or child.³⁵

Health

Unmarried partners do not have the same rights to hospital visitation or emergency medical decisions.³⁶ Health coverage and Medicare/Medicaid coverage is often much harder, if not impossible, for unmarried couples to obtain.³⁷

Housing

Same-sex couples may be discriminated against when it comes to applications for public housing and may suffer other discriminations.³⁸

Immigration³⁹

Unmarried same-sex partners cannot use the laws about family unification to obtain legal status in the United States.⁴⁰

Inheritance

Unmarried couples do not automatically inherit and they do not get legal protections for inheritance or the ability to avoid probate court.⁴¹

Insurance

It may be hard for unmarried couples to sign up for joint insurance plans.⁴² Laws do not require coverage of unmarried couples, so many employers do not offer protections for same-sex couples or non-biological children.⁴³ In fact, the Michigan Supreme Court recently ruled that the state’s constitutional amendment providing that “the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or any similar union for any purpose,” *prohibited*

³¹ Kathryn J. Harvey, *The Rights Of Divorced Lesbians: Interstate Recognition Of Child Custody Judgments In The Context Of Same-Sex Divorce*, 78 FORDHAM L. REV. 1379, 1408 (2009) (citing Patricia M. Hoff, *Parental Kidnapping: Prevention and Remedies* 2000 A.B.A. Ctr. on Children and the Law, 1, available at [http:// www.abanet.org/child/pkprevrem.pdf](http://www.abanet.org/child/pkprevrem.pdf).)

³² 28 U.S.C.A. § 1738(c) (West 2010), discussed *infra* at notes 88-93 and accompanying text.

³³ *Id.*

³⁴ Harvey, *supra* note 31, at 1418-22.

³⁵ See WOLFSON, *supra* note 2, at 13-15.

³⁶ *Id.* Some of this can be cured through contracts, but as noted *infra* at note 71 and accompanying text, this is an imperfect and often expensive solution.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* On this issue, see also, Adams v. Howerton, 486 F. Supp. 1119 (C.D. Cal. 1980).

⁴⁰ See WOLFSON, *supra* note 2, at 13.

⁴¹ *Id.* at 14.

⁴² *Id.*

⁴³ *Id.*

public employers from providing health insurance benefits to their employees' same-sex domestic partners.⁴⁴

Litigation

Same-sex couples may not have the same right to loss of consortium claims as married couples.⁴⁵

Parentage

Unmarried couples find it much harder to have their adopted children recognized as their own or to have a legal relationship to both parents.⁴⁶ They lack the automatic rights to joint adoption and foster care, and because of the lack of formal divorce proceedings, when a couple with children ends its relationship, the partners may find it very difficult to get child support and visitation⁴⁷.

Additionally, there is some evidence that same-sex unmarried couples find it more difficult to get access to assisted reproductive technologies.⁴⁸ And, even when they do, their status as unmarried partners can create a mess when it comes to legal relationships with children conceived through such technologies.⁴⁹ It is important to note that in some countries, even the grant of same-sex marriage does not automatically confer permission to adopt: recent legislation in Portugal allows marriage but surprisingly and disappointingly, prohibits adoption by same-sex couples.⁵⁰

Portability and Recognition

One of the most important aspects of marriage in a peripatetic society is the knowledge that the relationship will be honored when the couple moves. Unmarried couples lack that security.⁵¹ The conflicts of law issues regarding same-sex marriage arise because this is exactly an area – in fact, is THE modern area – where laws differ by jurisdiction.

Wolfson describes it succinctly:

⁴⁴ See *National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008); See also *Recent Case: State Constitutional Law - Same-Sex Relations - Supreme Court of Michigan Holds that Public Employers May Not Provide Healthcare Benefits to Same-Sex Domestic Partners of Employees. - National Pride at Work, Inc. v. Governor of Michigan*, 748 N.W.2d 524 (Mich. 2008), 122 HARV. L. REV. 1263 (2009).

⁴⁵ See, e.g., *Charron v. Amaral*, 889 N.E.2d 946 (Mass. 2008); See also *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding that denying same-sex couples the right to marry violated State Constitution and the Vermont Supreme Court identified the right to bring a loss of consortium claim among many rights available to married couples from which same-sex couples were excluded).

⁴⁶ See WOLFSON, *supra* note 2, at 14. See also, *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005) (finding that a same-sex partner had no custody over a child); *Lofton v. Sec'y of the Dep't of Children and Family Serv.*, 358 F.3d 804 (11th Cir. 2004) (holding that a Florida statute that prohibiting homosexuals from adopting children did not violate equal protection).

⁴⁷ See WOLFSON, *supra* note 2, at 14.

⁴⁸ See generally, John A. Robertson, *Gay And Lesbian Access To Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323 (2004).

⁴⁹ See, e.g., *Miller-Jenkins v. Miller-Jenkins*, 637 S.E.2d 330 (Va. Ct. App. 2006), *aff'd*, 661 S.E.2d 822 (Va. 2008). See also *A.K. v. N.B.*, No. 2070086, 2008 WL 2154098 (Ala. Civ. App. May 23, 2008) (finding that Alabama would not reconsider a California judgment in which a natural mother tried to appeal a decision that had granted visitation rights with a child conceived through ART to her former lesbian partner). On assisted reproduction generally, see Sonia Bychkov Green, *Interstate Intercourse: How Modern Assisted Reproductive Technologies Challenge The Traditional Realm Of Conflicts Of Law*, 24 WIS. J.L. GENDER & SOC'Y 25 (2009).

⁵⁰ See Portugal's Parliament Approves Same-Sex Marriage Law, <http://www.rttnews.com/ArticleView.aspx?Id=1175163&SMap=1> (last visited on February 25, 2010).

⁵¹ WOLFSON, *supra* note 2, at 13-15.

“Marriage uniquely permits couples to travel and deal with others in business or across borders without playing a game of ‘now you’re legally next of kin; now you’re not.’”⁵²

The problems that couples face because of these inconsistencies can be seen on both a national and an international level. Within the U.S., differences in marriage laws create a great deal of confusion for same-sex couples. While ordinarily marriages are recognized across state lines, same-sex marriages do not get the same protection.⁵³ Thus, a couple considered legally married in Massachusetts, might choose to – or need to – move to Kansas, only to find that their entire legal relationship is not valid: they no longer have the same expectations about any of the crucial issues noted in this section.

In the United States, marriages have traditionally been recognized across state lines⁵⁴; some also argue that the Full Faith and Credit Clause either explicitly or, more likely through longstanding tradition, has protected married couples from this problem⁵⁵: in the case of same-sex marriage, however, such protections are absent.⁵⁶ Although some have argued that the Full Faith and Credit Clause does not apply to marriage, there may be an argument that if marriages were not protected by the Clause or the Full Faith and Credit Act then there would not have been a need for Section Two of the Defense of Marriage Act.

Outside the U.S, differences in national – and regional – laws about same-sex marriage create the same types of problems.⁵⁷ For example, a British court refused to recognize as a valid “marriage” the marriage between two Canadian law professors, which they entered into in British Columbia.⁵⁸ In a case simply between two men from different countries, a Spanish court refused to allow the

⁵² WOLFSON, *supra* note 2 at 5.

⁵³ See *infra* Appendix I for details about all the states that do not recognize same-sex marriages from other states.

⁵⁴ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 284 (1971) (“A state usually gives the same incidents to a foreign marriage, which is valid under the principles stated in § 283, that it gives to a marriage contracted within its territory.”).

⁵⁵ The Full Faith and Credit Clause reads as follows: “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. The question of whether the Full Faith and Credit Clause protects marriage has been debated. Some have stated that marriages are recognized across state lines through a common-law rule and tradition rather than a constitutional mandate. See, e.g., Andrew Koppelman, *Dumb And Dumber: Why The Defense Of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 10 (arguing that DOMA is unconstitutional because it discriminates against homosexuals). Others, however – and this author as well – would argue that “the Full Faith and Credit Clause ... allows people to have some certainty as to their legal status and responsibilities.” Leslie Dubois-Need & Amber Kingery, *Transgendered In Alaska: Navigating The Changing Legal Landscape For Change Of Gender Petitions*, 26 ALASKA L. REV. 239, 267 (2009).

⁵⁶ The federal Defense of Marriage Act allows states to refuse to recognize same-sex marriages from other state jurisdictions. See *infra* notes 88-93 and accompanying text.

⁵⁷ One of the justifications for approving more European Union recognition and allowing of same sex marriages is seen here: ILGA-Europe Executive Director Ailsa Spindler said:

As more and more EU citizens have their same-sex partnerships and marriages legally recognized at home, they will expect the same recognition when they move around Europe. Any refusal to recognize such partnerships by other member states is a barrier to free movement and as such runs contrary to the founding principles of the EU [European Union].

Same-sex (homosexual) Marriage in Belgium, http://www.religioustolerance.org/hom_mar10.htm (last visited Feb. 23, 2010).

⁵⁸ See England and Wales High Court (Family Division) Decisions, <http://www.bailii.org/ew/cases/EWHC/Fam/2006/2022.html> (last visited on Feb. 23, 2010).

marriage of a Spanish man to his Indian partner because even though same-sex marriages were legal in Spain, they were not in India, and the court held that the limitation should control.⁵⁹

Privilege

A sometimes unmentioned aspect of marriage pertains not to the social aspects of the relationship, but to the judicial implications thereof: unmarried couples do not have the privilege of refusing to testify against each other.⁶⁰ Additionally, unmarried couples are also “usually denied the coverage in crime-victims counseling and protection programs afforded married couples.”⁶¹

Property

Unmarried couples lose any privileges married couples have under rules that grant more favorable conditions for joint property ownership.⁶² They lack protection in a shared property and, as mentioned early, if one partner dies, they do not have automatic inheritance rights of personal or real property.⁶³ For some couples, this could mean that the home they have been living in for years, and where they raise their children, could be lost.⁶⁴

Retirement

Spouses may have privileges with regard to IRAs and other retirement plan; additionally, spouses have benefits through Social Security and Medicare (and other such programs) that may not be available to same-sex unmarried couples.⁶⁵

Taxes

There is some debate over whether marriage is a benefit or a burden where income taxes are concerned⁶⁶, but the income tax laws certainly make many distinctions based on marital status and to the extent that married couples have advantages and options, unmarried couples lack those.⁶⁷

Marriage: Not Civil Unions

One argument that has been made is that civil union, or comparable status is just as good. Courts in Vermont and New Jersey had allowed state legislatures to remedy equal protection concerns through civil union statutes.⁶⁸ However, most recently, the Iowa Supreme Court held that such a distinction would be equally suspect under the Iowa Constitution.⁶⁹

⁵⁹ David Shucosky, *New Spanish Gay Marriage Law Runs Into Judicial Roadblock*, JURIST, July 6, 2005, <http://jurist.law.pitt.edu/paperchase/2005/07/new-spanish-gay-marriage-law-runs-into.php>.

⁶⁰ 735 ILL. COMP. STAT. 5/8-801; see also WOLFSON, *supra* note 2, at 14.

⁶¹ WOLFSON, *supra* note 2, at 14

⁶² *Id.*

⁶³ *Id.*

⁶⁴ If title to the home were in the name of the partner who died intestate, title would pass to his or her heirs at law -- children (if any), parents, siblings and their descendants, and possibly more distant “blood” relatives -- but not to the same-sex partner. See, e.g., 755 ILL. COMP. STAT. 5/2-1 (defining Illinois’ law of intestate succession, which provides for inheritance only for those related to the deceased by blood or marriage.).

⁶⁵ WOLFSON, *supra* note 2, at 13-15.

⁶⁶ See, e.g., Frederick J. Bradshaw, IV, *The Earned Income Tax Credit and the Marriage Penalty: New Proposals in Light of the Economic Growth and Tax Relief/Reconciliation Act of 2001*, 54 TAX LAW. 701 (2001).

⁶⁷ *Id.*

⁶⁸ *Baker v. State*, 744 A.2d 864, 886-87 (Vt. 1999); *Lewis v. Harris*, 908 A.2d 196, 221-24 (N.J. 2006).

⁶⁹ *Varnum v. Brien*, 763 N.W.2d 862, 906-07 (Iowa 2009). See also *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (rejecting the trial court’s finding that equal protection was not implicated if civil unions were available).

Ultimately, same-sex couples may, through contracts, arrange for some of the protections and privileges that married couples enjoy, but it is costly.⁷⁰ One article described the following:

“If Howard Wax and Robert Pooley Jr. were a heterosexual couple, they could've gone to their nearest Cook County Clerk's office, paid \$40 for a marriage license and been wed. That would have provided them an array of legal protections -- the right to make medical decisions for one another, the ability for one to inherit the other's property. Instead, the couple paid \$10,000 for an attorney to help them roughly simulate -- using wills, trusts and powers of attorney -- the protections that marriage affords. It was a price the men, parents of 3-year-old twins, were willing to pay for peace of mind, though they admit it's far from perfect.”⁷¹

⁷⁰ Rex W. Huppke, *'Marriage' Benefits Costly for Gay Couples*, CHI. TRIB., Jan. 18, 2010, *available at* <http://www.chicagotribune.com/news/chi-gays-pay-more-18-jan18,0,2205178.story>.

⁷¹ *Id.*

PART TWO: THE DEBATE OVER SAME-SEX MARRIAGE IN THE UNITED STATES

“Had those who drew and ratified the Due Process Clauses of the Fifth Amendment 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.”⁷²

The battle over the creation of same-sex marriage in the United States started in earnest in the 1970s, with the earliest cases before the state courts and one case dismissed by the U.S. Supreme Court.⁷³ The current status of same-sex marriages is one of the most confusing situations in United States law and probably *the* leading conflicts of law issue of today. To properly understand the confusion, it is important to break down the creation of same-sex marriage by both what the laws are, and what the arguments are on both sides of the debate.

Laws regarding same-sex marriage, civil unions, and prohibitions of both exist at both state and federal levels.⁷⁴ States have passed amendments that prohibit same-sex couples from marrying.⁷⁵ Additionally, same-sex marriage, and other legal arrangements approximating marriage, are regulated and evaluated at all levels and across various institutions: legislative, judicial and administrative. Judicial decisions at the state levels, and recent federal decisions and new federal cases have added some unique arguments to the debate. This section outlines some laws, which are expanded in Appendix I, and then examines some of the leading cases about same-sex marriage before concluding with a summary of the key legal issues: those issues, the article will argue later, can be analyzed through the prism of customary international law.

A. Laws Regarding Same-Sex Marriage In The United States Vary Greatly.⁷⁶

Five states allow same-sex marriage: Massachusetts,⁷⁷ Connecticut,⁷⁸ Iowa,⁷⁹ Vermont,⁸⁰ and New Hampshire (began January, 2010).⁸¹ A handful of other states allow same-sex couples to enter into legal relationships that confer some or all of the same state-level benefits of marriage, but using terms such as “civil union” or “domestic partnership” to distinguish those relationships from heterosexual “marriage”.

⁷² *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

⁷³ *See Baker v. Nelson*, 409 U.S. 810 (1972) (dismissing case for lack of a substantial federal questions); *Baker v. Nelson*, 291 Minn. 310 (1971) (holding of state court that marriage statute did not authorize same sex marriage).

⁷⁴ *See* Appendix I for a table with a comprehensive, current description of the laws.

⁷⁵ *See* HUMAN RIGHTS CAMPAIGN, STATEWIDE MARRIAGE PROHIBITIONS (2008), http://www.hrc.org/documents/marriage_prohibitions.pdf.

⁷⁶ *See* Appendix I for a thorough list of the laws of each state.

⁷⁷ *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941, 969 (Mass. 2003).

⁷⁸ *Kerrigan v. Comm’r of Public Health*, 957 A.2d 407, 480-82 (Conn. 2008).

⁷⁹ *Varnum v. Brien*, 763 N.W.2d 862, 906-07 (Iowa 2009).

⁸⁰ VT. STAT. ANN. tit. 15, § 8 (2010) (amended in 2009 to change the definition of marriage from “the legally recognized union of one man and one woman” to “the legally recognized union of two people”).

⁸¹ N.H. REV. STAT. ANN. § 457:1-a (2010). Interestingly, New Hampshire still distinguishes between same-sex and opposite-sex marriages, but in the age of consent. In an opposite-sex marriage, the age of consent is 14 for males and 13 for females; in same-sex marriages, the age of consent is 18 for both sexes. N.H. Rev. Stat. Ann. § 457:4 (2010).

Two states – Rhode Island⁸² and New York⁸³ – and the District of Columbia⁸⁴ recognize same-sex marriages from other states. California will start recognizing same-sex marriages entered into in other jurisdictions for the purpose of affording the couple benefits, but without calling it a “marriage”.⁸⁵

On the other hand, thirty-nine states have laws that defined marriage as between a man and a woman; thirty states have constitutional amendments with the same definition.⁸⁶ Some opponents of same-sex marriage have advocated a federal Constitutional amendment to define marriage as between a man and woman, but that measure has failed to gain significant support.⁸⁷

However, there is a crucial current federal statute at issue. The Federal Defense of Marriage Act (“DOMA”) has two important components: first, it defines marriage as that between a man and woman for federal purposes⁸⁸; second, it provides that states do not have to recognize same-sex marriages even under Full Faith & Credit Clause⁸⁹:

DOMA Section 2:

“No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”⁹⁰

DOMA Section 3:

“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”⁹¹

⁸² RELIGIOUS TOLERANCE.ORG, Same Sex Marriage (SSM) & Civil Unions in Rhode Island: 2007: Attorney General Issues Statement on SSM Recognition, *available at* <http://www.religioustolerance.org/hommarri2.htm> (last visited Feb. 24, 2010). *See also*, Katie Zezima, *Rhode Island Steps Toward Recognizing Same-Sex Marriage*, N. Y. TIMES, Feb. 22, 2007, *available at* <http://www.nytimes.com/2007/02/22/us/22rhode.html> (last visited Feb. 24, 2010).

⁸³ *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 743 (N.Y. App. Div. 2008) *leave to appeal dismissed*, 889 N.E.2d 496 (N.Y. 2008). *See also* Memorandum from David Nocenti, legal counsel to Gov. Patterson, to all NY State Agency Counsel 1 (May 14, 2008), http://www.state.ny.us/governor/reports/pdf/Nocenti_memo.pdf. The Nocenti memo directs all New York administrative agencies to review and alter their policy statements and regulations to accommodate same-sex marriages performed in other states. *Id.* at 1-2.

⁸⁴ D.C. CODE § 46-405.01 (2009).

⁸⁵ CAL. FAM. CODE § 308 (2010).

⁸⁶ *See* Appendix I.

⁸⁷ CNN.com: Senate Set to Reject Gay Marriage Ban (June 6, 2006), <http://www.cnn.com/2006/POLITICS/06/06/same.sex.marriage/index.html> (last visited Feb. 24, 2010).

⁸⁸ This has been attacked in the Massachusetts litigation. *See infra* notes 194-212 and accompanying text.

⁸⁹ This has been attacked in the California litigation. *See infra* notes 213-225 and accompanying text.

⁹⁰ 28 U.S.C. § 1738C (1996).

⁹¹ 1 U.S.C. § 7 (1996).

Recently, there has been a movement to eliminate this statute. In Congress, U.S. Rep. Jerry Nadler (D-NY), along with Tammy Baldwin (D-Wis.) Jared Polis (D-CO), John Lewis (D-GA) and Nydia Velazquez (D-NY), introduced the Respect for Marriage Act, which would fully repeal the federal DOMA law.⁹² President Obama has stated that his “administration believes [DOMA] is discriminatory and should be repealed by Congress.”⁹³

However, the trend in the United States is currently against same-sex marriage, especially in states where the question has been put to a popular vote.⁹⁴ Appendix I details the current status of same-sex marriage in each state.

B. Judicial Decisions And Pending Cases Underscore The Importance Of The Debate.⁹⁵

The current status of same-sex marriage in the United States has been affected just as much, if not more, by judicial activity as by legislation.⁹⁶ In order to place customary international law into the context of the current debate, it is important to understand what the courts have done – and are doing – to date.

California

More than probably in any other state, California has vacillated on the issues of same sex-marriage.

In 2004 the California Supreme Court held that local officials in the city and county of San Francisco could not refuse to enforce provisions of California’s marriage laws that limited the granting of a marriage license and marriage certificate to opposite-sex couples.⁹⁷ The case was triggered in February 2004, when San Francisco Mayor Gavin Newsom sent a letter to the county clerk, requesting that she determine whether changes should be made to the documents used to apply for and issue marriage licenses in order to provide them regardless of sexual orientation.⁹⁸ The mayor expressed his view that the California Constitution required this.⁹⁹ The county clerk responded by developing gender-neutral marriage documents, but printing a warning on the applications explaining that a same-sex marriage performed in San Francisco may not be recognized anywhere else.¹⁰⁰ Approximately 4,000 such marriages were performed.¹⁰¹

⁹² Unite the Fight: BREAKING NEWS: Full Repeal of DOMA Introduced to U.S. House Called ‘Respect for Marriage Act’ (Sept. 15, 2009), <http://unitethefight.blogspot.com/2009/09/breaking-news-full-repeal-of-doma.html> (last visited Feb. 24, 2010).

⁹³ Scott Wilson, *Obama Makes Explicit His Objections to DOMA*, WASH. POST (Aug. 17, 2009), http://voices.washingtonpost.com/44/2009/08/17/obama_makes_explicit_his_objec.html (last visited Feb. 24, 2010).

⁹⁴ Mike O’Sullivan, *San Francisco Gay Marriage Court Case Could Have National Impact*, 1/13/10 Voice Am. Press Releases & Documents (Pg. Unavail. Online), *available on Westlaw at* 2010 WLNR 787931.

⁹⁵ See Appendix I listing additional details on relevant judicial activity.

⁹⁶ It should be noted that while historically, same-sex marriage has been an issue brought to and taken up by the courts, not all agree that this is the best way to achieve reform. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE*, Part 4 (2d ed. 2008).

⁹⁷ *Lockyer v. City and County of San Francisco*, 95 P.3d 459 (Cal. 2004).

⁹⁸ *Id.* at 464.

⁹⁹ *Id.* at 465.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

The state's attorney general, Bill Lockyer, sought a writ in the state Supreme Court asking that local officials stop the marriages, and that any marriages already performed be declared void.¹⁰² The case was consolidated with another one brought by residents and taxpayers also seeking to compel the San Francisco officials to stop the marriages.¹⁰³

Importantly, in this case, the court began by determining that the legal issue in the case was not really the right of same-sex couples to marry, but rather the right of local officials to refuse to carry out a law they deem unconstitutional: the court found that local officials simply do not possess that kind of authority.¹⁰⁴ The court said its ruling came down to separation of powers principles, in that the job of the legislature is to enact statutes, the job of the judiciary is to determine their constitutionality, and the job of the executive is to carry out the laws.¹⁰⁵ As such, the court issued a mandate directing officials to carry out the laws unless and until they were determined to be unconstitutional.¹⁰⁶

Soon thereafter, the California Supreme Court did address the substantive question avoided in *Lockyer*.¹⁰⁷ In 2008, the court squarely faced the question of whether statutes limiting marriage to opposite-sex couples were unconstitutional.¹⁰⁸ On one side were groups supporting gay marriage, including San Francisco officials, same-sex couples and organizations representing them.¹⁰⁹ On the other were supporters of retaining the traditional definition, including backers of Proposition 22, a ballot question under which voters approved a statute explicitly defining marriage as between a man and a woman, as well as the state's Attorney General.¹¹⁰

The court noted at the outset that this case was somewhat different than previous cases addressing same-sex marriage bans because California's domestic partnership statutes granted virtually all of the legal rights and responsibilities of marriage under state law, but by a 4-3 vote, the court found the marriage laws unconstitutional.¹¹¹

First, it held that the right to marry was an integral part of an individual's interest in personal autonomy protected by the *privacy* and *due process* provisions of the California Constitution.¹¹² The court rejected the argument that there was no fundamental right to *same-sex marriage*, noting that the same distinction had been unsuccessfully made by those who opposed interracial marriage and argued that marriage had been traditionally limited to those of the same race.¹¹³

The court next held that the marriage laws raised equal protection concerns.¹¹⁴ It held that the applicable standard of review of the marriage laws was strict scrutiny, given that the statutes discriminated on the basis of sexual orientation and impinged on same-sex couples' fundamental

¹⁰² *Id.* at 461, 466.

¹⁰³ *Id.* at 466-67.

¹⁰⁴ *Id.* at 460, 464.

¹⁰⁵ *Id.* at 463.

¹⁰⁶ *Id.* at 464.

¹⁰⁷ *See In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

¹⁰⁸ *Id.* at 397. At this time, the constitution had no language defining or limiting marriage to between a man and a woman.

¹⁰⁹ *Id.* at 402-03.

¹¹⁰ *Id.* at 402.

¹¹¹ *Id.* at 397-98.

¹¹² *Id.* at 419.

¹¹³ *Id.* at 424-35.

¹¹⁴ *Id.* at 435.

interest in having their family relationships accorded the same respect enjoyed by opposite-sex couples.¹¹⁵ The court noted that in light of historic discrimination against gay people, there was a significant risk that retaining a distinction in nomenclature between “marriage” for heterosexuals and “domestic partnerships” for homosexuals would mark homosexuals as second-class citizens.¹¹⁶

Because strict scrutiny was applied, the state was required to show a compelling interest as well as show that the differential treatment was necessary to serve that compelling interest: the state failed.¹¹⁷ The state’s purpose in differentiating marriage between a man and a woman and a union between two same-sex persons, to retain the traditional definition of marriage, was not compelling or necessary, the court held.¹¹⁸ The court acknowledged that the majority of states, *and the majority of countries around the world*, does not recognize gay marriage¹¹⁹; however, this was not surprising given historical discrimination against homosexuals.¹²⁰ The court found that permitting same-sex couples to marry would not alter the substantive nature of the legal institution of marriage, nor would any religious institution be forced to solemnize such marriages.¹²¹ The court also found that excluding same-sex couples from the definition of marriage harmed the children of those relationships by validating the notion that it is permissible for families headed by gay couples to be treated differently than those headed by heterosexual couples.¹²² The court held that the remedy was to strike the unconstitutional language from the statutes and direct the appropriate state officials to enforce the marriage statutes equally.¹²³

Between June 16 and November 5, 2008, an estimated 18,000 same-sex couples were married in California.¹²⁴ On November 4th, however, the voters of California passed “Proposition 8”, an amendment to California’s constitution that provided “Only marriage between a man and a woman is valid or recognized in California.”¹²⁵

Legal challenges followed, and in May, 2009, deciding the highly publicized *Strauss v. Horton* case, the California Supreme Court found that the same-sex marriages performed before Nov. 5, 2008 were still valid, but effectively terminated any future same-sex marriages.¹²⁶ The *Strauss* court held that the question at issue was the right of the people to change the state’s constitution through the initiative process to limit marriage to opposite-sex couples.¹²⁷ The constitution allows for amendments to be proposed by two-thirds of the membership of each house of the legislature or by an initiative petition signed by voters numbering at least 8 percent of the total votes cast for governor in the last

¹¹⁵ *Id.* at 441-42. California apparently does not use intermediate scrutiny for suspect or quasi-suspect classifications when interpreting its Constitution.

¹¹⁶ *Id.* at 402.

¹¹⁷ *Id.* at 451.

¹¹⁸ *Id.* at 450.

¹¹⁹ *Id.* At the time, only Canada, South Africa, the Netherlands, Belgium and Spain allowed same-sex couples to marry, along with Massachusetts in the United States. *Id.* at 450 n.70.

¹²⁰ *Id.* at 451.

¹²¹ *Id.* at 451-52.

¹²² *Id.* at 401.

¹²³ *Id.* at 453.

¹²⁴ National Center for Lesbian Rights: issues and cases: marriage: 18,000 Couples, http://www.nclrights.org/site/PageServer?pagename=issue_marriage_18000Couples (last visited February 25, 2010).

¹²⁵ *Strauss v. Horton*, 207 P.3d 48, 59, 75 (Cal. 2009). Proposition 8 was passed on November 4, 2008 and went into effect on November 5, 2008. *Id.* at 59. Proposition 8 was approved by 52.3 percent of the voters. *Id.* 68.

¹²⁶ *Id.* at 121.

¹²⁷ *Id.* at 105.

gubernatorial election.¹²⁸ Once proposed, an amendment becomes part of the constitution if approved by a simple majority of voters, which Proposition 8 was: but that procedure cannot be used to *revise* the state's constitution, but only to *amend* it.¹²⁹

Prior California case law provided that substantial changes, either quantitative or qualitative, amount to revisions.¹³⁰ The court noted that Proposition 8 was not a revision from a quantitative standpoint, given that it was only 14 words.¹³¹ In finding that the initiative was not a qualitative change, the court noted that it has usually deemed revisions to be those that make “far reaching changes in the nature of our basic government plan.”¹³²

The court also rejected the petitioners' argument that separation of powers principles prohibited the amendment because of the high court's ruling in *In re Marriage Cases*.¹³³ The court held that the Marriage Protection Act did not readjudicate the issues decided in that case, but created a new constitutional rule that took effect upon approval of Proposition 8.¹³⁴

As for the issue of whether Proposition 8 should be retroactive, the court held that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is clear from extrinsic sources that the legislature or voters must have intended a retroactive application.¹³⁵ There was no express retroactivity provision in Proposition 8, and the ballot pamphlet did not say it was retroactive.¹³⁶ Further, applying the law retroactively would raise due process concerns by depriving more than 18,000 couples of vested rights, including employment benefits, interests in property and inheritances.¹³⁷

There is currently a federal challenge to Proposition 8.¹³⁸

Hawaii

¹²⁸ *Id.* at 60.

¹²⁹ *Id.*

¹³⁰ *Id.* at 61.

¹³¹ *Id.* at 62. Proposition 8's text reads “Only marriage between a man and a woman is valid or recognized in California.” *Id.* at 75.

¹³² *Id.* at 98.

¹³³ *In re Marriage Cases*, 183 P.3d at 449.

¹³⁴ *Id.* at 63. A dissenting judge argued that Proposition 8 effected a fundamental change in the core values of the state constitution, and as such was a revision to the state constitution. *Id.* at 129. The dissenting judge said that the ruling placed in jeopardy the rights of all disfavored minorities. *Id.* He would have held that any initiative that denies a fundamental right to a group that has historically been subject to discrimination on the basis of a suspect classification violates the essence of the equal protection clause and fundamentally alters its scope. *Id.*

¹³⁵ *Id.* at 120-21.

¹³⁶ *Id.*

¹³⁷ *Id.* at 120-22.

¹³⁸ See Complaint at 8, *Perry v. Schwarzenegger*, No. 3:09 cv 02292 (9th Cir. May 22, 2009), <http://www.scribd.com/doc/15841006/Perry-v-Schwarzenegger-Complaint> (last visited Feb. 24, 2010) (alleging that Proposition 8 violates the fundamental liberties of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment). See also AMERICAN CIVIL LIBERTIES UNION: *Federal legal challenge to Proposition 8, filed by prominent attorneys Ted Olson and David Boies on behalf of two California couples*, (Feb. 3, 2010), http://www.aclu.org/lgbt-rights_hiv-aids/perry-v-schwarzenegger-case-profile (last visited Feb. 24, 2010) (discussing the filing of a federal lawsuit challenging proposition 8); Margaret Talbot, *A Risky Proposal*, THE NEW YORKER (Jan. 18, 2010), http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot (last visited Feb. 24, 2010) (discussing the possibility of the case *Perry v. Schwarzenegger* challenging the constitutionality of Proposition 8 and arguing for same-sex marriage as a fundamental right being brought before the United States Supreme Court).

The Hawaii Supreme Court issued an important decision in 1993¹³⁹ that set the stage for the rights of same-sex couples and, ultimately, precipitated the Defense of Marriage Act¹⁴⁰. In that case, three same-sex couples filed suit against the state's Department of Health after it denied their applications for marriage licenses.¹⁴¹ The plaintiffs alleged that the Department of Health's interpretation violated their right to privacy and guarantee of equal protection under the Hawaiian Constitution.¹⁴² The trial court dismissed the plaintiffs' complaint, but the Hawaii Supreme Court reversed, holding that the law restricting marriage to opposite-sex couples was a classification based on sex, and thus subject to strict scrutiny under the Equal Protection clause of Hawaii's Constitution.¹⁴³ As such, the law was presumed to be unconstitutional unless the state could show that it was justified by compelling state interests and narrowly drawn to avoid unnecessary abridgements of the plaintiffs' constitutional rights.¹⁴⁴

The Hawaii decision prompted a national reaction.¹⁴⁵ The federal Defense of Marriage Act and many state laws defining marriage as between a man and a woman were passed in response to this case.¹⁴⁶ Voters in Hawaii passed a constitutional amendment giving the legislature the right to restrict marriage to opposite sex couples.¹⁴⁷ Based on this constitutional amendment, the Hawaii Supreme Court vacated its prior holding and reversed the judgment in favor of the *Baehr* plaintiffs, thus effectively ending the attempt to legalize same-sex marriage in Hawaii.¹⁴⁸

Massachusetts

In the leading case *Goodrich v. Department of Public Health*¹⁴⁹, a suit was brought by seven long-term, same-sex couples from five Massachusetts counties, all of whom wanted to marry.¹⁵⁰ In March and April of 2001, all attempted to obtain a marriage license from a city or town clerk's office, but were turned away.¹⁵¹ The couples argued that the denial of the benefits of marriage to them violated several provisions of the Massachusetts constitution; the Supreme Judicial Court agreed, overruling the trial court's ruling in favor of the Commonwealth.¹⁵² At issue was the state's marriage licensing statute.¹⁵³ Nothing in the law specifically addressed same-sex couples.¹⁵⁴ However, the court rejected

¹³⁹ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); after remand *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996) (holding unconstitutional the restriction of marriage to opposite-sex couples, because the state had not shown a compelling governmental interest), *aff'd* 950 P.2d 1234 (Haw. 1997).

¹⁴⁰ Defense of Marriage Act, 1 U.S.C. §7 (1996) and 28 U.S.C. § 1738C (1996).

¹⁴¹ *Baehr*, 852 P.2d at 60.

¹⁴² *Id.* at 52.

¹⁴³ *Id.* at 60.

¹⁴⁴ *Id.* at 67.

¹⁴⁵ Wojcik, *supra* note 2, at 618.

¹⁴⁶ See generally, David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning And Fate*, 22 U. HAW. L. REV. 19, 20 (2000).

¹⁴⁷ *Id.*

¹⁴⁸ Summary Disposition Order at 1, *Baehr v. Miike*, No. 20371 (Haw. S. Ct. Dec. 9, 1999), <http://hawaii.gov/jud/20371.htm> (last visited Feb. 24, 2010) (dismissing the appeal and reversing the trial court's holding that the Hawai'i marriage statute was unconstitutional because it was in violation of the equal protection clause of the Hawai'i constitution due to the subsequent ratification of the marriage amendment).

¹⁴⁹ *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)

¹⁵⁰ *Goodridge*, 798 N.E.2d at 949.

¹⁵¹ *Id.* at 949-50.

¹⁵² *Id.* at 969.

¹⁵³ *Id.* at 952.

¹⁵⁴ *Id.* at 952.

the argument that it could interpret the statute as permitting same-sex marriage, because it held that the statute incorporated the common-law definition of marriage.¹⁵⁵ The court held, 4-3, that to forbid same-sex couples from marrying violated state equal-protection and due process guarantees.¹⁵⁶

The court noted that in Massachusetts, marriage has always been a secular institution, with no religious ceremony required.¹⁵⁷ It also noted that marriage confers significant benefits and obligations on couples, with the Department of Public Health noting that hundreds of state laws were related to marriage and marital benefits: joint income tax filing, tenancy by the entirety, homestead protection, inheritance rights, access to veteran's spousal benefits, etc.¹⁵⁸ Children of married couples also benefit, through greater access to state and federal benefits.¹⁵⁹

The court held that the Massachusetts Constitution protects personal liberty to a greater degree than the U.S. Constitution.¹⁶⁰ The court applied a rational-basis review for both due process and equal protection, and found the statute forbidding same-sex marriage could not survive either test.¹⁶¹ The Department of Public Health argued the prohibition was supportable because it (1) provided a favorable setting for procreation; (2) ensured an optimal setting for child-rearing; and (3) preserved scarce state and private resources.¹⁶² The court rejected these arguments.¹⁶³

The court held that the distinguishing feature of marriage is the exclusive commitment of one person to another, not the ability to have and raise children.¹⁶⁴ The court noted that fertility is not a requirement for marriage, and that there was no evidence that a heterosexual marriage provides the "optimal" setting for raising children, or that forbidding same-sex marriage would increase the number of couples choosing to enter into opposite-sex marriage in order to raise children.¹⁶⁵ The court also noted that many same-sex couples are excellent parents, including several of the plaintiffs in this case.¹⁶⁶

The dissent argued, among other things, that it was the proper role of the legislature, and not the courts, to define marriage.¹⁶⁷ They also argued that there was no fundamental right to same-sex marriage, given the history of marriage of the union of one man and one woman.¹⁶⁸ The dissenters also pointed out that *Lawrence v. Texas*¹⁶⁹, which struck down anti-sodomy laws, expressly noted that the case did not involve the formal recognition of same-sex relationships.¹⁷⁰ And they argued that

¹⁵⁵ *Id.* at 952-53.

¹⁵⁶ *Id.* at 978.

¹⁵⁷ *Id.* at 954.

¹⁵⁸ *Id.* at 948.

¹⁵⁹ *Id.* at 957.

¹⁶⁰ *Id.* at 959. This idea also supports the use of international law as a prism for evaluating freedoms.

¹⁶¹ *Id.* at 961.

¹⁶² *Id.* These are some of the same arguments being used in the Proposition 8 trial as well. See *infra* notes 213-225 and accompanying text.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 963. These exact arguments are also currently at issue in the Proposition 8 case. See *infra* notes 213-225 and accompanying text.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 351.

¹⁶⁸ *Id.* at 367.

¹⁶⁹ 539 U.S. 558 (2003).

¹⁷⁰ Goodridge, 798 N.E.2d at 948.

the majority gave short shrift to the traditional role of marriage as providing a forum for procreation and the raising of children.¹⁷¹

Federal Cases

A number of federal cases have struggled with the issue of same-sex marriage. The federal courts have generally focused on issues of equal protection and immigration and generally, the courts have not found a right to same-sex marriage on the federal level.¹⁷² Most of the cases have ruled against the same-sex couples, finding that no discrimination existed.¹⁷³

One case, however, found that that a deputy federal public defender who had legally wed his partner in California when such marriages were allowed, was entitled to have his spouse made a beneficiary of his health insurance under the Federal Employee Health Benefits Act.¹⁷⁴ His request had been denied based on DOMA's definition of a spouse.¹⁷⁵ The Ninth Circuit's Judicial Council determined that he was entitled to such benefits because the denial of benefits violated the Ninth Circuit's employment dispute resolution plan, which prohibits discrimination on the basis of sex and sexual orientation.¹⁷⁶ The Court concluded that the application of DOMA to the Federal Employees Health Benefits program violated Levenson's Fifth Amendment due process rights.¹⁷⁷

Additionally, while saying that some form of heightened scrutiny probably applied, the Court concluded that the denial of benefits to the public defender's husband could not survive even rational basis review.¹⁷⁸ The court noted that the denial of federal benefits to same-sex couples cannot be justified by animus against homosexuals as a group¹⁷⁹, nor were the justifications given by Congress for DOMA sufficient.¹⁸⁰ Finally, although the government's interest in preserving its scarce resources had been given as a justification for DOMA, the opinion noted that said any savings

¹⁷¹ *Id.* at 997.

¹⁷² *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980) (holding that for immigration purposes, the definition of marriage is governed by federal intent, so even if the state law recognized same-sex marriage, if it offended federal policy, that policy would prevail); *Largess v. Supreme Judicial Court for the State of Massachusetts*, 373 F.3d 219 (1st Cir. 2004) (declining to review the district court's ruling that *Goodridge* was consistent with the Massachusetts Constitution, and finding that the alleged state constitutional violations did not amount to a violation of the federal Guarantee Clause); *McConnell v. Noonan*, 547 F.2d 54 (8th Cir. 1976) (finding that the Veterans Administration was not required to grant spousal benefits to a same-sex couple because *Baker v. Nelson* was dispositive of the issue of the validity of same-sex marriage the couple in this case were the plaintiffs in that case; therefore, the couple was collaterally estopped from re-litigating the issue of whether they had the right to marry). *See also* *McConnell v. United States*, 188 Fed. App'x 540 (8th Cir. 2006) (finding that issue preclusion barred a similar suit); *Singer v. U.S. Civil Service Comm'n*, 530 F.2d 247 (9th Cir. 1976) (upholding the firing of an openly gay man, finding that it was not a result of him merely being a homosexual, but because he "openly and publicly flaunt[ed]" his lifestyle while identifying himself as working for a federal agency); *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (affirming a finding that a foreign male married to another male was not a spouse for immigration law purposes and that this did not violate equal protection); *Smelt v. County of Orange*, 447 F.3d 673 (9th Cir. 2006) (finding that a couple did not have standing to challenge Section 2 of DOMA, which provides that no state shall be required to recognize records or judicial proceedings from other states involving a same-sex marriage).

¹⁷³ *Id.*

¹⁷⁴ *In re Levenson*, 560 F.3d 1145 (9th Cir. Jud. C. 2009), *enforced*, 587 F.3d 925 (9th Cir. 2009).

¹⁷⁵ *Levenson*, 587 F.3d at 929.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 931.

¹⁷⁹ *Id.* at 931, citing *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁸⁰ *Id.*

would be insignificant and founded an arbitrary ground.¹⁸¹ As such, the Court ordered the Administrative Office of the United States Courts to ensure that the spouse would be covered under the health plan, and to process any future beneficiary addition requests without regard to the sex of the spouse.¹⁸²

Current Cases

Recently, four federal cases have been filed to challenge various provisions of DOMA. One of them has already been dismissed¹⁸³, and the rest are pending. The three current cases are discussed below, to illustrate the issues that are being presented to the courts and may very likely reach the Supreme Court within the next few years.¹⁸⁴

*Gill v. Office of Personnel Management*¹⁸⁵

In March 2009, Massachusetts-based group GLAD (Gay and Lesbian Advocates and Defenders) brought a suit, alleging that same-sex spouses are denied specific monetary benefits from public programs like social security under DOMA.¹⁸⁶ Brought on behalf of several Massachusetts same-sex married couples, the lawsuit challenges section 3 of DOMA, which codifies “marriage” for federal purposes as that between a man and a woman.¹⁸⁷ The GLAD description of it is as follows:

“The law in question, the ‘Defense of Marriage Act’ deprives families of federally-created economic safety nets, to the detriment of those couples and their children or other dependents. It creates a system of first and second class marriages, where the former receive all federal legal protections, and the latter are denied them, even while taking on the responsibilities of legal marriage.”¹⁸⁸

¹⁸¹ *Id.* at 934.

¹⁸² *Id.*

¹⁸³ The case was dismissed for lack of standing. See Joel Zand, *Federal Court Dismisses Pro. 8 Challenge Against State: “Don’t Worry, You’re Married,”* FINDLAW, July 17, 2009, <http://blogs.findlaw.com/courtside/2009/07/federal-court-dismisses-prop-8-challenge-against-state-dont-worry-youre-married.html>. President Obama received heavy criticism for allowing the Justice Department to defend the constitutionality of DOMA. Defendant’s Motion to Dismiss, *Smelt v. United States*, No. SACV09-00286 (C.D. Cal. Aug. 3, 2009), available at <http://www.scribd.com/doc/16355867/Obamas-Motion-to-Dismiss-Marriage-case>. However, it has been noted that even the brief filed supporting dismissal reaffirms Obama’s position that DOMA should be repealed. Wilson, *supra* note 93.

¹⁸⁴ GLAD Challenges DOMA Section 3 – The Lawsuit, <http://www.glad.org/doma/lawsuit/> (last visited Feb. 24, 2010).

¹⁸⁵ Discussing the *Gill* case, Lawrence Tribe noted “the case is a strong candidate for review by the US Supreme Court for two reasons -- (1) the Court has long held that the equality principles of the 5th and 14th Amendments apply to the states, and (2) DOMA is an unprecedented break from the Court’s view that marriage is a state matter.” Kelvin Lynch, *DOMA Case Could go to US Supreme Court*, INTERNATIONAL LGBT ISSUES EXAMINER, Apr. 1, 2009, <http://www.examiner.com/x-4107-SF-Gay--Lesbian-Examiner~y2009m4d1-DOMA-case-could-go-to-US-Supreme-Court>; see also Margaret Talbot, *A Risky Proposal*, THE NEW YORKER, Jan. 18, 2010, http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot; Michael Kirkland, *U.S. Supreme Court: Will Justices Catch the Gay Marriage Bouquet?*, UPI.COM, Feb. 7, 2010, http://www.upi.com/Top_News/US/2010/02/07/US-Supreme-Court-Will-justices-catch-the-gay-marriage-bouquet/UPI-46901265531400/.

¹⁸⁶ GLAD Challenges DOMA Section 3 – The Lawsuit, <http://www.glad.org/doma/lawsuit/> (last visited Feb. 24, 2010).

¹⁸⁷ 1 U.S.C. §7 (1996). See discussion *infra* at notes 88-91 and accompanying text.

¹⁸⁸ GLAD Challenges DOMA Section 3 – The Lawsuit, *supra* note 186.

The lawsuit alleges that DOMA violates the Fifth Amendment Equal Protection Clause.¹⁸⁹ Plaintiffs argue that heightened scrutiny is applicable because “(1) [DOMA] represents an unprecedented intrusion upon a domain traditionally reserved to the States; (2) it burdens the core liberty interest in the integrity of one’s family; and (3) it unfairly discriminates against gay men and lesbians.”¹⁹⁰ The lawsuit argues that DOMA fails heightened scrutiny but even if a lesser standard were applicable, that it would fail even a rational basis review because the justification of DOMA is insubstantial.¹⁹¹

This lawsuit is currently pending in the U.S. District Court for the District of Massachusetts. The government has moved to dismiss GLAD’s complaint, and GLAD has moved for summary judgment.¹⁹² As of March 1, 2010, both motions were awaiting decision.¹⁹³

*Commonwealth of Massachusetts v. Department of Health & Human Services*¹⁹⁴

In a groundbreaking lawsuit, the Commonwealth of Massachusetts also sued the federal government in March 2009, alleging that the section 3 of the Defense of Marriage Act¹⁹⁵ is unconstitutional.¹⁹⁶ The suit was brought by Massachusetts through its Attorney General, Martha Coakley, and names the Department of Health and Human Services and its secretary, the Department of Veteran Affairs and its secretary, and the United States itself because the suit involves the constitutionality of an act of Congress.¹⁹⁷

The suit alleges DOMA violates the Spending Clause¹⁹⁸ by conditioning federal funding on the violation of citizens’ constitutional rights.¹⁹⁹ Because of DOMA’s Section 3, married same-sex couples in Massachusetts are denied rights including federal income tax credits, employment and retirement benefits, health insurance coverage and Social Security payments.²⁰⁰ According to the suit, the General Accounting Office has identified 1,138 statutory provisions in which marital status is a factor in determining eligibility for federal benefits rights and privileges.²⁰¹ In addition, the suit alleges that DOMA violates the Tenth Amendment,²⁰² arguing that until DOMA, the federal

¹⁸⁹ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss and in Support of Plaintiffs’ Motion for Summary Judgment at 12, Gill v. Office of Personnel Mgmt., No. 1:09-cv-10309 JLT (D. Mass. Nov. 17, 2009), *available at* <http://www.glad.org/uploads/docs/cases/2009-11-17-doma-memorandum.pdf>.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Press Release, GLAD, GLAD Responds to U.S. Motion to Dismiss DOMA Suit (Nov. 17, 2009), *available at* <http://www.glad.org/current/news-detail/glad-responds-to-u.s.-motion-to-dismiss-doma-suit/>.

¹⁹³ See Plaintiff’s Reply Memorandum of Law in Support of Their Motion for Summary Judgment, Gill v. Office of Personnel Mgmt., No. 1:09-cv-10309 JLT (D. Mass. Feb. 16, 2010), *available at* <http://www.glad.org/uploads/docs/cases/gill-reply-memo-in-support-of-summary-judgment-02-16-10.pdf>.

¹⁹⁴ See Complaint, Massachusetts v. United States Dep’t of Health and Human Servs., No. 09 CV 11156, (D. Mass. July 8, 2009), 2009 WL 1995808 (with accompanying materials available).

¹⁹⁵ 1 U.S.C. § 7.

¹⁹⁶ Complaint at 1, Massachusetts v. United States Dep’t of Health and Human Servs., No. 09 CV 11156, (D. Mass. July 8, 2009), 2009 WL 1995808.

¹⁹⁷ *Id.*

¹⁹⁸ U.S. CONST. art. I, § 8.

¹⁹⁹ Complaint, *supra* note 196, at 2.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² U.S. CONST. amend. X.

government had recognized that defining marital status was the “exclusive prerogative of the states and an essential aspect of each state’s sovereignty.”²⁰³

The suit alleges that DOMA creates two classes of married persons in Massachusetts.²⁰⁴ For example, employees of the Commonwealth have the option of including their spouses on their health insurance.²⁰⁵ But because DOMA restricts the meaning of “spouse” under the Internal Revenue Code, the Commonwealth must treat health benefits provided to same-sex spouses as taxable income for the purpose of federal income and Medicare tax withholding, when it is not required to do this for opposite-sex spouses.²⁰⁶ Collecting those taxes is a multi-step, burdensome process, the suit alleges.²⁰⁷

Further, the Commonwealth contends it faces an unconstitutional dilemma because any time it implements a federally funded program covered by DOMA, it has to choose either to forego recognition of otherwise valid marriages in order to keep the funding, or to honor all valid marriages and risk losing the funding.²⁰⁸ In particular, it recounts problems with the administration of its state health insurance program, which is jointly funded with the federal government, and with burials in its veterans’ cemeteries, which were built and improved with federal funds.²⁰⁹

The suit alleges that DOMA codifies animus toward gays and lesbians.²¹⁰ And it contends that the federal budget would actually benefit by the recognition of same-sex marriage in all fifty states by \$500 million to \$900 million annually, citing an estimate from the Congressional Budget Office, due to increased revenue through income and estate taxes and decreased expenditures for Supplement Security Income, Medicaid and Medicare.²¹¹

Briefs have been filed and the case is current pending in the District Court.²¹²

*Perry v. Schwarzenegger*²¹³

Immediately after the California Supreme Court upheld Proposition 8²¹⁴, in May 2009 two prominent attorneys filed a federal suit in the Northern District of California to challenge the

²⁰³ Complaint at 1, *Massachusetts v. United States Dep’t of Health and Human Servs.*, No. 09 CV 11156, (D. Mass. July 8, 2009), 2009 WL 1995808.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² See Memorandum of Points and Authorities on Support of Defendants’ Motion to Dismiss, *Massachusetts v. United States Dep’t of Health and Human Servs.*, No. 1:09-11156-JLT (D. Mass. Oct. 30, 2009), 2009 WL 3794375; Response of the Commonwealth of Massachusetts to the Motion of Mark A. Thomas for Intervener Status or to File an Amicus Curiae Brief, *Massachusetts*, No. 1:09-11156-JLT (D. Mass. Oct. 1, 2009), 2009 WL 3169897; Memorandum of Points and Authorities in Opposition to Motion for Permissive Intervention or, in the Alternative, for Leave to File Amicus Curiae Brief, *Massachusetts*, No. 1:09-11156-JLT (D. Mass. Oct. 1, 2009), 2009 WL 3169898.

²¹³ See *Perry v. Schwarzenegger*, 2009 WL 1490740 (N. D. Cal. May 22, 2009); see also American Foundation for Equal Rights, *Perry v. Schwarzenegger*, <http://www.equalrightsfoundation.org/our-work/perry-v-schwarzenegger/> (last visited Feb. 24, 2010).

²¹⁴ *Strauss v. Horton*, 207 P.3d 47 (Cal. 2009).

constitutionality of Proposition 8.²¹⁵ The plaintiffs are all California residents.²¹⁶ The defendants are the key California officials responsible for enforcing the new law, including Governor Schwarzenegger and Jerry Brown, California's Attorney General²¹⁷.

The lawsuit alleges violations of Due Process and Equal protection clauses. The website for the American Foundation for Equal Rights explains,

“Specifically, Proposition 8:

- Violates the Equal Protection Clause of the Fourteenth Amendment.
- Violates the Due Process Clause by impinging on fundamental liberties.
- Singles out gays and lesbians for a disfavored legal status, thereby creating a category of “second-class citizens.”
- Discriminates on the basis of gender.
- Discriminates on the basis of sexual orientation.”²¹⁸

The trial itself lasted just over two weeks and included witnesses on both sides testifying about same-sex marriage.²¹⁹ The witnesses on the plaintiffs' side supported the arguments that Proposition 8 is harmful and gave “dramatic and emotional testimony that banning same-sex marriage harms gay couples, their children and even society.”²²⁰ On the other side, the defenders of Proposition 8 argued that “the only question the court needs to address is the legal issue of whether voters acted rationally, not whether same-sex marriage is beneficial or harmful to society.”²²¹

Both public and expert opinion on the trial was sharply divided. Supporters of Proposition 8 felt that they put on a strong defense and reminded everyone that the burden of proof was on the plaintiffs.²²² On the other side, Rick Jacobs, a strong advocate for same-sex marriage commented that “[a]nybody who watched that trial, any federal judge who sat through that trial, would have to rule that Proposition 8 is blatantly discriminatory.... I'm not a judge, but everything was so clear in every possible way that Proposition 8 is the latest extension of decades-long discrimination against gays and lesbians.”²²³

²¹⁵ The attorneys are Ted Olson, a U.S. solicitor, and David Boies, a trial attorney: both men had become well known through their roles in the *Bush v. Gore* litigation. John W. Dean, *The Olson/Boies Challenge to California's Proposition 8: A High-Risk Effort*, FindLaw, May 29, 2009, <http://writ.news.findlaw.com/dean/20090529.html>.

²¹⁶ *Id.*

²¹⁷ *Id.* Note however, “Gov. Schwarzenegger, however, did not challenge the Foundation's position against Proposition 8, and Attorney General Brown went so far as to file papers with the court agreeing that Proposition 8 is unconstitutional. Accordingly, Proposition 8 is being defended by the group that led the campaign to pass it.” American Foundation for Equal Rights, *Perry v. Schwarzenegger*, <http://www.equalrightsfoundation.org/our-work/perry-v-schwarzenegger/> (last visited Feb. 24, 2010).

²¹⁸ *Id.*

²¹⁹ Valerie Richardson, *Prop 8 Trial Stirs Up Questions, Emotions; Gay-marriage Allies Optimistic*, WASH. TIMES (D.C.), Feb. 2, 2010, at A01, available at 2010 WLNR 2656797.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* Rick Jacobs, president of the Los Angeles-based Courage Campaign, attended and live-blogged throughout the entire trial.

Judge Walker, the District Court judge presiding over the trial without a jury, completed the testimony phase in late January and accepted additional evidence and amicus briefs shortly thereafter; closing arguments are expected in March.²²⁴ The commentators and press are convinced that this case “will surely advance to the 9th U.S. Circuit Court of Appeals and could end up before the U.S. Supreme Court.”²²⁵

C. The Debate To Date Has Not Included International Custom.

Challenges and defenses to same-sex marriage, domestic partnerships and civil unions have been made on a variety of points. Scholars have argued some of these points in various recent articles.²²⁶ Additionally, judges have been asked to interpret state constitutional amendments that prevent same-sex couples from getting married.²²⁷ This article proposes another argument that could be added to the challenges raised so far – that same-sex marriage should also be allowed under customary international law. The following is a brief explanation of some of the main arguments.

Due Process and Equal Protection

The argument for why refusal to allow same sex marriages violates equal protection clauses is based on the premise that such refusal is essentially discrimination based on sexual orientation. Often coupled with an argument about a violation of due process, the equal protection argument has been raised frequently at all levels. In fact, several courts have noted that the issues of the same-sex marriage debate create a convergence of the two constitutional provisions.²²⁸ In *Goodridge*, the Massachusetts Supreme Court noted, “[i]n matters implicating marriage, family life, and the upbringing of children, the two constitutional concepts frequently overlap.”²²⁹

The Supreme Court in *Lawrence v. Texas* held that criminal sodomy statutes are unconstitutional because they violate the Due Process clause.²³⁰ However, in her concurrence, Justice O'Connor noted that she would have found the law unconstitutional under Equal Protection analysis:

“This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. [citations omitted]

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See *supra* note 3.

²²⁷ See, e.g., *Alaska Civil Liberties Union v. State*, 122 P.3d 781 (Alaska 2005) (construing Alaska's marriage amendment); *State v. Carswell*, 871 N.E.2d 547 (Ohio 2007) (construing Ohio's marriage amendment). For a good discussion of recent Michigan interpretation of such an amendment, see, HARVARD LAW REVIEW, STATE CONSTITUTIONAL LAW -- SAME-SEX RELATIONS -- SUPREME COURT OF MICHIGAN HOLDS THAT PUBLIC EMPLOYERS MAY NOT PROVIDE HEALTHCARE BENEFITS TO SAME-SEX DOMESTIC PARTNERS OF EMPLOYEES NATIONAL PRIDE AT WORK, INC. V. GOVERNOR OF MICHIGAN, 748 N.W.2D 524 (MICH. 2008). 122 Harv. L. Rev. 1263 (2009) (arguing that the Michigan Supreme Court erred in concluding that the state's constitutional amendment banning gay marriage also prohibited public employers from providing health-care benefits to same-sex partners.).

²²⁸ See generally Landers, *supra* note 3, at 697-98.

²²⁹ *Goodridge*, 798 N.E.2d at 953; see also *Lawrence v. Texas* 539 U.S. 558, 575 (2003) (stating “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.”).

²³⁰ See *Lawrence v. Texas*, 539 U.S. 558.

Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.”²³¹

Even courts that have agreed that some part of equal protection was triggered have differed on whether gays and lesbians fall into a suspect class and, thereby, whether laws about same-sex marriage warrant strict scrutiny: Massachusetts did not find that the issue warranted strict scrutiny²³², but California did²³³. Both courts, however, found that refusal to allow same-sex marriage violated equal protection²³⁴.

In 2008, Connecticut became the third state to allow same-sex marriage²³⁵. In an important decision, the Connecticut Supreme Court focused on equal protection as a reason to invalidate the state laws that prohibited same-sex marriage.²³⁶ Eight same-sex couples denied marriage licenses sued state and local officials seeking a declaration that laws precluding same-sex marriage violated the state constitution.²³⁷ The trial court ruled in favor of the defendants, finding that because same-sex couples in the state could enter into civil unions, they had not suffered a constitutionally cognizable harm.²³⁸ The high court disagreed, invalidating the marriage laws on equal protection grounds.²³⁹ The court held that sexual orientation was a quasi-suspect class, and reviewed the laws on an intermediate scrutiny basis: it held that laws restricting civil marriage to opposite-sex couples were not substantially related to an important government interest in the regulation of marriage.²⁴⁰

Importantly, the court held that it was not enough that the civil union statute gave gay couples the same rights as opposite-sex married couples, because they still were not allowed to marry, and that status had a unique importance.²⁴¹ In holding that gay people were a quasi-suspect class, the court noted the history of discrimination they have faced and the fact that their distinguishing characteristic bears no relation to their ability to contribute to society.²⁴² The court also considered the immutability of a person’s sexual preference and the relative lack of political power of gay people.²⁴³ The court deemed the first of these two factors the most important, but said all of them applied to homosexuals as a class.²⁴⁴

Applying heightened scrutiny, the court considered the state’s justifications for the prohibition on gay marriage, which were (1) to promote uniformity with the laws of other jurisdictions; and (2) to preserve the traditional definition of marriage as between a man and a woman.²⁴⁵ The court said the mere assertion that uniformity with other jurisdictions was important couldn’t save the law, nor

²³¹ *Lawrence*, 539 U.S. at XXX (J. O’Connor concurring).

²³² *Goodridge*, 798 N.E.2d at 960.

²³³ The California Supreme Court did in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

²³⁴ *Id.* at 397 *Goodridge*, 798 N.E.2d at 953.

²³⁵ *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

²³⁶ *Id.* at 412.

²³⁷ *Id.* at 411.

²³⁸ *Id.* at 412.

²³⁹ *Id.*

²⁴⁰ *Id.* at 414.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 427-8.

²⁴⁴ *Id.* at 429.

²⁴⁵ *Id.* at 476-7.

could legislators' deeply held beliefs that marriage should be defined as it has been traditionally.²⁴⁶ Tradition alone cannot justify discrimination against a protected class, the majority said, and concluded that upholding the law against gay marriage would be tantamount to applying one set of constitutional principles to gay people and another to heterosexual people.²⁴⁷

In the most recent state supreme court decision to decide this issue, the Iowa Supreme Court held that Iowa's marriage statute, akin to the Federal DOMA law because it defined "marriage" as solely between a man and a woman, violated the fundamental right of same-sex couples to marry and unconstitutionally discriminated against them on the basis of sexual orientation.²⁴⁸ Using Iowa's equal protection clause, the court held that intermediate – and not strict – scrutiny applied, looking at these factors: (1) the history of discrimination against the class burdened by the statutory classification; (2) whether the characteristics that distinguish the class have anything to do with the class members' ability to contribute to society; (3) whether the distinguishing characteristic of the class is immutable or beyond the class members' control; and (4) the political power of the class.²⁴⁹ The court found the first two factors were met because of the history of discrimination against gays and lesbians, and because their sexual orientation has nothing to do with their ability to contribute to society.²⁵⁰

Importantly, the court found that regardless of whether homosexuals can change their orientation, the court said the immutability analysis does not come down to whether the characteristic is impossible to change, but rather whether the trait is so central to a person's identity that it would be unfair to ask the person to change: this is the case with homosexuality, the court found.²⁵¹ While homosexuals are not politically powerless, the court noted that women also had some measure of political power when the U.S. Supreme Court first began applying heightened scrutiny to them.²⁵² The key factor, according to the court, is whether the group has sufficient political power to promptly end the discrimination against it: the realm of civil marriage, the court noted, gays and lesbians have gained little ground.²⁵³

The Iowa court found that the statute did not withstand intermediate scrutiny because it was not substantially related to an important government objective.²⁵⁴ The court ordered the language limiting marriage to between a man and a woman to be stricken from the law, and for same-sex couples to be allowed to marry.²⁵⁵

One court considered the intriguing argument that a state's Equal Rights Amendment can implicate Equal Protection analysis:²⁵⁶

“Appellees assert that, because [the Maryland restriction against same-sex marriage] excludes same-sex couples from marriage, the statute draws an impermissible

²⁴⁶ *Id.* at 477.

²⁴⁷ *Id.* at 479.

²⁴⁸ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

²⁴⁹ *Id.* at 887-8.

²⁵⁰ *Id.* at 889.

²⁵¹ *Id.* at 897-8.

²⁵² *Id.* at 889.

²⁵³ *Id.* at 894.

²⁵⁴ *Id.* at 906-7.

²⁵⁵ *Id.*

²⁵⁶ *See Conaway v. Deane*, 932 A.2d 571 (Md. 2007)

classification on the basis of sex, in violation of Article 46 of the ERA. Specifically, Appellees reason that “[a] man who seeks to marry a woman can marry, but a woman who seeks to marry a woman cannot. Similarly, a woman who seeks to marry a man can marry, but a man who seeks to marry a man cannot.” Thus, because [the statute] allows opposite-sex couples to marry but, at the same time, necessarily prohibits same-sex couples from doing so, the statute “makes sex a factor in the enjoyment and the determination of one's right to marry,” and is therefore subject to strict scrutiny.”²⁵⁷

In that case, however, the Maryland Supreme Court held that the state’s equal rights amendment was meant to prevent discrimination between men and women as classes: because equality between sexes was the point of the statute, a law that treated them equally, in that neither could marry a partner of the same sex, did not amount to sex discrimination, and did not warrant strict scrutiny.²⁵⁸

The analogy to race based classifications – along with the argument that sexual orientation discrimination is as invidious as racial discrimination²⁵⁹ – raises the potential argument that same-sex marriage prohibitions violate equal protection just like the miscegenation statutes that the Supreme Court struck down in *Loving v. Virginia*.²⁶⁰

Right to Marriage²⁶¹

Another strong argument is that there is a constitutionally protected right to marriage. In *Goodridge*, the Massachusetts high court noted that the U.S. Supreme Court has described the right to marry as part of the fundamental right of privacy implicit in the Fourteenth Amendment’s Due Process clause.²⁶² The court cited *Loving v. Virginia*²⁶³ the case that held that barring interracial marriage violated the Fourteenth Amendment, for the proposition that the right to marry means little if a person cannot marry the person of his or her choice. The Vermont Supreme Court also found that marriage has long been considered a personal right.²⁶⁴

As one scholar notes,

“Given that the state already recognizes a right to marry for opposite-sex couples, if this is not a sufficient basis to extend that right to same-sex-couples, I do not know what would be. It is then almost a self-evident truth that same-sex couples ought to be afforded the same legal right to marry in the name of human dignity that is afforded to opposite-sex couples.”²⁶⁵

²⁵⁷ *Id.* at 585-6.

²⁵⁸ *Id.*

²⁵⁹ See generally, James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93 (1993) (comparing the legalization of interracial marriages to the fight to legalize same-sex marriages).

²⁶⁰ *Loving v. Virginia*, 388 U.S. 1 (1966); See ESKRIDGE, *supra* note 3, at 1504-10.

²⁶¹ See generally Samar, *supra* note 3, at 12-15 for a very good discussion. See also Vincent J. Samar, *Privacy and Same-Sex Marriage: The Case for Treating Same-Sex Marriage as a Human Right*, 68 MONT. L. REV. 335 (2007).

²⁶² *Goodridge*, 798 N.E.2d at 957 (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978), a key case invalidating Wisconsin law that provided that those with minor children they were obligated to support may not re-marry without court approval).

²⁶³ 388 U.S. at 1.

²⁶⁴ *Baker v. State*, 744 A.2d 864, 883 (Vt. 1999) (citing *Loving*, 388 U.S. at 1).

²⁶⁵ Samar, *Privacy and Same-Sex Marriage*, 68 MONT. L. REV. at 360-61.

Right to Privacy

The right to privacy has been raised in support of same-sex marriage as well.²⁶⁶ The argument here is that the right to marry is part of an individual's interest in personal autonomy, and as such, is protected. One article argues that the right to privacy requires the legalization of same-sex marriage.²⁶⁷ Because marriage itself does not exist independently from the law, the law must create the "'thing' to which one has a right to....[imposing] an *affirmative obligation* on the state" to allow same-sex marriage.²⁶⁸ The California supreme court found that same-sex marriages were protected under this right.²⁶⁹

Full Faith & Credit

Two independent issues arise under Full Faith & Credit analysis of this issue: first, whether a state can ignore a marriage entered into in another state, and second, whether absent DOMA, states can use their own laws to decide whether a marriage entered into a foreign state is "valid".

On the first issue, the argument might turn on whether marriages are "judgments" and as such, are protected by the Full Faith & Credit clause.²⁷⁰ This is a valuable argument – if accepted – because the Supreme Court has clearly stated (albeit in another context) that there is no "public policy" exception to Full Faith & Credit.²⁷¹

On the second issue, the answer is more clearly against same-sex marriage. The standard for whether a court's use of its own law violates Full Faith & Credit was established in the 1930s in a string of Supreme Court cases.²⁷² The end result was that a state can use its own law in a case as long as it has a "legitimate interest": a low standard, requiring just some factual connection between the facts of the case and the state that is seeking to apply its law.²⁷³

Free Exercise and Establishment Clauses

Arguments have also been made that state and federal DOMA statutes may violate the Free Exercise and Establishment Clauses of the First Amendment.²⁷⁴

Federalism

The federal DOMA law has been challenged on classic federalism grounds as well: the argument is that the federal government cannot dictate to states any rules about marriage. This, the argument goes, is strictly the province of state power.²⁷⁵

²⁶⁶ See, e.g., William M. Hohengarten, *Same-Sex Marriage and the Right to Privacy*, 103 YALE L.J. 1495 (1994).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1496.

²⁶⁹ *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

²⁷⁰ U.S. Const. art. IV, § 1. See also *supra*, note 55 and accompanying text.

²⁷¹ See *Baker v. General Motors Corp.*, 522 U.S. 222 (1998).

²⁷² *Pacific Employers Ins. Co. v. Industrial Accident Commission of State of California*, 306 U.S. 493 (1939); *Alaska Packers Ass'n v. Industrial Acc. Com'n*, 294 U.S. 532 (1935); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932).

²⁷³ *Pacific Employers*, 306 U.S. at 502-4.

²⁷⁴ See, e.g., Ben Schuman, *Gods & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO. L.J. 2103 (2008).

Spending Clause

Massachusetts' DOMA litigation against the federal government alleges that the Federal DOMA statute violates the Spending Clause.²⁷⁶ As discussed in the previous section²⁷⁷, the argument is this: the Spending Clause²⁷⁸ prevents Congress from exercising its spending power in a way that induces any state to violate its' citizens constitutional rights.²⁷⁹ Massachusetts has granted same-sex couples constitutional protection but DOMA would have Massachusetts treat same sex couples differently than married couples when it comes to a number of state run Federal programs.²⁸⁰ This, then violates the spending clause.²⁸¹

Other Attacks on the Federal DOMA Statute

In addition to the recent lawsuits²⁸², a number of articles have argued against the constitutionality of DOMA.²⁸³ One article argues that that Congress didn't have the power to enact DOMA in the first place and "tramples" state sovereignty over family law.²⁸⁴ Since DOMA is legislation in an area that is typically state controlled, the federal government should have to show a "substantial federal interest" before federal law is allowed to conflict with state family law, and it fails to do so.²⁸⁵ No explicit delegation of power enables Congress to "'restrict, abrogate or dilute,' the mandates of the FFCC."²⁸⁶ This author stresses that DOMA is unique – and impermissibly so – because it explicitly gives states permission to ignore the constitutional requirements of the Full Faith and Credit Clause."²⁸⁷

Unique Solutions

It should also be noted that some of the articles in favor of same-sex marriage have offered solutions for how such marriages can be allowed and still accepted by many people.²⁸⁸

²⁷⁵ See, e.g., Complaint at 1, *Massachusetts v. United States Dep't of Health and Human Servs.*, No. 09 CV 11156, (D. Mass. July 8, 2009), 2009 WL 1995808; see generally Ann Laquer Estin, *Sharing Governance: Family Law In Congress And The States*, 18 CORNELL J.L. & PUB. POL'Y 267, 311 (2009).

²⁷⁶ Complaint at 2, *Massachusetts v. United States Dep't of Health and Human Servs.*, No. 09 CV 11156 (D. Mass. July 8, 2009), 2009 WL 1995808.

²⁷⁷ See *supra* notes 194-212 and accompanying text.

²⁷⁸ U.S. CONST. art. I, § 8.

²⁷⁹ Complaint at 88, *Massachusetts*, No. 09 CV 11156.

²⁸⁰ Programs listed include MassHealth, Medicaid, State Cemetery grants, etc. *Id.* at 90, 91, 94.

²⁸¹ *Id.*

²⁸² See *supra* notes 194-212 and accompanying text.

²⁸³ In addition to the articles discussed, see also Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution*, 7 CORNELL J. L. & PUB. POL'Y 203, Fall 1997.

²⁸⁴ Melissa A. Provost, *Disregarding the Constitution in the Name of Defending Marriage: The Unconstitutionality of the Defense of Marriage Act*, 8 SETON HALL CONST. L.J. 157, 196 (1997).

²⁸⁵ *Id.* at 197-8.

²⁸⁶ *Id.* at 200

²⁸⁷ *Id.* at 201; see also Kafahni Nkrumah, *The Defense of Marriage Act: Congress Re-Writes the Constitution to Pacify its Fears*, 23 T. MARSHALL L. REV. 513, 519-20 (1998) (arguing that the Defense of Marriage Act contradicts the Full Faith and Credit Clause of the Constitution by allowing those states to take away the state and federal marital rights of same-sex couples).

²⁸⁸ See, e.g., James L. Musselman, *What's Love Got To Do With It? A Proposal For Elevating The Status Of Marriage By Narrowing Its Definition, While Universally Extending The Rights And Benefits Enjoyed By Married Couples*, 16 DUKE J. GENDER L. & POL'Y 37 (2009). Professor Musselman proposes opening up marriage to same-sex couples, while offering a more

Arguments Against

Arguments against same-sex marriage have gained much national attention, and are oftentimes heartfelt moral and religious objections²⁸⁹. One note offered a legal response to the religious concerns:

“While one may personally support same-sex marriage, that does not give one the right to denigrate the sincerely held religious beliefs of another who does not support same-sex marriage. And vice versa. Dividing civil marriage from religious marriage, keeping the church out of the state and the state out of the church, is the best method for preventing injustice to either side.”²⁹⁰

Another book, focusing on Christian objections to same-sex marriage²⁹¹, suggests that there needn’t be a conflict between religion and same-sex marriage: “Because marriage is inherently healthy, same-sex marriage will be healthier than its less permanent alternatives.”²⁹²

Considering the other argument often made, that this will open a Pandora’s Box of undesirable marriage options, the authors note, “It will likely not accelerate us down a slippery slope to promiscuity and polygamy.... It can prompt heterosexual women and men to appreciate marriage in a new way.”²⁹³ Other sources have studied the effects of registered partnerships and same-sex marriages in Scandinavian countries and have proven that same-sex marriage does not undermine society, harm children or lead to the parade of horrors that opponents have suggested.²⁹⁴

Sometimes, the arguments against same-sex marriage are simply reasons for why a *ban* on such marriages *is* permissible. For example, in 2006, the Eighth Circuit found that Nebraska’s constitutional amendment defining marriage as between a man and woman did not violate the federal Constitution.²⁹⁵ The court cited a long line of rulings finding that it is reasonable to confer

narrowly defined “covenant” marriage to those opposite-sex couples who want a more traditional marriage. *Id.* at 77-86. The relationships would confer the same rights and benefits, but “covenant marriage” would only be available to straight couples. *Id.* Musselman argues that this may solve the constitutional problem of prohibiting gay marriage because such a prohibition denies rights and benefits to class of individuals based on their choice of a partner; he suggests that this would also elevate marriage to a more honored status in society, which would result in more stable relationships. *Id.* Interestingly, the Kansas legislature has just recently allowed covenant marriage for heterosexual couples. See Mary Sanchez, *Kansas marriages need more than covenants*, KansasCity.com, Feb, 21, 2010, available at <http://www.kansascity.com/2010/02/21/1764522/kansas-marriages-need-more-than.html>.

²⁸⁹ See, e.g., Schuman, *supra* note 274, at 2103 (presenting a good description of the religious arguments against same-sex marriage, and a well reasoned response thereto). The author of the current article has no doubt of the sincerity of some strongly held religious beliefs, and credits her good friend, Jay Sultan, for explaining those with patience and heart, for consideration in this article.

²⁹⁰ *Id.* at 2141.

²⁹¹ Certainly, other faiths have objections as well. See, e.g., Abdullah al-Ahsan, *Law, Religion And Human Dignity In The Muslim World Today: An Examination Of Oic's Cairo Declaration Of Human Rights*, 24 J.L. & RELIGION 569, 573 (2008-9) (noting that “the demands for gay rights and the right of consensual sex outside of marriage are not popular demands in Muslim countries.”).

²⁹² DAVID G. MYERS & LETHA DAWSON SCANZONI, *WHAT GOD HAS JOINED TOGETHER: A CHRISTIAN CASE FOR GAY MARRIAGE* 130 (Harper Collins 2005).

²⁹³ *Id.*

²⁹⁴ See, e.g., WILLIAM N. ESKRIDGE, JR. AND DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE – WHAT WE’VE LEARNED FROM THE EVIDENCE* (Oxford 2006).

²⁹⁵ *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

the inducement of marriage on opposite-sex couples in order to ensure responsible procreation.²⁹⁶ Without clear explanation as to its finding, the court noted that the Nebraska amendment was not similar to the one in *Romer*²⁹⁷ because unlike the amendment at issue there, the marriage amendment could be explained by reasons other than animus toward gays.²⁹⁸

Sometimes, however, judicial reasoning incorporates a moral stance against homosexuals. For example, in the early 1970's, the Eighth Circuit found that a university library's refusal to hire a man who had filed for a marriage with another man did not violate equal protection because the university had broad discretion in the administration of the college and had ample reason to conclude that McConnell's promotion would not be in the best interest of the school.²⁹⁹ The court focused on the fact that McConnell was not a homosexual, but was actively seeking to "implement" his unconventional ideas "and, thereby, to foist tacit approval of this socially repugnant concept upon his employer"³⁰⁰

One of the most common arguments for why same-sex marriage fails the *Loving* analogy is definitional: marriage is, has been and should be defined as strictly between one man and one woman. In one case, the Kentucky courts considered a case where two women who wanted to be married, and who alleged that the refusal of a county clerk to issue them a marriage license violated their right to marry, right to free association, and right to free exercise of religion.³⁰¹ They also contended the refusal amounted to cruel and unusual punishment.³⁰² The Kentucky Court of Appeals "analysis" was this:

"Kentucky statutes do not specifically prohibit marriage between persons of the same sex nor do they authorize the issuance of a marriage license to such persons. Marriage was a custom long before the state commenced to issue licenses for that purpose. For a time the records of marriage were kept by the church.... *[M]arriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary....* It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined."³⁰³

Eskridge offers a response to that:

"Opponents are then left with only one definitional argument, that no official act of legislation or high court decision has ever sanctioned a same-sex marriage occurring in the United States. But this is a circular argument in a constitutional case, where the legitimacy of a state's practice is questioned. Is it legitimate for the state to prohibit one class of people from getting married? To say that the state will not give

²⁹⁶ *Id.* at 867 (citing *Hernandez v. Robles*, No. 86, 2006 N.Y. Slip Op 5239 at 5-6, 2006 WL 1835429 (N.Y.Ct.App. Jul. 6, 2006); *Morrison v. Sadler*, 821 N.E.2d 15, 24-26 (Ind.Ct.App.2005)).

²⁹⁷ *Romer v. Evans*, 517 U.S. 620 (1996)

²⁹⁸ *Citizens*, 455 F. 3d at 867-8.

²⁹⁹ *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971)

³⁰⁰ *Id.* at 196.

³⁰¹ *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973).

³⁰² *Id.*

³⁰³ *Id.* at 589.

marriage licenses to same-sex couples because they by “definition” cannot be married, and then to support that definition by reference to the state's traditional refusal, is not only viciously circular but dissolves the line separating law from fiat.”³⁰⁴

Finally, as has been discussed, sometime the argument is based on the tradition of what marriage has “always” been: the union of a man and woman. To this, the Connecticut Supreme Court offered this response: “[t]radition alone never can provide sufficient cause to discriminate against a protected class...”³⁰⁵

³⁰⁴ ESKRIDGE, *supra* note 3, at 1495.

³⁰⁵ Kerrigan, 957 A.2d at 479.

PART THREE: SAME-SEX MARRIAGE AS CUSTOMARY INTERNATIONAL LAW

*“The right to marry whoever one wishes is an elementary human right compared to which ‘the right to attend an integrated school, the right to sit where one pleases on a bus, the right to go into any hotel or recreation area or place of amusement, regardless of one’s skin or color or race’ are minor indeed. Even political rights, like the right to vote, and nearly all other rights enumerated in the Constitution, are secondary to the inalienable human rights to ‘life, liberty and the pursuit of happiness’ proclaimed in the Declaration of Independence; and to this category the right to home and marriage unquestionably belongs.”*³⁰⁶

Customary international law is the often-misunderstood arm of the international legal system. Less readily ascertainable than treaty law, but still integral to the laws of nations, custom holds a unique place for the international and domestic courts. One scholar describes it the following way: “For many modern international lawyers, customary international law is, alongside treaty law, one of the two central forms of international law. Indeed, until the twentieth century, custom was often viewed as the principal source of international law.”³⁰⁷

The current status of custom is a slight second to international treaty law: the Statute of the International Court of Justice (“ICJ”) states,

“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;³⁰⁸

The idea behind custom is that it is, like treaty law, a consensual form of law.³⁰⁹ It is distinguishable from treaties because the legal rules in custom are implied, rather than explicit.³¹⁰ Of course, it is unfair to introduce custom as a concept that uncontroversial: some customary law may be viewed as being merely regional custom, and some states may expressly opt out of custom.³¹¹ However, frequently custom is viewed as “general international law” and may be described as a “universal law of society”.³¹²

³⁰⁶ Hannah Arendt, *Reflections on Little Rock*, DISSENT 6, No. 1, Winter 1959.

³⁰⁷ MARK WESTON JANIS, INTERNATIONAL LAW 44 (5th ed. 2008).

³⁰⁸ Statute of the International Court of Justice, art 38(1)(b), available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II (last visited on February 25, 2010).

³⁰⁹ JANIS, *supra* note 307, at 45.

³¹⁰ *Id.*

³¹¹ *Id.* (discussing the *Asylum* case of 1950, 1950 I.C.J. Reports 266, where the ICJ held that Peru was not obligated to follow an arguably American regional custom regarding asylum because it had expressly rejected that custom); *See also id.* at 56-57.

³¹² *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820); *see generally* JANIS, *supra* note 307, at 45.

Customary international law may evolve from norms in international treaties, and may be based on the U.N. Charter or similar international documents.³¹³ Some have argued that because the United States has not ratified many human rights treaties, a special importance must be given to custom.³¹⁴ Since treaty law – somewhat akin to legislation in common law countries – cannot touch on every topic, custom is viewed as a useful gap filler, but still, importantly, a real source of law.³¹⁵

Much interesting analysis has been undertaken to assess exactly what rises to the level of a norm of customary international law, with much disagreement at every level.³¹⁶ This article argues that rights instruments that reflect custom, and the modern trend, and the justifications of the countries that have allowed same-sex marriage support this argument and may be used in the U.S. courts to bolster the position that same-sex marriages should be protected through customary international law.

A. Same-Sex Marriages Are Protected Under Some International Documents.

Treaties, declarations and resolutions passed by international organizations can serve as evidence of customary international law.³¹⁷ Although no document explicitly grants a right to same-sex marriage, several have provisions that could – and have – been read to extend similar rights. As one scholar noted, “Although the Universal Declaration of Human Rights and the other principal human rights instruments drafted by the United Nations do not explicitly mention sexual orientation or same-sex marriage, they have created a comprehensive body of human rights law that protects all people.”³¹⁸

First, the Universal Declaration on Human Rights³¹⁹ has several provisions that can be read to protect same-sex marriage.

Article 7 provides equal protection:

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”³²⁰

Article 12 focuses on privacy:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”³²¹

³¹³ See generally JANIS, *supra* note 307, at 43-57.

³¹⁴ See generally Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 42 (1992). The recent ratification of major human rights treaties may, however, make U.S. courts less reluctant to apply customary international law.

³¹⁵ JANIS, *supra* note 307, at 44.

³¹⁶ See, e.g., Christiana Ochoa, *The Individual And Customary International Law Formation*, 48 VA. J. INT'L L. 119 (2007).

³¹⁷ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (noting “(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.”).

³¹⁸ Mary Patricia Byrn, *Same-Sex Marriage in South Africa: A Constitutional Possibility*, 87 MINN. L. REV. 511, 537 (2002).

³¹⁹ Universal Declaration of Human Rights, G.A. Res. 217 A(III), at art. 20(1), U.N. Doc. A/810 (Dec. 10, 1948).

³²⁰ *Id.*

³²¹ *Id.*

Article 16 guarantees a right to marry:

“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”³²²

In addition to the Declaration, the International Covenant on Civil and Political Rights (ICCPR)³²³ is the leading international document that can serve as evidence of customary international law in this area.³²⁴ The U.N. Human Rights Committee (HRC) has found that some of the protections of the ICCPR encompass sexual orientation³²⁵, and some scholars have proposed that the HRC’s holding supports that argument that same-sex marriage is a protected right under international law.³²⁶ One article has gone so far as to state that, “the logical interpretation of the ICCPR itself arguably stands for the right of homosexuals to marry one another.”³²⁷ The ICCPR could, theoretically, be used as a treaty based source of international law, enforceable through human rights organizations or in the U.S. courts.³²⁸ However, this article would like to develop the less-discussed idea: that the ICCPR could be used as evidence of customary international law and this is reason alone to consider its provisions as relevant to American jurisprudence.

While neither the ICCPR nor any internationally ratified document has recognized an explicit right to same-sex marriage³²⁹, several provisions in the ICCPR support at least a right to equality regardless of sexual orientation.

Article 2 of the ICCPR provides:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”³³⁰

Article 26 of the ICCPR is its equal protection provision:

“All persons are equal before the law and are entitled without any discrimination to

³²² Id.

³²³ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (hereinafter “ICCPR”).

³²⁴ See Edward H. Sadtler, *A Right to Same-Sex Marriage Under International Law: Can it be Vindicated in the United States?* 40 VA. J. INT’L L. 405 (1999) for an excellent discussion of this particular point, and whether the ICCPR could also be usable in U.S. courts as a treaty.

³²⁵ See *Toonen v. Australia*, Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 49th Sess., Supp. No. 40, vol. II, at 226, U.N. Doc. A/49/40 (1994).

³²⁶ See Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 Harv. Hum. Rts. J. 61, 70 (1996) (“By recognizing that sexual orientation discrimination may violate international human rights obligations, the Committee has opened the door to a wide range of challenges to laws and policies that disadvantage sexual minorities, including ... limiting marriage exclusively to heterosexuals.”).

³²⁷ Anne M. Burton, *Gay Marriage--A Modern Proposal: Applying Baebr v. Lewin to the International Covenant on Civil and Political Rights*, 3 IND. J. GLOBAL LEGAL STUD. 177, 206 (1995).

³²⁸ See *id.* at 199-202; see also Sadtler, *supra* note 324, at 431-445.

³²⁹ See Sadtler, *supra* note 324, at 418.

³³⁰ See ICCPR, *supra* note 323, art. 2(1).

the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.³³¹

In the important and interesting case of *Toonen v Australia*, the HCR found that the gender protection in Article 26 protection also encompassed sexual orientation.³³² In that case, an Australian citizen alleged that Tasmania's anti-sodomy laws³³³ violated his rights under the ICCPR. The Human Rights Commission found that the laws violated the equal protection provisions of article 2, and the privacy protections of Article 17.³³⁴ Australia urged Tasmania to repeal the offending laws, finally giving Tasmania a two-month deadline.³³⁵ Importantly, the decision affirmed the importance of homosexual rights within international law and "was a watershed for gay and lesbian rights advocates."³³⁶

Additionally, Article 23 of the ICCPR recognizes a right to marry: "The right of men and women of marriageable age to marry and to found a family shall be recognized."³³⁷

One article examined the Hawaii Supreme Court's reasoning in *Baehr v. Lewin*³³⁸ and found that it supported a reading of the ICCPR to protect same sex marriage:

"The *Baehr* court held that if a man can marry a woman the state cannot prohibit a woman from exercising the same right. Thus, under the equal protection clause of the Hawaiian constitution, a woman may marry a woman; a man may marry a man. Because of the similarities between Hawaii's constitution and Articles 23 and 26 of the ICCPR, *Baehr*'s reasoning could successfully be applied to the ICCPR resulting in the same conclusion that the *Baehr* court reached."³³⁹

³³¹ *Id.* at art. 26.

³³² *Toonen v. Australia*, Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 49th Sess., Supp. No. 40, vol. II, at 226, U.N. Doc. A/49/40 (1994). See generally, Sadtler, *supra* note 324; Burton, *supra* note 327.

³³³ Tas. Stat. R. §§ 122(a), (c) and 123.

³³⁴ *Toonen v. Australia*, Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 49th Sess., Supp. No. 40, vol. II, at 226, U.N. Doc. A/49/40 (1994). The HRC was established under the ICCPR to ensure compliance with the provisions of the Covenant. ICCPR, *supra* note 323, arts. 28, 40. Under the Optional Protocol to the ICCPR, even individuals can bring complaints of alleged violations, thereby allowing the HRC to act in a quasi-judicial capacity. See Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, arts. 1-2, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976).

³³⁵ Deutsche Presse-Agentur, *United Nations Panel Attacks Tasmania Law Against Homosexuality*, SAN DIEGO UNION-TRIB., May 13, 1994, at A-32, available at LEXIS, News Library, NEWS File.

³³⁶ See Sadtler, *supra* note 324, at 419.

³³⁷ ICCPR, *supra* note 323, at art. 23. See discussion in Sadtler, *supra* note 324, at 424 on the use of the terms "men" and "women." While arguably, these could be read to mean that the Covenant only protects the right to marriage when it is a man and a woman getting married, the better understanding is that no such restriction should be superimposed on the drafters' design. See Sadtler, *supra* note 324, at 424 n. 100 (noting that "[o]ther international treaties use similar language. The American Convention on Human Rights provides: 'The right of men and women of marriageable age to marry and to raise a family shall be recognized . . .'; Organization of American States, American Convention on Human Rights, art. 17(2), Nov. 22, 1969, 1144 U.N.T.S. 123, 999 U.N.T.S. 150. The European Convention for the Protection of Human Rights and Fundamental Freedoms provides: 'men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.' Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 12, Nov. 4, 1950, 213 U.N.T.S. 221.').

³³⁸ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), discussed *infra* at notes 139-48 and accompanying text.

³³⁹ Burton, *supra* note 327, at 206.

In 1994, the European Parliament called for an end to discrimination against gays and lesbians, passing the resolution on “Equal Rights for Homosexuals and Lesbians in the European Union”.³⁴⁰ This resolution calls upon member states to end “the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework”³⁴¹ and states that instead they “should guarantee the full rights and benefits of marriage, allowing the registration of partnerships.”³⁴² It reaffirmed this stance in 1998.³⁴³ In 2006, the European Parliament expressed concern about nations banning same-sex unions and called on member states to end discrimination and homophobia.³⁴⁴

Finally, most recently - in December 2008 -, the United Nations General Assembly issued a Statement on Human Rights, Sexual Orientation and Gender Identity:

“We reaffirm the principle of universality of human rights. We reaffirm that everyone is entitled to the enjoyment of human rights without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, as set out in Article 2 of the Universal Declaration of Human Rights and Article 2 of the International Covenants on Civil and Political, Economic, Social and Cultural Rights, as well as in article 26 of the International Covenant on Civil and Political Rights.”³⁴⁵

The significance of the General Assembly Statement is that even though it is not a treaty, it is an expression of state positions and thus an integral component of customary international law. Together, these various documents indicate that there may well be a level of protection in customary international law for same sex-marriage.

B. Same-Sex Marriages Are A Modern Trend.³⁴⁶

The status of same-sex couples in the world varies greatly³⁴⁷, but this article argues that the trend³⁴⁸ seems to be in favor of same-sex marriage³⁴⁹. This section describes some of the key laws at issue; Appendix II details the status of couples in many parts of the world.

³⁴⁰ Resolution on Equal Rights for Homosexuals and Lesbians in the EC, 1994 O.J. (C 61/40) 40. (pdf available at <http://www.france.qrd.org/assocs/ilga/euroletter/63.html>).

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ Resolution on equal rights for gays and lesbians in the EC, http://www.europarl.europa.eu/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=980917&LANGUAGE=EN&TPV=DEF&SDOCTA=10&TXTLST=7&Type_Doc=RESOL&POS=1 (last visited Feb. 24, 2010).

³⁴⁴ European Parliament Resolution on Homophobia in Europe, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2006-0018&language=EN&ring=P6-RC-2006-0025>.

³⁴⁵ United Nations General Assembly Statement on Human Rights, Sexual Orientation and Gender Identity, U.N. Doc. A/63/635 (Dec. 18, 2008).

³⁴⁶ See Wojcik, *supra* note 3, at 607-615 for an excellent discussion of the progress of same-sex marriage throughout the world.

³⁴⁷ See Appendix II, which details the rights available (or not available) in many countries.

³⁴⁸ Admittedly, there is excellent scholarship arguing just the opposite. See, e.g., Fellmeth, *supra* note 3, at 928 (comprehensively evaluating worldwide rights of sexual minorities and concluding that “beyond Europe and a few isolated states elsewhere, the trend toward recognition of sexual privacy rights “remains an aspiration goal for international law.”).

European countries, and Scandinavian countries in particular have led the way in allowing and recognizing such unions. Both the first – Netherlands, in 2001³⁵⁰ – and most recent – Sweden, in 2009³⁵¹ – countries to have a nationwide law allowing same-sex marriage are in Europe. The seven countries that have legalized same-sex marriage are Netherlands (2001)³⁵², Belgium (2003)³⁵³, Spain (2004)³⁵⁴, Canada (2005)³⁵⁵, South Africa (2005)³⁵⁶, Norway (2008)³⁵⁷ and Sweden (May, 2009).³⁵⁸

Portugal may be on the way to allowing same-sex marriage: its Parliament has passed a law that will allow it, which the President has not yet, but is expected to, sign.³⁵⁹

Argentina held the first same-sex marriage in Latin American in December, 2009³⁶⁰, and a bill is will be discussed in Argentina's Congress to allow same-sex marriage in that country.³⁶¹ The Justice

³⁴⁹ There is also some end-directed-research and writing on this issue. See Melissa Durand, *From Political Questions to Human Rights: The Global Debate on Same-Sex Marriage and its Implications for U.S. Law*, 5 REGENT J. INT'L L. 269 (2007) (student note recognizing that same-sex marriage has gained acceptance in international law, but observing that marriages are in decline in the countries that lack "religiosity" and allow same-sex marriage – though acknowledging that there is no causal connection between same-sex marriage and divorce or out-of-wedlock children). The paper obviously opposes same-sex marriage but its real danger is that in arguing that courts should resist same-sex marriage - *because society is ready to embrace it* - it puts the courts in the undemocratic role of gatekeepers of a certain, approved type of social norm: "as laws liberalize globally, it will become more difficult for even conservative courts to resist the waves of cultural change." *Id.* at 298.

³⁵⁰ THE PEW FORUM ON RELIGION AND PUBLIC LIFE, SAME-SEX MARRIAGE: REDEFINING MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/docs/?DocID=235>.

³⁵¹ *Sweden Passes Same Sex Marriage Law*, CNN, Apr. 1, 2009, <http://edition.cnn.com/2009/WORLD/europe/04/01/sweden.samesex/index.html>.

³⁵² THE PEW FORUM ON RELIGION AND PUBLIC LIFE, *supra* note 350.

³⁵³ *Id.*

³⁵⁴ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/spain (last visited Feb. 21, 2010).

³⁵⁵ THE PEW FORUM ON RELIGION AND PUBLIC LIFE, *supra* note 350; see also Wojcik, *supra* note 3, at 636-647 (thoroughly discussing the developments that led to same-sex marriage in Canada).

³⁵⁶ THE PEW FORUM ON RELIGION AND PUBLIC LIFE, SAME-SEX MARRIAGE: REDEFINING MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/docs/?DocID=235>. The South African statute is available here. South African Government Information, Government Gazette, <http://www.info.gov.za/view/DownloadFileAction?id=67843> (last visited Feb. 21, 2010); see also Byrn, *supra* note 318, at 511 (predicting accurately that South Africa would allow same-sex marriages *before the law was passed*).

³⁵⁷ The Marriage Act, <http://www.regjeringen.no/en/doc/Laws/Acts/the-marriage-act.html?id=448401>. A 2008 amendment to The Marriage Act repealed The Partnership Act, allowing two persons of the same sex to contract a marriage. The Partnership Act allowed for same-sex civil unions and almost all of the same rights that heterosexual married couples received--except full adoption rights. The amendment effectively abolishes civil unions and makes marriage laws gender neutral. See Ministry of Children, Equality and Social Inclusion, A Marriage Act for All, <http://www.regjeringen.no/en/dep/bld/Topics/Homosexuality/a-marriage-act-for-all--entering-into-fo.html?id=509376>.

³⁵⁸ Gender-neutral Marriage and Marriage Ceremonies, <http://www.sweden.gov.se/sb/d/574/a/125584>. See also *infra* Appendix 2, which details the laws in many countries.

³⁵⁹ Agence France-Presse, *Portuguese Parliament Passes Gay Marriage Bill*, VANCOUVER SUN, Feb. 11, 2010, <http://www.vancouversun.com/life/Portuguese+parliament+passes+marriage+bill/2551697/story.html>. As further proof of the immediacy of this, the Portuguese law was passed as this article was in the final stages of being written, and the status of the law may well change during the editing process.

³⁶⁰ Almudena Calatrava, *Gay Marriage in Argentina is 1st in Latin America*, MercuryNews.com, Dec. 28, 2009, http://www.mercurynews.com/news/ci_14082112?nclink_check=1.

³⁶¹ Anibal Fernandez *Supports Parliamentary Debate on Same-Sex Marriages*, Buenos Aires Herald, <http://www.buenosairesherald.com/BreakingNews/View/4013>.

Minister of Argentina has spoken out in favor of the bill.³⁶² In Mexico City, legislators made another striking move for same-sex marriage when they passed a law giving same-sex couples full access to marriage.³⁶³

Recently, other countries have allowed for recognition of same sex-couples through judicial decisions. For example, a judicial decision in Nepal in November, 2008 made news:

“In a landmark verdict, the apex court in Nepal has given its consent to same-sex marriages, a move that beats off social taboos in the conservative valley. The apex court on Monday directed the Maoist-led government in Nepal to formulate necessary laws to guarantee full rights to gays, including right to same-sex marriage.”³⁶⁴

The legislation to realize that directive may come as soon as 2010.³⁶⁵

Some countries do not allow same-sex marriage, but offer other protections. For example, recognition of same-sex marriages from other jurisdictions is required in Israel, Aruba, and the Dutch Antilles; recently, France and Japan have required recognition as well.³⁶⁶ As Appendix II details, civil unions and registered partnerships are allowed in a number of nations as well.³⁶⁷

However, in much of the world, there is no recognition for same-sex marriage, or civil unions; in the worst situations, there is either no protection for same-sex couples or at the most extreme, government sponsored persecution.³⁶⁸ Certainly, there is a strong argument to be made that since most of the countries of the world do not yet allow same-sex marriage, it has not risen to the level of an international norm.³⁶⁹ This article suggests that the trend is in favor of same-sex marriage and that international documents and state justifications evidence a sense of obligation, and that together, this establishes the possibility that the norm already exists.

It is important to note that this article in no way intends to detract from the seriousness of the discrimination imposed on homosexuals throughout the world. There is also a counter-argument that can be made that could actually benefit same-sex couples: if the trend is away from same-sex

³⁶² *Id.*

³⁶³ Miguel Angel Gutierrez, *Mexico City Allows Gay Marriage with Landmark Law*, REUTERS, Dec. 22, 2009, <http://www.reuters.com/article/idUSTRE5BK47420091222>.

³⁶⁴ *Nepal SC Approves Same-Sex Marriage*, HINDUSTAN TIMES, Nov. 19, 2008, <http://www.hindustantimes.com/News-Feed/nepal/Nepal-SC-approves-same-sex-marriage/Article1-352722.aspx>.

³⁶⁵ “Some Do, Some Don’t,” WEST AUSTRALIAN NEWSPAPERS, Nov. 21, 2009, *available at* 2009 WLNR 23583346.

³⁶⁶ THE PEW FORUM ON RELIGION AND PUBLIC LIFE, GAY MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/docs/?DocID=423>.

³⁶⁷ See *infra* Appendix II. See also LGBT World Legal Wrap-Up Survey, November 2006, pdf *available at* www.lsvd.de/756.0.html (noting that some 20 countries have civil unions, domestic partnerships or other legal protections.).

³⁶⁸ In Jamaica, for example, “openly gay people must contend with the constant fear of violence... Many attacks [on homosexuals] go unreported.” *A Vicious Intolerance*, ECONOMIST, Sept. 19, 2009, at 49. The Washington Post reported in 2006 – when South Africa legalized same-sex marriage – that “homosexuality is still largely taboo in Africa. It is illegal in Zimbabwe, Kenya, Uganda, Nigeria, Tanzania, Ghana and most other sub-Saharan countries.” *Same-Sex Marriage Law Takes Effect in S. Africa*, WASH. POST, Dec. 1, 2006 (Pg. Unavail. Online), *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/30/AR2006113001370.html>.

³⁶⁹ See Fellmeth, *supra* note 3.

marriage and protection of such relationships, then the world should pay more attention to the problems that gay and lesbian citizens of various countries are facing and should address those problems.

Looking just at same-sex marriage, however, the most current trend seems to be in the direction of allowing such unions. Consider this statement from a Dutch legal expert:

"The Belgian law shows that the Dutch were not acting peculiarly insular[ly], when they opened up marriage to same-sex couples in 2001. There is a continuous trend in the law of many countries to recognize same-sex love as equal to different-sex love. And there is no reason why some of the core institutions of family law should be excluded from this utterly just trend. After Belgium, one would expect Sweden, South-Africa, or Canada to be the next jurisdiction to legislate for full equality in family law."³⁷⁰

C. State Justifications For Allowing Same-Sex Marriage Show A Sense Of Legal Obligation.

Another tool for assessing what falls under “custom” is to review of the practice of nations and – crucially – their reasons for the practice. The Restatement of Foreign Relations states that “[c]ustom results from a general and consistent practice of states, followed by them from a sense of legal obligation.”³⁷¹

The next question then becomes: how does one know WHAT states are doing and how does one know WHY states are doing what they are doing? State practice “includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy.”³⁷² Luckily, the internationalization of legal research has made it possible to determine what the laws and practices are in many – if not all – states of the world.³⁷³

It can be difficult to determine why a state is doing what it is doing. Thus, the relevant question to ask is not just whether certain states allow same-sex marriage, but why the states that allow same-sex marriages have done so. Evidence of custom and reasons for adoption of laws can be found in official statements of the governments.³⁷⁴

³⁷⁰ Equal Marriage for Same-Sex Couples, Marriage Equality in our World, <http://www.samesexmarriage.ca/equality/bel013003.htm> (noting the statement by Dutch legal expert, Kees Waaldijk). Douglas Elliott, president of the International Lesbian and Gay Law Association, made a similar statement:

Belgium's action is a tremendous step forward. It is the second country in the world to have its government legally recognize same sex marriage. It is in a country with a majority of Catholics, too, that has historically been far more conservative than the Netherlands. Rather than Holland being the odd man out, a trend is being created. As a former resident of that other delightful bilingual kingdom, I can only say, 'Vive Verhofstadt et vive la Belgique!'

Id.

³⁷¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

³⁷² *Id.* § 102, cmt. B.

³⁷³ See *infra* Appendix II for a summary of the laws.

³⁷⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. B, "Practice of states," Subsection (2), includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states..."

Interestingly, many of the countries that have allowed same-sex marriage have either justified the decision by relying on international law, or have at least referred to international law in the explanation of why same-sex marriages were allowed. Note the following examples from the countries that have allowed same-sex marriage, organized alphabetically below:

Argentina: "Argentina's government said over the weekend it would not appeal a recent court ruling that authorizes marriage between two men. So on Monday the first gay couple went to Buenos Aires' civil court to make their marriage a reality and become the first gay married couple in Latin America. In a statement, Buenos Aires Mayor Mauricio Macri supported the union, saying, 'the world is already moving in this direction'.³⁷⁵" Tierra del Fuego Governor Fabiana Rios said in a statement that gay marriage "is an important advance in human rights and social inclusion and we are very happy that this has happened in our state."³⁷⁶

Belgium: Justice Minister Marc Verwilghen said: "Mentalities have changed. There is no longer any reason not to open marriage to people of the same sex."³⁷⁷

Canada: Commenting on Canada's 2005 legislation authorizing same-sex marriage, then-Prime Minister Paul Martin stated, "In a nation of minorities, it is important that you don't cherry-pick rights. A right is a right."³⁷⁸ In ruling on the constitutionality of this legislation, Canada's Supreme Court noted that "Recognition of same-sex marriage in several Canadian jurisdictions as well as two European countries belies the assertion that [marriage is understood as only available to opposite-sex couples]."³⁷⁹

Netherlands: The first country to legalize same-sex marriage, the Netherlands' position is, as it should be, one of a trailblazer in this area. The Mayor of Amsterdam, who officiated at the first same-sex marriage ceremonies said, "In the Netherlands, we have gained the insight that an institution as important as marriage should be open to everyone."³⁸⁰ The Mayor also said that "he said he believed the Dutch law would be a stimulus for other countries to reassess their views on gay marriages."³⁸¹

Norway: During the debate on passage of Norway's 2008 law allowing same-sex marriage, Labour Party rapporteur Gunn Karin Gjøl described the proposed bill as "... of an importance comparable to universal suffrage..."³⁸²

³⁷⁵ *Argentina Approves Latin America's First Gay Marriage*, THE SANTIAGO TIMES, Nov. 16, 2009, http://www.santiagotimes.cl/index.php?option=com_content&view=article&id=17625:argentina-approves-latin-americas-first-gay-marriage-&catid=19:other&Itemid=142.

³⁷⁶ Calatrava, *supra* note 360.

³⁷⁷ Same-Sex (homosexual) Marriage in Belgium, http://www.religioustolerance.org/hom_mar10.htm (last visited on Feb. 24, 2010). Kurt Krickler, Co-chair of the European Region of the International Lesbian and Gay Association (ILGA-Europe) said: "Throughout the world there are positive moves to recognize the rights of lesbians, gay men, bisexuals and transgender people. There are now eight EU Member States where same-sex partnerships have some legal recognition, and two that allow same-sex marriage. We hope and expect this trend to continue." *Id.*

³⁷⁸ *Reasonable Rights*, L.A. TIMES, July 6, 2005 at 12, available at 2005 WLNR 23329237.

³⁷⁹ Same-Sex Marriage, Re., [2004] 3 S.C.R. 698 (Can.).

³⁸⁰ *Amsterdam Holds First Legal Gay Marriages*, 4/2/01 INDEPENDENT (United Kingdom), April 2, 2001 (Pg. Unavail. Online), available on Westlaw at 2001 WLNR 7076913.

³⁸¹ *Id.*

³⁸² Norway adopts gay marriage law, AFP, June 11, 2008, available at http://afp.google.com/article/ALeqM5jko_BIHizUFFqUtmEaUrAEoPXFwWw.

Portugal: In his address to the parliament before the recent vote to allow same-sex marriage, Portuguese Prime Minister Jose Socrates described the proposed bill as "... a small change in the law, but a very important and symbolic step to fully realize *values that are pillars of open, tolerant and democratic societies*; freedom, equality and non-discrimination."³⁸³

South Africa: "The government said the law represented a wider commitment to battling discrimination. 'We are hopeful this act will level the playing field by ensuring equality and restoring the dignity of this marginalised minority in South Africa,' said home affairs department spokesman Jacky Mashapu."³⁸⁴

Spain: From the law legalizing same-sex marriage: "This constitutional guarantee has the effect of marriage that the legislature can not ignore the institution, or fail to regulate in accordance with the higher values of law, and its legal character of the person based on the Constitution.... The regulation of marriage in contemporary civil law has reflected the dominant models and values in European societies and the West. ... But it is not in any way the legislature ignored the obvious: that society is moving in the way of shaping and recognize the different models of coexistence, and that therefore the legislature may, indeed must, act accordingly and avoid any bankruptcy between law and societal values whose relationship has to regulate. ... This perception is not only produced in Spanish society, but also in broader areas, as reflected in the European Parliament resolution of 8 February 1994, which explicitly asks the Commission to submit a draft recommendation for the purposes of ending the prohibition of marriage to same-sex couples, and guarantee the full rights and benefits of marriage."³⁸⁵ Prime Minister José Luis Rodríguez Zapatero, who signed the new law, stated: "We are not the first to adopt such a law but I am sure we will not be the last; many other countries will come after, pushed by two unstoppable forces, liberty and equality."³⁸⁶

Sweden: The Minister of Integration and Gender Equality, whose very post suggests Sweden's support of same-sex couples, noted in a speech: "The universal declaration includes all people, no matter sexual orientation..."³⁸⁷

³⁸³ Portugal's Parliament Approves Same-Sex Marriage Law, *supra* note 50.

³⁸⁴ Mariette le Roux, *Final Seal Of Approval For South Africa Gay Marriage Law*, 11/30/06 Agence Fr.-Presse 16:49:00.

³⁸⁵ Ley 13/2005 por la que se modifica el Código Civil en materia de derecho a contraer matrimonio (Law 13/2005 amending the Civil Code concerning the right to marry) (Google translation of the law *available at* Law 13/2005 that amends the Civil Code of Spain regarding the right of same-sex couples to marry), *available at* http://translate.google.com/translate?hl=en&sl=es&u=http://www.boe.es/aeboe/consultas/bases_datos/doc.php%3Fcoleccion%3Diberlex%26id%3D2005/11364&ei=jqDHSbq3NZawMsLV0fQH&sa=X&oi=translate&resnum=1&ct=result&prev=/search%3Fq%3Dhttp://www.boe.es/aeboe/consultas/bases_datos/doc.php%253Fcoleccion%253Diberlex%2526id%253D2005/11364%26hl%3Den%26client%3Dfirefox-a%26channel%3Ds%26rls%3Dorg.mozilla:en-US:official%26hs%3DAil%26sa%3DG).

³⁸⁶ Edward M. Gomez, *Spain reacts to new gay marriage law*, S.F. CHRON., July 6, 2005, *available at* 2005 WLNR 1101558.

³⁸⁷ Nyamko Sabuni, Minister for Integration and Gender Equality, Speech at the Baltic Pride Festival in Riga, Latvia, (May 15, 2009) (transcript available at <http://www.regeringen.se/sb/d/8811/a/127052>).

PART FOUR: CUSTOMARY INTERNATIONAL LAW MATTERS IN THE UNITED STATES

*“Customary international law informs the construction of domestic law, and, at least in the absence of any superseding positive law, is controlling.”*³⁸⁸

First, it is important to establish why international law is even presumptively part of the US legal system. The answer comes from the Constitution, which establishes that Treaties are part of US law and are included in the Supremacy Clause.³⁸⁹ Thus, the treaty arm of international law is part of our legal system as well, and treaties can actually trump inconsistent statutes.³⁹⁰ Customary international law, however, is harder to place, though scholars have argued that there was no need to include custom in the Constitution because it was already presumptively part of the legal system. Louis Henkin notes, “The law of nations of the time was not seen as something imposed on the states by the new U.S. government; it had been binding on and accepted by the states before the U.S. government was even established.”³⁹¹

The Restatement of Foreign Relations Law of the United States lists custom as a clear source of international law:

“§ 102. Sources Of International Law

- (1) A rule of international law is one that has been accepted as such by the international community of states
 - (a) in the form of customary law;
 - (b) by international agreement; or
 - (c) by derivation from general principles common to the major legal systems of the world.”³⁹²

³⁸⁸ Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 49 (1994).

³⁸⁹ U.S. Const. art. VI, cl. 2. (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”)

³⁹⁰ See GARY BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 16 (4th ed. 2007) (explaining that the “last-in-time principle” holds that “a federal statute supersedes prior inconsistent treaties, and conversely, a treaty supersedes prior inconsistent federal statutes”).

³⁹¹ Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557 (1984). at 1566.

³⁹² RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987).

The courts and scholars have differed on how customary law should be used³⁹³, but it is certainly safe to say that from this nation's origins to modern times, custom has played a role in our jurisprudence.

A. Customary International Law Is An Historical Part Of Our Legal System.

Chief Justice John Jay writing in *Chisholm v. Georgia* said that the United States, “by taking a place among the nations of the earth, become amenable to the laws of nations.”³⁹⁴ In another case, *Case*, Chief Justice Jay stated that the laws of the United States could be fit into three classes, first was treaties, second were the laws of nations, and finally the Constitution and statutes of the United States.³⁹⁵

For the founders, being a nation made one subject to the laws of nations without further action. Daniel Farber argues that the Framers viewed international law as part of the legal system; and the legal system as part of US law.³⁹⁶ However, Farber suggests that this generation had an even more robust view of international law and that they assumed that international principles were integral to the laws of the United States.³⁹⁷

Early Supreme Court cases discuss the use of international law as means of constitutional interpretation. The Charming Betsy presumption is a canon of statutory construction found in an historic case.³⁹⁸ The presumption is that whenever possible the Court should interpret statute of Congress so as not to conflict with the laws of nations.³⁹⁹ Ten years later the Court extended this rule to Constitutional interpretation in *Brown v. United States*.⁴⁰⁰ In the case, the Court was attempting to interpret the War Clause of the Constitution. In the case, they determined that merely declaring war did not authorize the President to seize enemy property, but instead that Congress would have to give separate authorization.⁴⁰¹ Chief Justice John Marshall, after examining various sources of international law, much to his surprise, concluded that the “modern” rule in international law was that enemy property would not be automatically seized when war is declared.⁴⁰² While Justice Story dissented, he did so based on the premise that the Chief Justice was wrong about the

³⁹³ Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that customary international law is not common law) with F. Giba-Matthews, *Customary International Law Acts as Federal Common Law in U.S. Courts*, 20 FORDHAM INT'L L.J. 1839, 1854 (1997) (arguing that it is).

³⁹⁴ *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793), *superseded by* U.S. CONST. amend. XI. Justice Wilson makes similar statement in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796). Additionally, the nation's first Attorney General Edmund Randolph wrote that the “laws of nations, although not specially adopted by the [C]onstitution or any municipal act, is essentially a part of the law of the land.” 1 Op. Att’y Gen. 26, 27 (1792). See also *Kerr v. Illinois*, 119 U.S. 436, 444 (1886) (describing the laws of nation as binding upon the Court).

³⁹⁵ *Henfield’s Case*, 11 F. Cas. 1099, 1100–01 (C.C.D. Pa. 1793).

³⁹⁶ DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* 6 (2007).

³⁹⁷ *Id.* (quoting Locke “The law of Nature stands as an eternal rule to all men, legislators as well as others”).

³⁹⁸ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). It should be noted that this rule first appeared in *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43 (1801).

³⁹⁹ *Murray*, 6 U.S. (2 Cranch) at 118. However, this is not to say that international law is a bar to a statute. The presumption only means that Congress must unambiguously display its intent to make a law contrary to international law.

⁴⁰⁰ *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814).

⁴⁰¹ *Id.* at 126.

⁴⁰² *Id.* at 125.

modern rule, and not that international law was irrelevant.⁴⁰³ A year later Chief Justice Marshall would make the more general statement that absent an act directing otherwise, “the Court is bound by the law of nation which is part of the law of the land.”⁴⁰⁴

*The Paquete Habana*⁴⁰⁵ more than any other case cited here is an unambiguous endorsement of customary international law applied in the United States. This case, which addressed whether a fishing boat flying the Spanish flag could be captured as a war prize during the Spanish-American War, was decided entirely on the basis of customary international law. The Supreme Court’s strong language established the importance of customary international law in the U.S. legal system:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.⁴⁰⁶

Dean Harold Koh stated that *The Paquete Habana* implied that the courts from now forward should take the advice of the Declaration of Independence and to pay, “a decent respect to the opinions of mankind.”⁴⁰⁷ Similarly, Justice Blackman stated that the obvious significance of *The Paquete Habana* was that

Historically, the Court has used international law to assist in the interpretation of ambiguous or contradictory phrase or laws.⁴⁰⁸ The Court has also used international law as support for its positions.⁴⁰⁹

Both historically and in modern times, international law has been used as a “gap filler”. Throughout the Court’s history, it has used international law to fill gaps when there was not another piece of positive law.⁴¹⁰ Chief Justice Marshall in *The Nereide*, states that absent an act directing otherwise, “the Court is bound by the law of nation which is part of the law of the land.”⁴¹¹ This use of international law as a default position is common. A more recent case cited *The Paquete Habana* for

⁴⁰³ *Id.* at 132–35.

⁴⁰⁴ *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

⁴⁰⁵ *The Paquete Habana* 175 U.S. 677 (1900).

⁴⁰⁶ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

⁴⁰⁷ Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 43–56 (2004).

⁴⁰⁸ *See, e.g.*, *The Rapid*, 12 U.S. (8 Cranch) 155, 162 (1814); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

⁴⁰⁹ *See* Justice Story’s use of Roman law in *Colum. Ins. Co. of Alexandria v. Ashby*, 38 U.S. (13 Pet.) 331, 340–42 (1839).

⁴¹⁰ *See* *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808) (relying on English cases in deciding that it had jurisdiction to review cases from other jurisdictions); *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (holding that Congress could define piracy by reference to law of nations); *Ashby*, 38 U.S. (13 Pet.) at 331 (filling in gaps in the U.S. Admiralty law).

⁴¹¹ *Nereide*, 13 U.S. (9 Cranch) at 423.

the proposition that “[w]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”⁴¹²

B. Customary International Law Is Used Currently As Well.

A variety of sources indicate that customary international law continues to be a robust and important aspect of the United States’ legal system. Federal statutes refer to the term “customary international law” is used in several federal statutes, which indicates its recognition as a source of law.⁴¹³ Additionally, the State Department can make a pronouncement about whether a particular practice is custom. Beyond the Court, the State Department makes pronouncements about whether a particular practice is customary international law, which also shows that the U.S. recognizes customary international law.⁴¹⁴

The US has noted and the Supreme Court recognized that even without ratification of a convention, its provisions can reflect custom.⁴¹⁵ In fact, even when there has been a treaty in the same area of the law which the United States refused to sign, the Supreme Court applied a customary international law.⁴¹⁶

Several other developments indicate the importance of customary international law.

Custom as a source of empirical evidence

Both Chief Justice Rehnquist and Justice Souter cited abuses of the Dutch assisted suicide law as proof of the government’s legitimate interest in regulating suicide.⁴¹⁷ In *Printz v. the United States*, Justice Breyer cited the experience of other federal systems in Switzerland, and Germany to question the concerns of the majority.⁴¹⁸ Even Justice Scalia has joined in this practice.⁴¹⁹ Moreover, this is not a new practice; Justice Harlan for example cited the average hours of work in other countries in his *Lochner* dissent.⁴²⁰

The importance of *Filartiga*⁴²¹

In 1980 the Second Circuit took a broad view of international law.⁴²² The court decided in that case that the Alien Tort Statute⁴²³ created a cause of action for a violation of international law.⁴²⁴ The

⁴¹² *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004).

⁴¹³ See 46 U.S.C.S. § 3715 (West 2010) (governing Lightering); 42 U.S.C.S. § 9111 (West 2010) (requiring the license for the ownership, construction, and operation of ocean thermal energy conversion facilities or plantships); 33 U.S.C.S. § 1902 (West 2010) (describing ships subject to preventive measures); 33 U.S.C.S. § 1503 (West 2010) (requiring the license for ownership, construction, and operation of deepwater port).

⁴¹⁴ See David S. Bogen, *Mr. Justice Miller’s Clause: The Privileges or Immunities of Citizens of the United States Internationally*, 56 *DRAKE L. REV.* 1051, 1088 n.171 (2008).

⁴¹⁵ See *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992) (applying the law of sea convention despite the US’s refusal to sign because it reflects customary international law).

⁴¹⁶ *Id.*

⁴¹⁷ *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997).

⁴¹⁸ 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting).

⁴¹⁹ *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334, 381–82 (1995) (Scalia, J. dissenting).

⁴²⁰ *Lochner v. New York*, 198 U.S. 45, 66 (1905) (Harlan, J., dissenting).

⁴²¹ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir.1980); See also Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights*, 41 *HASTINGS L.J.* 805 (1990) (providing an excellent discussion of the case).

⁴²² *Id.* But see *Adamu v Pfizer, Inc.*, 399 F. Supp. 2d 495 (S.D.N.Y. 2005) (holding that the law of nations does not itself create right of action because it does not prescribe remedy; therefore, where Nigerian minors and their guardians

court also recognized that “the “law of nations” is a dynamic concept, which should be construed in accordance with the current customs and usages of civilized nations, as articulated by jurists and commentators. It held specifically that U.S. law directly incorporated customary international law principles prohibiting deliberate government torture.”⁴²⁵

Post *Filartiga*, a number of similar cases “in U.S. federal courts has successfully challenged gross human rights abuses committed abroad.”⁴²⁶ Some scholars had higher hopes for *Filartiga*⁴²⁷ than have yet been realized, but certainly it is fair to say that at least within its context, *Filartiga* represented a willingness toward a more expansive view of the influence of international custom on U.S. law.⁴²⁸

The importance of *Sosa*⁴²⁹

In 2004, the Supreme Court reached a significant decision in the this field: the court allowed customary international law to be a part of U.S. law, at least for the purposes of interpreting the Alien Tort Act.⁴³⁰ In *Sosa*, the Supreme Court stated that the laws of nations had three elements. First, the laws of nations cover the general rights and obligations between states.⁴³¹ Second, the laws of nations cover the body of law that regulates “the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor.”⁴³² Third, the laws of nations cover the “sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships.”⁴³³ This is a hybrid area that refers to things like piracy, and protection of ambassadors. In a more modern area, this may refer to crimes against humanity, and perhaps may be extended to rights granted in human rights treaties.

One scholar describes the importance of *Sosa* in the following way:

sued pharmaceutical company, their claim that its non-consensual medical experimentation violated law of nations did not provide independent source of subject matter jurisdiction under 28 U.S.C.S. § 1350 because company was not alleged to have violated any treaty and there was no showing that company violated clear and unambiguous rule of customary international law).

⁴²³ 28 U.S.C. § 1350 (1982) (codifying the Judiciary Act of 1789, ch. 20, sec. 9b, 1 Stat. 73, 77 (1789)) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”).

⁴²⁴ *Filartiga*, 630 F.2d at 886.

⁴²⁵ Strossen, *supra* note 421, at 881 (citing *Filartiga*, 630 F.2d at 884-5).

⁴²⁶ See Beth Stephens, *Litigating Customary International Human Rights Norms*, 25 GA. J. INT’L & COMP. L. 191, 194 (1996).

⁴²⁷ See Scheebaum, Recent Judicial Developments in Human Rights Law, L. Group Docket 1, 7 Spring 1981) (noting “the effect of *Filartiga* is to direct American lawyers and judges to international sources of the rights of litigants.”).

⁴²⁸ See, e.g., Richard B. Lillich, *The Constitution And International Human Rights*, 83 AM. J. INT’L L. 851, 859 (1989) (noting “[a]ll these sources of customary international law [state practice, human rights treaties, resolutions, scholarly opinions and judicial and arbitrar decision] were drawn upon by the U.S. Court of Appeals for the Second Circuit to support its eloquent and path-breaking decision in *Filartiga v. Pena-Irala* which has done as much to advance the development of international human rights law in the United States as the infamous *Sei Fujii v. California* did to retard it.”) (citing *Filartiga*, 630 F.2d 876 and *Sei Fujii v. California*, 38 Cal.2d 718, 722-25(1952)).

⁴²⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

⁴³⁰ *Id.* See also William S. Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System After Sosa v. Alvarez-Machain*, 12 TULSA J. COMP. & INT’L L. 87 (2004) (providing an excellent discussion of the importance of this case).

⁴³¹ *Sosa*, 542 U.S. at 714.

⁴³² *Sosa*, 542 U.S. at 715.

⁴³³ *Id.*

“In sum, *Sosa*'s methodology attempts to bridge a gap not just between the international and the domestic, but between the past and the present. In determining the relationship between customary international law and a particular legal provision, both the original understanding of those who enacted the provision and modern developments in the U.S. legal system are relevant, but neither is determinative. In building a bridge to link the past and the present, the Court works from both sides.”⁴³⁴

C. Customary International Law Can Be Used To Interpret Issues Of Human Rights.

As the following categories illustrate, customary international law can be – and has been – used by the courts to define various issues relating to rights and freedoms: this is crucial for establishing a precedent that can be used in the debate regarding same-sex marriage.

Custom and Marriage

In 1878, Chief Justice Waite wrote: “Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people.”⁴³⁵

Much more recently, and more relevant to the issue at hand, in the context of same-sex marriages, the Massachusetts highest court in *Goodridge* court cited a ruling by the Court of Appeal for Ontario⁴³⁶, which defined the common-law meaning of marriage as a remedy in a similar case.⁴³⁷ The Massachusetts court concurred, and redefined marriage “to mean the voluntary union of two persons as spouses, to the exclusion of all others.”⁴³⁸

Custom and Substantive Due Process

The Supreme Court has invoked international law in cases involving substantive due process. The earliest example of this is *Dred Scott v. Sanford*.⁴³⁹ Six of the nine Justices, including the two dissenting Justices, relied on foreign cases, opinions of international jurists, and even Roman law.⁴⁴⁰ Another early example is *Reynolds v. United States*.⁴⁴¹ Moreover, this practice has continued in modern jurisprudence as well.⁴⁴²

Most relevant is *Lawrence v. Texas*.⁴⁴³ In striking down the Texas sodomy law Justice Kennedy relied both on a European Court of Human Rights decision, *Dudgeon v. United Kingdom*.⁴⁴⁴ While the *Dudgeon* relied on the European Human Rights Convention and not customary international law

⁴³⁴ Dodge, *supra* note 430, at 100.

⁴³⁵ *Reynolds v. United States*, 98 U.S. 145, 164 (1878). Additionally, Chief Justice Waite refers to an 1868 British decision. *Id.*

⁴³⁶ *Halpern v. Toronto*, [2003] 172 O.A.C. 276 (Can.).

⁴³⁷ *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

⁴³⁸ *Id.*

⁴³⁹ *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

⁴⁴⁰ *Id.*

⁴⁴¹ *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

⁴⁴² See, e.g., *Hurtado v. California*, 110 U.S. 516, 531 (1884); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴⁴³ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴⁴⁴ *Lawrence*, 539 U.S. at 573 (citing *Dudgeon v. United Kingdom*, [1981] 45 Eur. Ct. H.R. (ser. A) ¶ 52).

Justice Kennedy's use of it is closer to customary international law because it refuted Justice White's reliance on the traditional values of western civilization.⁴⁴⁵ Overruling *Bowers*, the court criticized that case for not considering the history of sodomy statutes, noting "To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere."⁴⁴⁶ The *Lawrence* court considered not only the European Court of Human Rights decision, but also additional sources of custom - including an amicus brief, which detailed the status of the law throughout the world, and other cases by the European Court.⁴⁴⁷

Custom for Defining Unenumerated Rights

Numerous commentators see international law playing an important role in defining unenumerated rights.⁴⁴⁸ Laurence Tribe begins his discussion of foreign law and its role in unenumerated rights with Chief Justice Rehnquist's dissent in *Planned Parenthood v. Casey*⁴⁴⁹, which cited a 1975 West German Constitutional Court decision about the right to life.⁴⁵⁰ However, international law had long been part of constitutional interpretation long before Rehnquist's citation in *Casey*. Nor was the use of international law limited to defining clauses of the Constitution such as the War Powers clause⁴⁵¹ or the Offenses clause.⁴⁵² In fact, by the time of *Casey* international law had long been used to help define the boundaries of the liberty of citizens and the government's authority to regulate.⁴⁵³

Custom and Other Constitutional Protections

Concerns over international practices have been key in analyzing the Eighth Amendment.⁴⁵⁴ For example, *Trop v. Dulles* cited a UN survey of law to determine the evolving standards of decency that should be used to evaluate what punishments are cruel and unusual under the Eighth Amendment.⁴⁵⁵ Similarly, the Court in *Coker v. Georgia* determined that international practice was relevant in analyzing the "evolving standards" regarding the death penalty for rape.⁴⁵⁶ Looking at state practice as evidence of custom, the Court in *Enmund v. Florida* noted that the felony murder doctrine have been abolished in countries like England and India, and have been restricted in other Commonwealth Countries like Canada.⁴⁵⁷ Finally, in *Thompson v. Oklahoma* the Court judged the constitutionality of the juvenile death penalty by examining human rights treaties and the practices in

⁴⁴⁵ *Id.* at 560 ("To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere.").

⁴⁴⁶ *Id.* at 576.

⁴⁴⁷ *Id.* (citing *P.G. & J.H. v. United Kingdom*, [2001] 550 Eur. Ct. H.R.; *Modinos v. Cyprus*, [1993] 259 Eur. Ct. H.R.; *Norris v. Ireland*, [1988] 142 Eur. Ct. H.R.)

⁴⁴⁸ LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 181 (2008); FARBER, *supra* note 396, at 183.

⁴⁴⁹ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁴⁵⁰ TRIBE, *supra* note 448, at 180; Tribe also quotes Chief Justice Rehnquist stating that "constitutional law is [now] firmly grounded in so many countries that it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."

⁴⁵¹ *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814).

⁴⁵² *United States v. Smith*, 18 U.S. (5 Wheat) 153 (1820).

⁴⁵³ TRIBE, *supra* note 448.

⁴⁵⁴ Most recently in *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

⁴⁵⁵ *Trop v. Dulles*, 356 U.S. 8, 101-03 (1958).

⁴⁵⁶ *Coker v. Georgia*, 433 U.S. 584 (1977).

⁴⁵⁷ *Enmund v. Florida*, 458 U.S. 782 (1982).

the Soviet Union and Western Europe.⁴⁵⁸ All of these show analysis similar to *The Paquete Habana*⁴⁵⁹ and support the use of customary international law.

The Court has used similar analysis in deciding the reasonableness of the Fourth Amendment. In *Adamson v. California*, the Court talked about “notions of justice of English-speaking peoples.”⁴⁶⁰ Additionally, in cases involving the due process and Habeas Corpus rights of alleged terrorists, the courts have turned to a consideration of international law.⁴⁶¹

More recently, in *Roper v. Simmons*, the Supreme Court held that the Eighth and Fourteenth Amendments prohibit the execution of minors under the age of eighteen.⁴⁶² The Court noted that while the Constitution is essential to American self-identity, “It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”⁴⁶³

These decisions, and many others, show the willingness of U.S. courts to consider customary international law.⁴⁶⁴

⁴⁵⁸ *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

⁴⁵⁹ *The Paquete Habana* 175 U.S. 677 (1900).

⁴⁶⁰ *Adamson v. California*, 332 U.S. 46, 67 (1947).

⁴⁶¹ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 561-63 (2006) (considering whether the Geneva Conventions are enforceable in U.S. courts).

⁴⁶² *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

⁴⁶³ *Roper*, 543 U.S. at 578.

⁴⁶⁴ The following cases are cited in Strossen, *supra* note 421 at 822 n.81: “See *United States v. Romano*, 706 F.2d 370, 375 n.1 (2d Cir. 1983) (suggesting that alien may assert denial of justice in U.S. criminal justice process if that process does not comply with ICCPR); *Forti v. Suarez-Mason*, 694 F. Supp. 707, 710 (N.D. Cal. 1988) (recognizing customary international law norm against “disappearance,” citing UDHR and ICCPR); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987) (recognizing customary international law norm proscribing summary execution or murder by government, citing UDHR, ICCPR, and American Convention); *Fernandez-Roque v. Smith*, 567 F. Supp. 1115, 1122 n.2 (N.D. Ga. 1983) (noting customary international law principles prohibiting prolonged detention are binding on U.S., citing UDHR, ICCPR, and American Convention) (dictum); *Lareau v. Manson*, 507 F. Supp. 1177, 1187 n.9 (D. Conn. 1980) (noting customary international law, as evidenced by U.N. Charter and U.N. Standard Minimum Rules for the Treatment of Prisoners, are part of U.S. law) (dictum); *Fernandez v. Wilkinson*, 505 F. Supp. 787, 795 (D. Kan. 1980) (noting that customary international law, as reflected in U.N. treaties and American Convention, secures to excluded alien the right to be free of arbitrary detention even though U.S. Constitution and statutes have been interpreted as affording no protection to such individuals), *aff’d sub. nom. Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir.1981); *Schneider v. Rusk*, 218 F. Supp. 302, 319 (D.D.C. 1963) (Fahy, J., dissenting) (citing UDHR, concludes that there is fundamental right to nationality).”

CONCLUSION: CUSTOMARY INTERNATIONAL LAW SUPPORTS LEGALIZATION AND RECOGNITION OF SAME-SEX MARRIAGE IN THE UNITED STATES.

The last issue to tackle is how, precisely, the legislature and courts should use customary international law allow same-sex marriage. How can it be used to support an appeal to a legislature or a case brought before a court?

This question must be answered and understood because there have been strong arguments raised that customary international law is a distant second to treaty law, and that there is no longer a place for custom in the US legal system.⁴⁶⁵ Professors Goldsmith and Bradley, in their well-known critique of the “Modern Position”⁴⁶⁶ argue customary international law does not have the status of federal common law.⁴⁶⁷ However, even they agree that custom does and should still continue to play an important role in our legal system, noting, “even if it were not viewed as federal common law, [customary international law] would continue to play an important role in the United States”.⁴⁶⁸

Justice Scalia has spoken out several times against the incorporation or even consideration of foreign law. For example, in his dissent in *Lawrence*⁴⁶⁹, Scalia noted,

“Constitutional entitlements do not spring into existence ... as the Court seems to believe, because *foreign nations* decriminalize conduct... The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since “this Court ... should not impose foreign moods, fads, or fashions on Americans.”⁴⁷⁰

In a speech to a gathering of the American Society of International Law, Justice Scalia argued “that the discussion of foreign cases in U.S. constitutional opinions is ‘wrong,’ perhaps even unconstitutional,” but concluded that “there's a difference between relying on alien cases and simply borrowing ideas from clever foreigners.”⁴⁷¹

Justice Scalia's criticism, especially tempered by his later remark, seems to be a disagreement with the sporadic use of foreign law *as precedent*. That is not what this article proposes. Customary international law is more than a haphazard use of miscellaneous foreign cases, or the borrowing of

⁴⁶⁵ See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

⁴⁶⁶ Defined as a consensus that customary international law has the status of federal common law.

⁴⁶⁷ See generally Bradley & Goldsmith, *supra* note 456.

⁴⁶⁸ Bradley & Goldsmith, *supra* note 456, at 871.

⁴⁶⁹ *Lawrence*, 539 U.S. at 578-9 (2003).

⁴⁷⁰ *Lawrence*, 539 U.S. at 598 (Scalia, dissenting) (emphasis in original) (citing *Foster v. Florida*, 537 U.S. 990, n., (sic)(2002)); see also Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 756 (2005) (“We thus substantially agree with the spirit, if not entirely all of the substance, of Justice Scalia's warning against citing foreign law in most U.S. Constitutional cases.”) (quoted in Landers, *supra* note 3, at 702, n.115.)

⁴⁷¹ Tim Wu, *Foreign Exchange, Should the Supreme Court Care What Other Countries Think?*, SLATE, Apr. 9, 2004, <http://www.slate.com/id/2098559> (quoted in Landers, *supra* note 3, at 702 n.115).

ideas from clever foreign courts: instead, it is a system of law all its own, with guidelines for consideration, and it is an essential source of the body of law referred to as international law.⁴⁷²

If customary international law is, in fact, federal common law – about which, as noted, there has been some debate – then it would ordinarily trump state law under the Supremacy Clause.⁴⁷³ The courts have relied on international treaties to assist in the interpretation of federal law “even when such treaties do not create an independent cause of action.”⁴⁷⁴

Some have argued that all international human rights instruments form a part of customary international law.⁴⁷⁵ However, the courts have been reluctant to use customary international law⁴⁷⁶ and some scholars have warned against too much optimism in this area.⁴⁷⁷

However, as discussed above, the Supreme Court and other courts have already used international law principles to help them decide certain issues, and certainly the area of human rights is an area where customary international law can guide the courts on how to interpret U.S. constitutional norms, and on what rights must be protected.⁴⁷⁸ Professor Strossen describes it the following way,

“In contrast to U.S. courts' current reluctance to view themselves as bound directly by international human rights principles on substantive issues, they are much more willing to invoke such principles—whether embodied in treaties or in other manifestations of customary international law—to guide the interpretation of domestic legal norms.”⁴⁷⁹ In fact, Strossen describes a “scholarly consensus supporting this interpretive use of international human rights norms in domestic litigation”.⁴⁸⁰

Another concern about customary international law is that due to its nature – a lack of codified and searchable principles – it can be hard to discern. Professor Harold Koh, now legal advisor to the State Department, and arguably the leading scholar on the combination of international and national law⁴⁸¹, refuted this: “The growing codification and hence, accessibility of customary international

⁴⁷² And here, the distinction between “foreign law” and “international law” is crucial.

⁴⁷³ See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (1987).

⁴⁷⁴ See Sadtler, *supra* note 324, at 444. “Federal courts have cited the Covenant as support for a variety of constitutional rights. See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 390 n.10 (1989) (Brennan, J., dissenting) (prohibition on juvenile executions); *Thompson v. Oklahoma*, 487 U.S. 815, 831 n.34 (1988) (prohibition on juvenile executions); *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 118 (2d Cir. 1998) (Weinstein, J., dissenting) (right to vote); *Lipscomb v. Simmons*, 884 F.2d 1242, 1244 n.1 (9th Cir. 1989) (freedom of association).” *Id.* at 444, n.211.

⁴⁷⁵ See Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 441-42 (1989) (arguing that all human rights norms are binding as customary international law); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L. J. 53, 69-70 n.75 (1981) (arguing that the Universal Declaration is binding as customary international law).

⁴⁷⁶ See discussion in Bayefsky, *supra* note 314 at 23; See also Strossen, *supra* note 421, at 815.

⁴⁷⁷ Strossen, *supra* note 421, at 815 (stating that customary international law “should not be expected to produce widespread practical results in the immediate future”).

⁴⁷⁸ See generally *id.*

⁴⁷⁹ *Id.* at 815.

⁴⁸⁰ *Id.* at 824. See *id.* at 825 n.90 for the citations.

⁴⁸¹ See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991) (citations omitted) noting:

law rules-through statutes, unratified treaties, and scholarly treatises-belied the claim that such rules were hopelessly beyond a domestic court's law-finding capacities.”⁴⁸²

International law can be used as a source of law to help courts interpret constitutional norms⁴⁸³, which is particularly important when the courts – and eventually, the Supreme Court – are charged with deciding cases about same-sex marriage. And, importantly, custom is not limited to the federal courts: it may be used by state courts as well.⁴⁸⁴ One article describes how federal and state courts may apply customary international human rights law:

"Probably the most promising use of international human rights law is for guidance in interpreting federal and state civil liberties and civil rights laws. Courts may refer to international law in determining the intended content of federal and state laws in the same way that they refer to legislative history... Second, under article VI of the United States Constitution, human rights provisions of treaties ratified by the United States have the same status and effect as federal law. ... Third, human rights provisions that are internationally accepted as legally binding are part of the body of customary international law that courts may apply as part of or in a manner analogous to United States common law.”⁴⁸⁵

This article does not suggest that customary international law be used as an independent basis for federal question jurisdiction in a case challenging DOMA or a similarly discriminatory law: there is no need for that. In the debate over same-sex marriage there are other, better ways for litigants to obtain jurisdiction⁴⁸⁶. Instead, customary international law can be used, as it has been, as a prism through which state and federal courts can assess whether there are violations of rights when same-sex marriage is prohibited. It can also be used to persuade the legislatures of the states, and even Congress, to pass laws that legalize same-sex marriage.

In transnational public law litigation private individuals, government officials, and nations sue one another directly, and are sued directly, in a variety of judicial fora, most prominently, domestic courts. In these fora, these actors invoke claims of right based not solely on domestic or international law, but rather, on a body of “transnational” law that blends the two. Moreover, contrary to “dualist” views of international jurisprudence, which see international law as binding only upon nations in their relations with one another, individual plaintiffs engaged in this mode of litigation usually claim rights arising directly from this body of transnational law.

⁴⁸² *Id.* See also Hiram Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87, 89 (1991) (describing a set of rules of “declarative international law”: rules “that are declared as law by a majority of states,” usually in unratified treaties or other legal texts “but not actually enforced by them, or rules that are both practiced and accepted as law, *but only by a minority of states.*”) (emphasis added).

⁴⁸³ See Paust, *Does Your Police Force Use Illegal Weapons? A Configurative Approach to Decision Integrating International and Domestic Law*, 18 HARV. INT'L L.J. 19, 42 (1977) (noting that the use of customary international norms for interpreting constitutional terms is especially useful “in this age of global interdependence which creates transnational patterns of subjectivity and a more detailed manifestation of uniform expectations about the content of basic human rights”).

⁴⁸⁴ See, e.g., *Servin v. State*, 32 P.3d 1277, 1290 (Nev. 2001) (Agosti, Beker and Rose, J. concurring) (“I believe that an additional ground for ruling out the death penalty for this minor is that customary international law precludes the most extreme penalty for juvenile offenders.”)

⁴⁸⁵ See Kathryn Burke, et. al., *Application of International Human Rights Law in State and Federal Courts*, 292 TEX. INT'L L.J. 291, 295 (1983), available at <http://ssrn.com/abstract=1149881>.

⁴⁸⁶ Although the *Smelt* case, *supra* notes 12, 172, serves as a cautionary tale for litigants about the importance of standing.

The title of this article - “Currency of Love” - though interestingly supported by a modern song⁴⁸⁷, actually originated from a phrase used in an interview with a protester speaking out in favor of same-sex marriage, who was asked why she favored “marriage” and not just “civil unions”: her response was that “marriage” was still the “currency of love” around the world.⁴⁸⁸

Indisputably, much of this is controversial and aspirational: others will argue that customary international law is unimportant or that same-sex marriages have not risen to the level of a level of a norm of customary international law. There may be more work that needs to be done before either premise is bulletproof. However, given current trends and judicial activity, neither of these ideas is as far-fetched as might appear. If nothing else, there is value in adding to the debate. This article argues that given the movement in the rest of the world, the U.S. is not - nor should it be - immune to international trends and “customs”, and that turning a blind eye to customary international law would be a terrible mistake – particularly right now, and especially when it comes to something as important as “the currency of love.”

⁴⁸⁷ SILVERSUN PICKUPS song, fortuitously discovered by the author after settling on the title.

⁴⁸⁸ Despite the author’s best efforts, this interviewee is unidentifiable. Many thanks go out to her.

APPENDIX I: STATE-BY-STATE SUMMARY OF THE STATUS OF SAME-SEX MARRIAGE

State	Law
Alabama	<p>State law and constitution ban same-sex marriage and recognition thereof.</p> <p>“No marriage license shall be issued in the State of Alabama to parties of the same sex.”⁴⁸⁹</p> <p>“The State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued.”⁴⁹⁰</p> <p>There also is a constitutional amendment called the “Sanctity of Marriage Amendment” passed in 2006, and providing much the same as the above law.⁴⁹¹</p>
Alaska	<p>Constitution bans same-sex marriage and recognition thereof:</p> <p>“To be valid or recognized in this State, a marriage may exist only between one man and one woman.”⁴⁹²</p> <p>Same-sex partners of state employees are entitled to benefits under a court decision.⁴⁹³</p>
Arizona	<p>State law and Constitution ban same sex marriage and the recognition thereof.</p> <p>“Marriage between persons of the same sex is void and prohibited.”⁴⁹⁴</p> <p>Same –sex marriages from other states and countries are <u>not</u> recognized.⁴⁹⁵ Constitutional amendment to same effect passed in 2008.⁴⁹⁶</p>
Arkansas	<p>State law and Constitution ban same-sex marriage and recognition thereof.</p> <p>“(a) It shall be the declared public policy of the State of Arkansas to recognize the marital union only of man and woman....b) Marriages between persons of the same sex are prohibited in this state... (c) However, nothing in this section shall prevent an employer from extending benefits to persons who are domestic partners of employees.”⁴⁹⁷</p> <p>Arkansas recognizes foreign marriages, but not same-sex marriages from other states. ⁴⁹⁸</p> <p>A constitutional amendment also provides that marriage is only between a man and a woman and that same-sex marriages from other states will not be recognized. ⁴⁹⁹</p>

⁴⁸⁹ ALA. CODE § 30-1-19 (1975).

⁴⁹⁰ ALA. CODE §30-1-19 (1975).

⁴⁹¹ ALA. CONST. art. I, § 36.03.

⁴⁹² ALASKA CONST. art. 1, § 25.

⁴⁹³ *State v. Alaska Civil Liberties Union*, 159 P.3d 513 (Alaska 2006).

⁴⁹⁴ ARIZ. REV. STAT. ANN. § 25-101 (2010).

⁴⁹⁵ ARIZ. REV. STAT. ANN. § 25-112 (2010).

⁴⁹⁶ ARIZ. CONST. art. 30, § 1.

⁴⁹⁷ ARK. CODE ANN. § 9-11-208 (2009).

⁴⁹⁸ ARK. CODE ANN. § 9-11-107 (2009).

⁴⁹⁹ ARK. CONST. amend. 83, §1; § 2.

California	<p>In May 2008, the California Supreme Court held that same sex partners should have the ability to marry, resulting in California performing same sex marriages.⁵⁰⁰</p> <p>A ballot initiative called Proposition 8, calling for marriage to be defined as between a man and a woman, passed in November 2008, bringing same sex marriage to a halt in California.⁵⁰¹ Marriages that were performed between May and November are still valid.⁵⁰²</p> <p>California has a domestic partnership registry, and a variety of rights and responsibilities have been extended to domestic partners.⁵⁰³</p>
Colorado	<p>State law and Constitution bans same-sex marriage and the recognition thereof.</p> <p>The law provides that marriage is between one man and one woman, and that same sex-marriages from other states shall not be recognized as valid.⁵⁰⁴</p> <p>Constitutional provision: Only a union of one man and one woman shall be valid or recognized as a marriage in this state.⁵⁰⁵□□</p>
Connecticut	<p>Allows same-sex marriage.</p> <p>The Connecticut Supreme Court ruled that a state statutory provision limiting marriage to heterosexual couples violated equal protection under the state constitution. (The state had allowed for civil unions for homosexual couples).⁵⁰⁶</p> <p>See also trial court order implementing the decision and ordering marriage licenses to issue.⁵⁰⁷</p>
Delaware	<p>Delaware law does not allow same-sex marriages. No constitutional provision.</p> <p>101. Void and voidable marriages: (a) A marriage is prohibited and void between a person and his or her ancestor, descendant, brother, sister, uncle, aunt, niece, nephew, first cousin or between persons of the same gender.⁵⁰⁸</p> <p>Note that Delaware Senate recently rejected a proposed constitutional amendment to define marriage as between a man and a woman.⁵⁰⁹</p>
District of Columbia	<p>Has a domestic partnership law and recognizes partnerships from other jurisdictions.</p> <p>Law has been amended several times since it went into effect in 2002, most recently in 2008.⁵¹⁰</p> <p>D.C. recognizes same-sex marriages entered into in other jurisdictions.⁵¹¹</p> <p>On December 1, 2009, the D.C. Council voted 11 to 2 in favor of a bill that legalizes same-sex marriage (“Religious Freedom and Civil Marriage Equality Amendment Act of 2009”).⁵¹²</p>

⁵⁰⁰ *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). This case held that a statutory provision limiting marriage to heterosexual couples was unconstitutional. This decision was ultimately voided by Proposition 8.

⁵⁰¹ Cal. Const. art. I, § 7.5, which states “only a marriage between a man and a woman is valid or recognized in California”. Proposition 8 withstood challenge in *Strauss v. Horton*, 207 P.3d 47 (Cal. 2009).

⁵⁰² *Strauss v. Horton*, 207 P.3d 47 (Cal. 2009).

⁵⁰³ Cal. Fam. Code § 297- 297.5 (2009).

⁵⁰⁴ COLO. REV. STAT. § 14-2-104 (2009).

⁵⁰⁵ COLO. CONST. art. 2, § 31.

⁵⁰⁶ *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008).

⁵⁰⁷ *Elizabeth Kerrigan & Joanne Mock v. State*, 2008 WL 5203867 (Conn.Super.) (Trial Order).

⁵⁰⁸ DEL. CODE ANN. tit. 13, § 101 (2010).

⁵⁰⁹ S.B. 27, 145th Gen. Assem., Reg. Sess. (Del. 2009) (bill withdrawn from further consideration March 26, 2009)

⁵¹⁰ D. C. CODE § 32-702 (2009).

⁵¹¹ D. C. CODE § 46-405.01 (2009).

⁵¹² 57 D.C. Reg. 27 (January 1, 2010). *See also* <http://www.washingtontimes.com/photos/galleries/dc-council-votes-to-legalize-same-sex-marriage/>.

Florida	<p>State law and constitution ban same-sex marriage and recognition thereof. No county court judge or clerk of the circuit court in this state shall issue a license for the marriage of any person ... unless one party is a male and the other party is a female.⁵¹³</p> <p>Same-sex marriages are not recognized.⁵¹⁴ Marriage is defined as that between one man and one woman.⁵¹⁵</p> <p>Constitutional provision: Inasmuch as marriage is the legal union of only one man and one woman as husband and wife, no other legal union that is treated as marriage or the substantial equivalent thereof shall be valid or recognized.⁵¹⁶</p>
Georgia	<p>State law and constitution ban same-sex marriage and recognition thereof. Same sex marriages are prohibited and foreign same-sex marriages are not recognized.⁵¹⁷</p> <p>Constitutional provision: “Paragraph I. Recognition of marriage (a) This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state...”⁵¹⁸</p>
Hawaii	<p>Same-sex marriage not allowed under state law, but same-sex relationships are recognized under a reciprocal beneficiary statute. 572-1. Requisites of valid marriage contract “... Valid marriage contract ... shall be only between a man and a woman.”⁵¹⁹</p> <p>“Nothing in this chapter shall be construed to render unlawful, or otherwise affirmatively punishable at law, the solemnization of same-sex relationships by religious organizations; provided that nothing in this section shall be construed to confer any of the benefits, burdens, or obligations of marriage under the laws of Hawaii.”⁵²⁰</p> <p>Constitutional provision: “The legislature shall have the power to reserve marriage to opposite-sex couples.”⁵²¹</p> <p>Legislation was recently killed in the Senate that would have allowed civil unions.⁵²²</p>
Idaho	<p>State law and Constitution ban same-sex marriage and recognition thereof. “All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state.”⁵²³</p> <p>Constitutional provision: “A marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state.”⁵²⁴</p>

⁵¹³ FLA. STAT. § 741.04 (2009)

⁵¹⁴ FLA. STAT. § 741.212 (2009)

⁵¹⁵ *Id.*

⁵¹⁶ FLA. CONST. art. 1, § 27

⁵¹⁷ GA. CODE ANN. § 19-3-3.1 (2009)

⁵¹⁸ GA. CONST. art. I, § 4, ¶ I

⁵¹⁹ HAW. REV. STAT. § 572-1 (2009)

⁵²⁰ HAW. REV. STAT. § 572-1.6 (2009); Reciprocal beneficiary law found under HAW. REV. STAT. § 572C-1 through C-7 (2009). This gives certain inheritance, health care and property rights.

⁵²¹ HAW. CONST. art. 1, § 23

⁵²² H.B. 444, 25th Leg., Reg. Sess. (Haw. 2009)

⁵²³ IDAHO CODE ANN. § 32-209 (2009)

⁵²⁴ IDAHO CONST. art. III, § 28

Illinois	<p>Illinois law bans same-sex marriage and the recognition thereof. No constitutional provision.</p> <p>”§ 201. Formalities. A marriage between a man and a woman licensed, solemnized and registered as provided in this Act is valid in this State.”⁵²⁵</p> <p>Same-sex marriages are prohibited⁵²⁶ and are contrary to the public policy of the state.⁵²⁷</p> <p>A House Bill is pending which would allow civil unions.⁵²⁸</p>
Indiana	<p>Law bans same-sex marriage and the recognition of such unions from other states.⁵²⁹</p> <p>Note that this law was upheld against a state constitutional challenge.⁵³⁰</p> <p>No constitutional amendment.</p> <p>A constitutional amendment to ban gay marriage was recently proposed, but that it is not likely to be voted on this year.⁵³¹</p>
Iowa	<p>Allows same-sex marriage.</p> <p>The Iowa Supreme court found unconstitutional Iowa’s law providing that “only marriage between a man and a woman is valid.”⁵³²</p> <p>No constitutional amendment.</p>
Kansas	<p>State law and Constitution ban same-sex marriage and the recognition thereof.</p> <p>Marriage is defined “a civil contract between two parties who are of opposite sex. All other marriages are declared to be contrary to the public policy of this state and are void.”⁵³³</p> <p>While marriages from other states are generally recognized, “[i]t is the strong public policy of this state only to recognize as valid marriages from other states that are between a man and a woman.”⁵³⁴</p> <p>Constitutional provision:</p> <p>(a) The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void.□ (b) No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.⁵³⁵</p>

⁵²⁵ ILL. COMP. STAT. 750/ 5-201 (2010).

⁵²⁶ ILL. COMP. STAT. 750/ 5-212 (2010).

⁵²⁷ ILL. COMP. STAT. 750/ 5-213.1 (2010).

⁵²⁸ H.B. 2234, 96th Gen. Assem., Reg. Sess. (Ill. 2009). There is also proposed legislation that would allow same-sex marriage, H.B. 178, 96th Gen. Assem., Reg. Sess. (Ill. 2009).

⁵²⁹ IND. CODE § 31-11-1-1 (2009) (“Only a female may marry a male. Only a male may marry a female.”).

⁵³⁰ *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. App. 2005).

⁵³¹ Bill Ruthhart, *Senate OK’s Same-Sex Marriage Ban*, Indystar.com, Jan. 29, 2010, available at <http://www.indystar.com/article/20100129/NEWS05/1290356/Senate-OKs-same-sex-marriage-ban>.

⁵³² *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (overturning IOWA CODE § 595.20 (2008)); *see also* <http://www.desmoinesregister.com/article/20090403/NEWS/90403010/Unanimous-ruling--Iowa-marriage-no-longer-limited-to-one-man--one-woman>.

⁵³³ KAN. STAT. ANN. § 23-101 (2008).

⁵³⁴ KAN. STAT. ANN. § 23-115 (2008).

⁵³⁵ KAN. CONST. art. XV, § 16.

Kentucky	<p>State law and Constitution ban same-sex marriage and the recognition of thereof.</p> <p>“Marriage” is defined as “the civil status, condition, or relation of one (1) man and one (1) woman united in law for life, for the discharge to each other and the community of the duties legally incumbent upon those whose association is founded on the distinction of sex.”⁵³⁶</p> <p>Law also provides that marriages between people of same sex are void.⁵³⁷</p> <p>Constitutional provision: “Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”⁵³⁸</p>
Louisiana	<p>Louisiana law and Constitution ban same-sex marriage and recognition thereof.</p> <p>“Persons of the same sex may not contract marriage with each other. A purported marriage between persons of the same sex contracted in another state shall be governed by the provisions of Title II of Book IV of the Civil Code”.⁵³⁹</p> <p>Same-sex marriages from foreign jurisdictions are not recognized because they are against a strong public policy of the state.⁵⁴⁰</p> <p>Constitutional provision: “Marriage in the state of Louisiana shall consist only of the union of one man and one woman....”⁵⁴¹□□</p>
Maine	<p>State law bans same-sex marriage and the recognition thereof, but there is a domestic partner registry. No constitutional amendment.</p> <p>Same-sex marriages are prohibited, and out-of-state same-sex marriages are not recognized.⁵⁴² Additionally, “when residents of this State, with intent to evade this section and to return and reside here, go into another state or country to have their marriage solemnized there and afterwards return and reside here, that marriage is void in this State.”⁵⁴³</p> <p>Domestic partner registry allows certain benefits, including property rights and guardianship if the partner becomes incapacitated.⁵⁴⁴</p>

⁵³⁶ KY. REV. STAT. ANN. § 402.005 (2010).

⁵³⁷ KY. REV. STAT. ANN. § 402.020 (2010).

⁵³⁸ KY. CONST. § 233a.

⁵³⁹ LA. CIV. CODE ANN. art. 89 (2010).

⁵⁴⁰ LA. CIV. CODE ANN. art. 3520 (2010).

⁵⁴¹ LA. CONST. art. XII, § 15.

⁵⁴² ME. REV. STAT. ANN. tit. 19-A, § 701 (2009).

⁵⁴³ ME. REV. STAT. ANN. tit. 19-A, § 701 (2009).

⁵⁴⁴ ME. REV. STAT. ANN. tit. 18-A, §1-201, § 2-202, § 3-203, § 5-311, § 5-410; tit. 19-A, §4002; tit. 22, §2710, § 2843, § 2846 (2009).

Maryland	<p>Maryland law provides that marriage is between a man and a woman, and a court challenge to that law was rejected in 2007. Domestic partnership benefits are available. No constitutional amendment.</p> <p>§ 2-201. Marriages which are valid “Only a marriage between a man and a woman is valid in this State.”⁵⁴⁵</p> <p>This was upheld by the Maryland Supreme Court.⁵⁴⁶</p> <p>Domestic partnership law: Allows for benefits in numerous areas, including hospital visitation, funeral arrangements, etc.⁵⁴⁷</p> <p>Most recently, a House committee in the Maryland legislature killed a bill that would have prohibited Maryland from recognizing same-sex marriages entered into in other jurisdictions.⁵⁴⁸</p> <p>There is pending legislation that would allow same sex marriage.⁵⁴⁹</p>
Massachusetts	Allows same-sex marriage; does not explicitly address whether such unions from other jurisdictions are honored. This was the result of a court decision. ⁵⁵⁰
Michigan	<p>State law and Constitution ban same-sex marriage and the recognition thereof.</p> <p>Marriage is defined as being between a man and a woman.⁵⁵¹</p> <p>Same-sex marriages from other states are not recognized.⁵⁵²</p> <p>Constitutional Provision: To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose. ⁵⁵³</p>
Minnesota	<p>State law bans same-sex marriage and the recognition thereof. No constitutional amendment.</p> <p>Same-sex marriages are prohibited.⁵⁵⁴</p> <p>Note: there is an ongoing battle over a constitutional amendment that would ban gay marriage, but a bill also has recently been introduced that would allow gay marriage. SF 1210. Now in committee.⁵⁵⁵</p>

⁵⁴⁵ MD. CODE ANN., FAM. LAW § 2-201 (2010).

⁵⁴⁶ Conaway v. Deane, 932 A.2d 571 (Md. 2007), discussed *supra* notes 256-8 and accompanying text.

⁵⁴⁷ MD. CODE ANN., HEALTH-GEN. § 6-101 (2010).

⁵⁴⁸ See <http://www.baltimoresun.com/news/maryland/legislature/bal-gay-marriage-bill0203,0,1892824.story>.

⁵⁴⁹ 2009 MD S.B. 565 (NS)).

⁵⁵⁰ Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003), discussed *supra* notes 149-71 and accompanying text.

⁵⁵¹ MICH. COMP. LAWS § 551.1 (2009).

⁵⁵² MICH. COMP. LAWS § 551.271 (2009).

⁵⁵³ MICH. COMP. LAWS § 551.1 (2009).

⁵⁵⁴ MISS. CODE ANN. § 517.03 (2009); MISS. CODE ANN. § 517.01 (2009).

⁵⁵⁵ S.B. 2145, 86th Leg., Reg. Sess. (Minn. 2009).

Mississippi	<p>State law and Constitution ban same-sex marriage and recognition thereof.</p> <p>“Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi.”⁵⁵⁶</p> <p>Constitutional provision: “Marriage may take place and may be valid under the laws of this state only between a man and a woman. A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state.”⁵⁵⁷</p>
Missouri	<p>State law and Constitution ban same-sex marriage and the recognition thereof.</p> <p>”It is the public policy of this state to recognize marriage only between a man and a woman.”⁵⁵⁸</p> <p>“A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted.”⁵⁵⁹</p> <p>Constitutional provision: ““That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.”⁵⁶⁰□ □</p>
Montana	<p>State law and Constitution ban same-sex marriage and recognition thereof.</p> <p>“Marriage is a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential.”⁵⁶¹</p> <p>“(1) The following marriages are prohibited:(d) a marriage between persons of the same sex.”⁵⁶²</p> <p>Constitutional provision: Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.⁵⁶³</p>
Nebraska	<p>Nebraska Constitution bans same-sex marriage and recognition thereof.</p> <p>Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.⁵⁶⁴□ □ Federal court challenge to the constitutional amendment failed when the Eight Circuit held it was rationally related to legitimate state interest of encouraging heterosexual couples to raise children in committed marriage relationships, and as such did not violate Equal Protection Clause of the U.S. Constitution.⁵⁶⁵□</p>

⁵⁵⁶ MISS. CODE ANN. § 93-1-1 (2009).

⁵⁵⁷ MISS. CONST. art. XIV, § 263A.

⁵⁵⁸ MO. REV. STAT. § 451.022 (2009).

⁵⁵⁹ *Id.*

⁵⁶⁰ MO. CONST. art. I, § 33.

⁵⁶¹ MONT. CODE ANN. § 40-1-103 (2009).

⁵⁶² MONT. CODE ANN. § 40-1-401 (2009).

⁵⁶³ MONT. CONST. art. XIII, § 7.

⁵⁶⁴ NEB. CONST. art. I, § 29.

⁵⁶⁵ *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

Nevada	<p>Nevada recognizes domestic partnerships, however, the Nevada Constitution bans same-sex marriage and recognition thereof.</p> <p>Constitutional Provision: Only a marriage between a male and female person shall be recognized and given effect in this state.⁵⁶⁶</p> <p>However, Nevada recognizes domestic partnerships.⁵⁶⁷</p>
New Hampshire	<p>Allows same-sex marriage.</p> <p>New Hampshire has had legislation identifying the legal status of civil unions and allowing for all state level spousal rights and responsibilities since 2007.⁵⁶⁸ New Hampshire passed legislation allowing same-sex marriage in May of 2009. It became effective on January 1, 2010.⁵⁶⁹ Civil unions will merge into marriage by 2011.⁵⁷⁰</p>
New Jersey	<p>Civil unions law provides benefits.</p> <p>New Jersey allows “civil unions” with many privileges similar to marriage.⁵⁷¹ “The Legislature has chosen to establish civil unions by amending the current marriage statute to include same-sex couples. In doing so, the Legislature is continuing its longstanding history of insuring equality under the laws for all New Jersey citizens by providing same-sex couples with the same rights and benefits as heterosexual couples who choose to marry.”⁵⁷²</p> <p>A court case led to establishment of civil unions.⁵⁷³</p>
New Mexico	<p>New Mexico law does not explicitly allow or prohibit same-sex marriage, but does provide that the state will recognize marriages that are valid elsewhere.</p> <p>“All marriages celebrated beyond the limits of this state, which are valid according to the laws of the country wherein they were celebrated or contracted, shall be likewise valid in this state, and shall have the same force as if they had been celebrated in accordance with the laws in force in this state.”⁵⁷⁴</p> <p>The same-sex partners of state employees can receive benefits.⁵⁷⁵</p>
New York	<p>New York does not allow same-sex marriages to be performed there, but recognizes same-sex marriages performed in other states. This is per a directive from Gov. David Patterson issued after the ruling in the Martinez case.⁵⁷⁶</p> <p>State law does allow some benefits for domestic partners, including hospital visitation⁵⁷⁷ and funeral arrangements.⁵⁷⁸</p>

⁵⁶⁶ S.B. 283, 75th Leg., Reg. Sess. (Nev. 2009); NEV. CONST. art. I, § 21.

⁵⁶⁷ S.B. 283, 75th Leg., Reg. Sess. (Nev. 2009) (Effective October 1, 2009).

⁵⁶⁸ N.H. REV. STAT. ANN. § 457-A (2009).

⁵⁶⁹ *Id.*

⁵⁷⁰ *Id.*

⁵⁷¹ N.J. STAT. ANN. § 37:1-28 (2010).

⁵⁷² N.J. STAT. ANN. § 37:1-28 (2010).

⁵⁷³ *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

⁵⁷⁴ N.M. STAT. § 40-1-4 (2009).

⁵⁷⁵ N.M. Exec. Or. No. 2003-010.

⁵⁷⁶ *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (N.Y.A.D. 4 Dept. 2008) (holding that held a same-sex marriage (in this case from Canada) should be recognized). The state’s highest court declined to review the ruling. However, the state

North Carolina	<p>State law bans same-sex marriage and the recognition thereof. No constitutional amendment to that effect.</p> <p>Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina.⁵⁷⁹</p>
North Dakota	<p>North Dakota law and Constitution ban same-sex marriage and the recognition thereof.</p> <p>Marriage is defined as being between one man and one woman.⁵⁸⁰ Same-sex marriages from other jurisdictions are not recognized.⁵⁸¹</p> <p>Constitutional provision: Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.⁵⁸²</p>
Ohio	<p>Ohio law and Constitution ban same-sex marriage and the recognition thereof.</p> <p>“A marriage may only be entered into by one man and one woman. ...”⁵⁸³</p> <p>Same-sex marriages from other jurisdictions are not valid.⁵⁸⁴</p> <p>Constitutional provision: “Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.”⁵⁸⁵</p> <p>Note that the second sentence of the above constitutional amendment was held unconstitutional by a trial court in 2005 in a case involving the application of the Domestic Violence Act to unwed partners.⁵⁸⁶</p>
Oklahoma	<p>State law and Constitution ban same-sex marriage and the recognition thereof.</p> <p>“A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage.”⁵⁸⁷</p> <p>Constitutional provision: “Marriage in this state shall consist only of the union of one man and one woman.”⁵⁸⁸</p>

Supreme Court has held that denial of marriage license to same-sex couples did not violate the state constitution. (The case noted that New York’s statutory law did not explicitly limit marriage to opposite sex couples, but that was the clear implication and understanding). *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

⁵⁷⁷ N.Y. [PUB. HEALTH] LAW §2805-Q (2010).

⁵⁷⁸ N.Y. [PUB. HEALTH] LAW §4201 (2010).

⁵⁷⁹ N.C. GEN. STAT. § 51-1.2 (2009).

⁵⁸⁰ N.D. CENT. CODE § 14-03-01 (2009).

⁵⁸¹ N.D. CENT. CODE § 14-03-08 (2009).

⁵⁸² N.D. CONST. art. XI, § 28.

⁵⁸³ OHIO REV. CODE ANN. § 3101.01 (2010).

⁵⁸⁴ OHIO REV. CODE ANN. § 3101.01 (2010).

⁵⁸⁵ OHIO CONST. art. XV, § 11.

⁵⁸⁶ *Phelps v. Johnson*, 2005 WL 4651081 (Ohio Com. Pl. 2005).

⁵⁸⁷ OKLA. STAT. tit. 43, § 3.1 (2009).

⁵⁸⁸ OKLA. CONST. art. II, § 35.

Oregon	<p>Oregon law and Constitution ban same-sex marriage and recognition thereof, but a domestic partner registry exists.</p> <p>”Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.150.”⁵⁸⁹</p> <p>Domestic Partnership Law provides the same rights and benefits as marriage under state law.⁵⁹⁰</p> <p>Constitutional provision: “‘It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.”⁵⁹¹□□□</p>
Pennsylvania	<p>Pennsylvania law bans same-sex marriage or the recognition thereof. No constitutional provision.</p> <p>It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.⁵⁹²□</p>
Rhode Island	<p>Rhode Island has no explicit ban on same-sex marriages.</p> <p>However, the Legislature has extended some rights to same-sex couples.⁵⁹³</p>
South Carolina	<p>State law and Constitution ban same-sex marriage and the recognition thereof.</p> <p>”A marriage between persons of the same sex is void ab initio and against the public policy of this State.”⁵⁹⁴</p> <p>Constitutional provision:□ ”A marriage between one man and one woman is the only lawful domestic union that shall be valid or recognized in this State....”⁵⁹⁵□</p>
South Dakota	<p>State law and Constitution ban same-sex marriage and the recognition thereof.</p> <p>Marriage is defined as that between a man and a woman.⁵⁹⁶</p> <p>Out of state same-sex marriages are not recognized.⁵⁹⁷</p> <p>Constitutional provision: “‘Only marriage between a man and a woman shall be valid or recognized in South Dakota. The uniting of two or more persons in a civil union, domestic partnership, or other quasi-marital relationship shall not be valid or recognized in South Dakota.”⁵⁹⁸□□</p>

⁵⁸⁹ OR. REV. STAT. § 106.010 (2007); OR. REV. STAT. § 107.615 (2007).

⁵⁹⁰ O. R. S. T. 11, Ch. 106, Refs & Annos, OR ST T. 11, Ch. 106, Refs & Annos.

⁵⁹¹ OR. CONST. art. XV, § 5a.

⁵⁹² 23 PA. CONS. STAT. ANN. § 1704 (2009).

⁵⁹³ R.I. GEN. LAWS §28-48-1, 36-12-4, 44-30-12, 45-49-4.3 (West 2010).

⁵⁹⁴ S.C. CODE ANN. § 20-1-15 (2009).

⁵⁹⁵ S.C. CONST. art. XVII, § 15.

⁵⁹⁶ S.D. CODIFIED LAWS § 25-1-1 (2009).

⁵⁹⁷ S.D. CODIFIED LAWS § 25-1-38 (2009).

⁵⁹⁸ S.D. CONST. art. XXI, § 9.

Tennessee	<p>State law and Constitution ban same-sex marriage and the recognition thereof.</p> <p>The only recognized marital union is between one man and one woman; foreign marriages that do not comply with that are not recognized.⁵⁹⁹</p> <p>Constitutional provision: “The historical institution and legal contract solemnizing the relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state.”⁶⁰⁰</p>
Texas	<p>State law and Constitution ban same-sex marriage and the recognition thereof.</p> <p>“(a) A man and a woman desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state; b) A license may not be issued for the marriage of persons of the same sex.”⁶⁰¹</p> <p>“A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.”⁶⁰²</p> <p>Constitutional provision: “Sec. 32. (a) Marriage in this state shall consist only of the union of one man and one woman.□ (b) This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.”□⁶⁰³</p>
Utah	<p>State law and Constitution ban same-sex marriage and the recognition thereof.</p> <p>“The following marriages are prohibited and declared void: (5) between persons of the same sex.”⁶⁰⁴</p> <p>Marriages other than those between a man and a woman are not recognized in Utah.⁶⁰⁵</p> <p>Constitutional provision: “(1) Marriage consists only of the legal union between a man and a woman.□ (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”⁶⁰⁶</p>
Vermont	<p>Allows same-sex marriage</p> <p>Vermont allows same-sex marriage through legislation passed in April, 2009.⁶⁰⁷</p> <p>Vermont had an extensive Civil union statute⁶⁰⁸, but now, has replaced it with marriage: “Please note that the new marriage equality law, effective September 1, 2009, discontinues the need for the separate status of “civil unions” in Vermont. Civil unions entered into prior to September 1 will continue to be recognized as civil unions. Couples currently in a civil union who want to be married will need to go through the new marriage process.”⁶⁰⁹</p>

⁵⁹⁹ TENN. CODE ANN. § 36-3-113 (2009).

⁶⁰⁰ TENN. CONST. art. XI, § 18.

⁶⁰¹ TEX. FAM. CODE ANN. § 2.001 (2010).

⁶⁰² TEX. FAM. CODE ANN. § 6.204 (2010).

⁶⁰³ TEX. CONST. art. I, § 32.

⁶⁰⁴ UTAH CODE ANN. § 30-1-2 (2009).

⁶⁰⁵ UTAH CODE ANN. § 30-1-4.1 (2009).

⁶⁰⁶ UTAH CONST. art. I, § 29.

⁶⁰⁷ http://www.nytimes.com/2009/04/08/us/08vermont.html?_r=1; VT. STAT. ANN. tit. 15, § 8 (2010).

⁶⁰⁸ VT. STAT. ANN. tit. 15, § 1204 (2010).

⁶⁰⁹ <http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html>; VT. STAT. ANN. tit. 18, § 5160 (2010).

Virginia	<p>State law and Constitution ban same-sex marriage and the recognition thereof.</p> <p>Marriages between persons of the same-sex are prohibited⁶¹⁰, as are civil unions and contractual partnership agreements.⁶¹¹</p> <p>Constitutional provision: “That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions..... Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.”⁶¹²□□</p>
Washington	<p>Washington law bans same-sex marriage, but domestic partnership is available. No constitutional amendment.</p> <p>Marriage is prohibited “when the parties are persons other than a male and a female” and same-sex marriages are not recognized. ⁶¹³□□ Washington expressly allows domestic partnerships that provide many of the same legal benefits as marriage.⁶¹⁴</p>
West Virginia	<p>State law bans same-sex marriage and the recognition thereof. No constitutional amendment.⁶¹⁵</p> <p>Same-sex marriages are not recognized or given effect.⁶¹⁶</p>
Wisconsin	<p>State law and Constitution ban same-sex marriage and the recognition thereof.</p> <p>“Marriage, so far as its validity at law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting is essential, and which creates the legal status of husband and wife.”⁶¹⁷</p> <p>Wisconsin forbids its residents from getting married elsewhere to circumvent its laws, finds such marriages void⁶¹⁸, and even punishes such attempts.⁶¹⁹</p> <p>Constitutional provision: “Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.”⁶²⁰□</p>
Wyoming	<p>State law bans same-sex marriage and the recognition thereof. No constitutional provision.</p> <p>“Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential.”⁶²¹</p>

⁶¹⁰ VA. CODE ANN. § 20-45.2 (2009).

⁶¹¹ VA. STAT. ANN. § 20-45.3 (2009).

⁶¹² VA. CONST. art. I, § 15-A.

⁶¹³ WASH. REV. CODE ANN. § 26.04.020 (2009).

⁶¹⁴ WASH. REV. CODE ANN. § 26.60.010 (2009) (listing the various protections offered).

⁶¹⁵ However, there is some evidence that a marriage amendment may be in the works. <http://www.herald-dispatch.com/news/x1838470830/Legislators-try-to-get-marriage-amendment-to-floor>. H.J.R. 5, 79th Leg., 2nd Sess. (W. Va. 2010).

⁶¹⁶ W. VA. CODE ANN. § 48-2-603 (2009).

⁶¹⁷ WIS. STAT. ANN. § 765.01 (2009).

⁶¹⁸ WIS. STAT. ANN. § 765.04 (2009).

⁶¹⁹ WIS. STAT. ANN. § 765.30 (2009).

⁶²⁰ WIS. CONST. art. XIII, § 13.

⁶²¹ WYO. STAT. ANN. § 20-1-101 (2010).

APPENDIX II: COUNTRY-BY-COUNTRY LAWS ON SAME-SEX MARRIAGE

Country	Same-Sex Marriage?	Rights for Same-Sex Couples	Relevant Law	Source of Law
Albania	No. Last year, the country's prime minister proposed allowing same-sex marriage, ⁶²² but anti-discrimination legislation introduced in the country's parliament in January did not include a same-sex marriage provision. ⁶²³			
Andorra	No.	Yes. The country allows for registration of unions between both same- and opposite-sex couples. ⁶²⁴ This registered cohabitation gives certain rights and responsibilities to couples, but is not equivalent marriage. ⁶²⁵	A registered cohabitating couple has the duty to support one another and the right to maintenance in the event of a split. They have the same rights as married couples in terms of social security and employment laws, and the adoption of children. ⁶²⁶ Partners wanting to register must prove they have lived together for at least six months, have a right of residency in Andorra, and have a private agreement regulating their property and personal regulations. ⁶²⁷	Statute ⁶²⁸
Argentina	No.	Civil unions are allowed in some cities. ⁶²⁹	In 2002, Buenos Aires became the first city in Latin America to allow civil unions for gay couples. The Argentine province of Rio Negro	Statute ⁶³¹

⁶²² *Albania Plans to Allow Gay Marriage*, BOSTON GLOBE, Aug. 1, 2009, at 3.

⁶²³ *Albania Postpones Gay Marriage Provision*, BALKAN INSIGHT, January 27, 2010, <http://www.balkaninsight.com/en/main/news/25264/>.

⁶²⁴ ILGA-EUROPE, MARRIAGE AND PARTNERSHIP RIGHTS FOR SAME-SEX PARTNERS: COUNTRY-BY-COUNTRY, http://www.ilga-europe.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country/#andorra (last visited Feb. 3, 2010).

⁶²⁵ *Id.*

⁶²⁶ *Id.*

⁶²⁷ *Id.*

⁶²⁸ *Id.*

⁶²⁹ THE PEW FORUM ON RELIGION AND PUBLIC LIFE, GAY MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/docs/?DocID=423>.

			and Villa Carlos Paz, another Argentine city, also provides for same-sex civil unions. ⁶³⁰	
Australia	No.	Civil unions in Australian Capital Territory, Tasmania and Victoria. ⁶³² Certain cities provide relationship declaration programs. ⁶³³	Federal government recognizes these state and territory civil unions for federal benefits. ⁶³⁴ These civil unions are open only to the residents of the state or territory that authorizes them. ⁶³⁵ Cities including Melbourne and Sydney provide relationship declaration programs. ⁶³⁶ These programs do not confer the rights of marriage, but may be relevant to establishing certain property rights and receiving inheritance rights. ⁶³⁷ However, Australian law defines marriage as solely between a man and a woman. ⁶³⁸	Statutes ⁶³⁹
Austria	No.	Since 2003, the country has had unregistered cohabitation. ⁶⁴⁰ This provides very limited rights after a specified period of cohabitation. ⁶⁴¹	The right of unregistered cohabitation was extended following the European Court of Human Rights' 2003 decision in <i>Karner v. Austria</i> , which held that a surviving same-sex partner was allowed to succeed his deceased lover's tenancy. ⁶⁴³	Court decision ⁶⁴⁴ and statute ⁶⁴⁵

⁶³⁰ *Id.*

⁶³¹ *Id.*

⁶³² Australian Marriage Equality, Civil Unions in Australia, <http://www.australianmarriageequality.com/civilunions.htm> (last visited Feb. 7, 2010).

⁶³³ *Id.*

⁶³⁴ *Id.*

⁶³⁵ *Id.*

⁶³⁶ Australian Marriage Equality, Civil Unions in Australia, <http://www.australianmarriageequality.com/civilunions.htm> (last visited Feb. 7, 2010).

⁶³⁷ City of Sydney Relationship Declaration Information Pack (Sept. 2005), <http://www.cityofsydney.nsw.gov.au/Community/documents/ServicesAndPrograms/RelationshipsDeclarationProgram/RelationshipsDeclarationProgramInfoPack.pdf>.

⁶³⁸ Australia, Marriage Amendment Act of 2004, at 3, [http://legislation.gov.au/comlaw/Legislation/Act1.nsf/0/91DFFD1199DF26D8CA2574170007CE06/\\$file/1262004.pdf](http://legislation.gov.au/comlaw/Legislation/Act1.nsf/0/91DFFD1199DF26D8CA2574170007CE06/$file/1262004.pdf) (last visited Feb. 7, 2010).

⁶³⁹ The text of the Australian Capital Territory Civil Partnerships Act can be found here. Australian Capital Territory, Civil Partnerships Act, <http://www.legislation.act.gov.au/a/2008-14/current/pdf/2008-14.pdf>, (last visited Feb. 7, 2010). The Tasmanian law can be found here. Tasmania, Relationships Act 2003, http://www.thelaw.tas.gov.au/tocview/index.w3p;cond=;doc_id=44%2B%2B2003%2BAT%40EN%2B20100208000000;histon=;prompt=;rec=-1;term= (last visited Feb. 7, 2010). The Victorian law can be found here. Relationships Act of 2008, [http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/A7417CE604D359DECA25742C0022EC95/\\$FILE/08-012a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e92000e23be/A7417CE604D359DECA25742C0022EC95/$FILE/08-012a.pdf) (last visited Feb. 7, 2010).

⁶⁴⁰ ILGA-EUROPE, MARRIAGE AND PARTNERSHIP RIGHTS FOR SAME-SEX PARTNERS: COUNTRY-BY-COUNTRY, http://www.ilga-europe.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country (last visited Feb. 7, 2010).

⁶⁴¹ *Id.*

		Beginning Jan. 1, 2010, the country has registered partnerships. ⁶⁴²		
Belgium	Yes.		Same-sex marriage was first allowed in 2003, giving homosexual couples the same tax and inheritance rights as heterosexual couples. ⁶⁴⁶ Adoption rights were added in 2006. ⁶⁴⁷	Statute ⁶⁴⁸
Brazil	No.	The state of Rio Grande do Sul allows civil unions. ⁶⁴⁹		Court decision ⁶⁵⁰
Bulgaria	No.	No. ⁶⁵¹		
Cambodia	No. ⁶⁵²	No.		
Canada	Yes.		Same-sex marriage gradually became legal through a series of court cases beginning in 2003. ⁶⁵³ In 2005, the Canadian parliament passed legislation making same-sex marriage legal nationwide. ⁶⁵⁴ The Canadian Supreme Court had upheld that legislation as within the authority of Parliament and consistent with the Canadian Charter of Rights and Freedoms. ⁶⁵⁵	Court decisions and statute ⁶⁵⁶

⁶⁴² ILGA-Europe, http://www.ilga-europe.org/europe/guide/country_by_country/austria/austrian_parliament_adopts_registered_partnership_law_for_same_sex_partners

⁶⁴³ ILGA-EUROPE, MARRIAGE AND PARTNERSHIP RIGHTS FOR SAME-SEX PARTNERS: COUNTRY-BY-COUNTRY, http://www.ilga-europe.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country (last visited Feb. 7, 2010).

⁶⁴⁴ *Id.* The full text of the *Karner* decision, which was based on violations of the European Convention on Human Rights, is available on the ILGA web site.

⁶⁴⁵ *Id.*

⁶⁴⁶ THE PEW FORUM ON RELIGION AND PUBLIC LIFE, SAME-SEX MARRIAGE: REDEFINING MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/docs/?DocID=235>.

⁶⁴⁷ *Id.*

⁶⁴⁸ *Id.*

⁶⁴⁹ THE PEW FORUM ON RELIGION AND PUBLIC LIFE, GAY MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/docs/?DocID=423>.

⁶⁵⁰ *Brazilian Go-Ahead for Gay Unions*, BBC News, March 5, 2004, <http://news.bbc.co.uk/2/hi/americas/3534959.stm>.

⁶⁵¹ ILGA-EUROPE, MARRIAGE AND PARTNERSHIP RIGHTS FOR SAME-SEX PARTNERS: COUNTRY-BY-COUNTRY, http://www.ilga-europe.org/europe/advocacy_lobbying/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country#bulgaria (last visited Feb. 8, 2010).

⁶⁵² The Cambodian king did informally express support for gay marriage in 2004. *Cambodian King Backs Gay Marriage*, BBC News, Feb. 20, 2004, <http://news.bbc.co.uk/2/hi/asia-pacific/3505915.stm>.

⁶⁵³ THE PEW FORUM ON RELIGION AND PUBLIC LIFE, SAME-SEX MARRIAGE: REDEFINING MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/docs/?DocID=235>.

⁶⁵⁴ *Id.*

⁶⁵⁵ *Re: Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79 (Can.)

⁶⁵⁶ THE PEW FORUM ON RELIGION AND PUBLIC LIFE, SAME-SEX MARRIAGE: REDEFINING MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/docs/?DocID=235>.

China	No.	No. ⁶⁵⁷		Statute ⁶⁵⁸
Colombia	No.	In a 2009 ruling, Columbia's Constitutional Court ruled that same-sex partners must receive the same rights as those in heterosexual common-law marriages. ⁶⁵⁹	The rights granted to same-sex couples include housing protections, Rights to benefits, including social security and certain subsidies, and rights for same-sex partners of crime victims. ⁶⁶⁰	Court ruling ⁶⁶¹
Denmark	No.	Denmark allows for registered partnerships that provide limited rights. ⁶⁶²	Adoption rights are limited, but same-sex partners may adopt each other's children. ⁶⁶³	Statute ⁶⁶⁴
Dominican Republic	No. ⁶⁶⁵			
Ecuador	No.	Civil unions ⁶⁶⁶	Note that adoption of children is not permitted	Constitution ⁶⁶⁷
England/Wales/Scotland	No.	Civil unions ⁶⁶⁸	The law gives same-sex partners rights in regard to occupancy of the family home, tax and employment benefits, child support, recognition under intestacy rules, and the ability to apply for parental responsibility of the civil partner's child. ⁶⁶⁹	Statute ⁶⁷⁰
Estonia	No. ⁶⁷¹	No. ⁶⁷²		

⁶⁵⁷ Although such marriages are not legally recognized in China, two men recently publicly wed, which was described as a first by the Chinese media. Huang Zhiling & Zhang Ao, *In a 'First,' Gay Couple Tie the Knot in China*, CHINA DAILY, Jan. 13, 2010, available at http://www.chinadaily.com.cn/regional/2010-01/13/content_9314498.htm.

⁶⁵⁸ China's law recognizes only marriage between opposite-sex couples. Consulate-General of the People's Republic of China in New York, Marriage Laws of the People's Republic of China, <http://www.nyconsulate.prchina.org/eng/lsqz/laws/t42222.htm> (last visited Feb. 11, 2010).

⁶⁵⁹ Press Release, Colombia Diversa, Colombia's Constitutional Court Rules for Equality, (Jan. 28, 2009), <http://www.colombiadiversa.org/dmdocuments/COLOMBIAN%20CONSTITUTIONAL2.pdf>

⁶⁶⁰ *Id.*

⁶⁶¹ *Id.*

⁶⁶² ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/Denmark (last visited Feb. 11, 2010).

⁶⁶³ *Id.*

⁶⁶⁴ *Id.*

⁶⁶⁵ *Dominican Lawmakers Reject Legalization of Same-Sex 'Marriage'*, Catholic News Agency, June 12, 2009, http://www.catholicnewsagency.com/news/dominican_lawmakers_reject_legalization_of_samesex_marriage/.

⁶⁶⁶ Joshua Partlow and Stephan Kuffner, *Ecuadorans Approve Constitution*, WASH. POST, Sept. 29, 2008, Bus. Sec.

⁶⁶⁷ *Id.*

⁶⁶⁸ Office of Public Sector Information, Civil Partnership Act of 2004, http://www.opsi.gov.uk/acts/acts2004/ukpga_20040033_en_1 (last visited Feb. 12, 2010).

⁶⁶⁹ *Id.*

⁶⁷⁰ *Id.*

France	No.	France does recognize same-sex unions from other countries. ⁶⁷³		
Germany	No.	Registered partnerships provide limited rights. ⁶⁷⁴	Germany's constitutional court has upheld the Lifetime Partnership Act, passed in 2001. ⁶⁷⁵ The act allows same-sex partners to share property, obligates them to support one another, gives them visitation rights to children raised in the partners' home, and gives them standing with respect to the estate of a deceased partner. ⁶⁷⁶	Statute ⁶⁷⁷
Greece	No.	No. ⁶⁷⁸		
Honduras	No.	No. A constitutional amendment bans marriage and adoption for same-sex couples. ⁶⁷⁹		Constitutional Amendment ⁶⁸⁰
Hungary	No.	Registered partnerships ⁶⁸¹	Registered partners are entitled to many of the same rights as married couples, but not the right to take their partner's name, adopt children or participate in assisted reproduction methods. ⁶⁸²	Statute ⁶⁸³
India	No.	No. ⁶⁸⁴		
Ireland	No.	No, but Irish parliament is currently debating a bill that would		

⁶⁷¹ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/Estonia (last visited Feb. 12, 2010).

⁶⁷² *Id.*

⁶⁷³ THE PEW FORUM ON RELIGION AND PUBLIC LIFE, GAY MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/docs/?DocID=423>.

⁶⁷⁴ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/germany (last visited Feb. 12, 2010).

⁶⁷⁵ Russell Miller & Volker Röben, *Constitutional Court upholds Lifetime Partnership Act*, 3 German Law Journal No. 8 (2002), available at <http://www.germanlawjournal.com/article.php?id=176>.

⁶⁷⁶ *Id.*

⁶⁷⁷ *Id.*

⁶⁷⁸ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/Greece (last visited Feb. 12, 2010).

⁶⁷⁹ GLOBAL RIGHTS & UNIVERSITY OF VIRGINIA INTERNATIONAL HUMAN RIGHTS LAW CLINIC, VIOLATIONS OF THE RIGHTS OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER PERSONS IN HONDURAS 13 (2006), http://www.globalrights.org/site/DocServer/Shadow_Report_Honduras.pdf?docID=9964

⁶⁸⁰ *Id.*

⁶⁸¹ ILGA-Europe, *Hungary Introduces Registered Partnership for Same-Sex Partners*, http://www.ilga-europe.org/europe/guide/country_by_country/hungary/hungary_introduces_registered_partnership_for_same_sex_partners (last visited Feb. 12, 2010).

⁶⁸² *Id.*

⁶⁸³ *Id.*

⁶⁸⁴ ILGA-Asia, India Country Survey, <http://ilga.org/ilga/en/countries/INDIA/Law> (last visited Feb. 12, 2010).

		allow for civil unions. ⁶⁸⁵		
Italy	No.	No. ⁶⁸⁶		
Japan	No.	Japan does recognize same-sex unions from other countries. ⁶⁸⁷		
Latvia	No.	No. ⁶⁸⁸	Marriage between persons of the same sex is banned by both the Civil Code and a 2005 amendment to the Constitution. ⁶⁸⁹	Constitutional Amendment, statute. ⁶⁹⁰
Liechtenstein	No.	No. ⁶⁹¹		
Lithuania	No.	No. ⁶⁹²		
Mexico	No.	Mexico City ⁶⁹³ and Coahuila ⁶⁹⁴ allow civil unions; Mexico City will allow marriage in March. ⁶⁹⁵	Mexico City's civil union law did not allow for adoption, social security benefits, or joint loans for same-sex couples, but the newly passed marriage law will. ⁶⁹⁶	Statute ⁶⁹⁷
Moldova	No.	No. ⁶⁹⁸		
Montenegro	No.	No. ⁶⁹⁹		

⁶⁸⁵ Michael O'Regan & Marie O'Halloran, *Dail Debates Civil Unions Bill*, IRISH TIMES, Jan. 21, 2010, <http://www.irishtimes.com/newspaper/breaking/2010/0121/breaking62.html>. The text of the bill is available here. House of the Oireachtas, Civil Partnership Bill 2009, www.oireachtas.ie/documents/bills28/bills/2009/4409/b4409d.pdf (last visited Feb. 18, 2010).

⁶⁸⁶ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/Italy (last visited Feb. 12, 2010).

⁶⁸⁷ THE PEW FORUM ON RELIGION AND PUBLIC LIFE, GAY MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/docs/?DocID=423>.

⁶⁸⁸ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/latvia (last visited Feb. 12, 2010).

⁶⁸⁹ *Id.*

⁶⁹⁰ *Id.*

⁶⁹¹ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/liechtenstein (last visited Feb. 12, 2010).

⁶⁹² ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/lithuania (last visited Feb. 12, 2010).

⁶⁹³ BBC News, *Mexico City Embraces Gay Unions*, March 17, 2007, <http://news.bbc.co.uk/2/hi/6461159.stm>.

⁶⁹⁴ *Id.*

⁶⁹⁵ Elisabeth Malkin, *Same-Sex Marriage Puts Mexico City at the Center of Rights Debate*, N.Y. TIMES, Feb. 7, 2010, at A10.

⁶⁹⁶ Miguel Angel Gutierrez, *Mexico City Allows Gay Marriage with Landmark Law*, Dec. 22, 2009, <http://www.reuters.com/article/idUSTRE5BK47420091222>

⁶⁹⁷ *Id.*

⁶⁹⁸ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/moldova (last visited Feb. 12, 2010).

⁶⁹⁹ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/montenegro (last visited Feb. 12, 2010).

Nepal	Yes, although a court decision ⁷⁰⁰ implementing that right has not yet been enacted. ⁷⁰¹			Court decision, constitutional amendment pending. ⁷⁰²
Netherlands	Yes. ⁷⁰³	Same-sex couples may marry or enter into a registered partnership. The country also provides registered cohabitating partners with limited rights. ⁷⁰⁴	First country to legalize same-sex marriage. ⁷⁰⁵ Partners may jointly adopt children and artificial insemination is available for lesbian couples. ⁷⁰⁶	Statute ⁷⁰⁷
Norway	Yes. ⁷⁰⁸	Same-sex couples can marry; registered cohabitating couples also have limited rights. ⁷⁰⁹	Same-sex couples may jointly adopt children; artificial insemination is available for lesbian couples. ⁷¹⁰	Statute ⁷¹¹
Poland	No.	No. ⁷¹²		
Romania	No.	No. ⁷¹³	Statute prohibits recognition of same-sex	Statute ⁷¹⁵

⁷⁰⁰ Nepal's Supreme Court in 2008 ordered the government to enact legislation allowing for same-sex marriage. Achal Narayanan, *Nepal's Supreme Court OKs Same-Sex Marriage*, Nov. 21, 2008, <http://pewforum.org/news/rss.php?NewsID=17001>.

⁷⁰¹ Dean Nelson, *Nepal 'to Stage Gay Weddings on Everest'*, TELGRAPH.CO.UK, Jan. 19, 2010, <http://www.telegraph.co.uk/news/worldnews/asia/nepal/7027736/Nepal-to-stage-gay-weddings-on-Everest.html>.

⁷⁰² *Id.*

⁷⁰³ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/the_netherlands (last visited Feb. 21, 2010).

⁷⁰⁴ *Id.*

⁷⁰⁵ THE PEW FORUM ON RELIGION AND PUBLIC LIFE, SAME-SEX MARRIAGE: REDEFINING MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/docs/?DocID=235>.

⁷⁰⁶ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/the_netherlands (last visited Feb. 21, 2010).

⁷⁰⁷ THE PEW FORUM ON RELIGION AND PUBLIC LIFE, SAME-SEX MARRIAGE: REDEFINING MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/docs/?DocID=235>.

⁷⁰⁸ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/Norway (last visited Feb. 21, 2010).

⁷⁰⁹ *Id.*

⁷¹⁰ *Id.*

⁷¹¹ Norway's marriage law is available here. Information from the Government and the Ministries, The Marriage Act, <http://www.regjeringen.no/en/doc/Laws/Acts/the-marriage-act.html?id=448401> (last visited Feb. 21, 2010).

⁷¹² ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/poland (last visited Feb. 21, 2010).

			marriage or partnerships, as well as adoption by same-sex couples. ⁷¹⁴	
Russia	No.	No. ⁷¹⁶		
Serbia	No.	No. ⁷¹⁷		
Slovakia	No.	No. ⁷¹⁸		
South Africa	Yes. ⁷¹⁹		Parliament legalized same-sex marriage in November 2006 after the country's highest court found that the country's marriage laws violated the constitutional guarantee of equal rights. ⁷²⁰	Statute, following court ruling. ⁷²¹
Spain	Yes. ⁷²²		Same-sex couples may adopt children, and artificial insemination is available for lesbian couples. ⁷²³	
Sweden	Yes. ⁷²⁴			Statute. ⁷²⁵
Uganda	No	No. ⁷²⁶		
Ukraine	No.	No. ⁷²⁷		
Uruguay	No.	Yes. ⁷²⁸	Same-sex couples may adopt children. ⁷²⁹	

⁷¹³ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/romania (last visited Feb. 21, 2010).

⁷¹⁴ ILGA-Europe, *Romania: Discriminatory Partnership and Adoption Provisions in New Civil Code*, http://www.ilga-europe.org/europe/guide/country_by_country/romania/romania_discriminatory_partnership_and_adoption_provisions_in_new_civil_code (last visited Feb. 21, 2010).

⁷¹⁵ *Id.*

⁷¹⁶ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/russia (last visited Feb. 21, 2010).

⁷¹⁷ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/serbia (last visited Feb. 21, 2010).

⁷¹⁸ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/slovakia (last visited Feb. 21, 2010).

⁷¹⁹ THE PEW FORUM ON RELIGION AND PUBLIC LIFE, SAME-SEX MARRIAGE: REDEFINING MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/docs/?DocID=235>.

⁷²⁰ *Id.*

⁷²¹ *Id.* The South African statute is available here. South African Government Information, Government Gazette, <http://www.info.gov.za/view/DownloadFileAction?id=67843> (last visited Feb. 21, 2010).

⁷²² ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/spain (last visited Feb. 21, 2010).

⁷²³ *Id.*

⁷²⁴ "Sweden Passes Same Sex Marriage Law", CNN, April 1, 2009 (available at <http://edition.cnn.com/2009/WORLD/europe/04/01/sweden.samesex/index.html>).

⁷²⁵ Swedish government website, <http://www.sweden.gov.se/sb/d/574/a/125584> (last visited Feb. 21, 2010).

⁷²⁶ THE PEW FORUM ON RELIGION AND PUBLIC LIFE, GAY MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/docs/?DocID=423>.

⁷²⁷ ILGA-EUROPE, COUNTRY-BY COUNTRY, http://www.ilga-europe.org/europe/guide/country_by_country/ukraine (last visited Feb. 21, 2010).

⁷²⁸ Miguel Angel Gutierrez, *Mexico City Allows Gay Marriage with Landmark Law*, Dec. 22, 2009, <http://www.reuters.com/article/idUSTRE5BK47420091222>.

⁷²⁹ Miguel Angel Gutierrez, *Mexico City Allows Gay Marriage with Landmark Law*, Dec. 22, 2009, <http://www.reuters.com/article/idUSTRE5BK47420091222>.