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

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AND THE BATTLE FOR SAME-SEX MARRIAGE IN THE UNITED STATES

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“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.”

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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
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 rolled 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

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3 There 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 a 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. POLICY & 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.


6 Maura Dolan, Prop. 8 Trial To Include Unprecedented Testimony, Los Angeles Times, Jan 11, 2010, at __


Hampshire started allowing gay marriages at the start of 2010\textsuperscript{10}. At the legislative level, some ninety U.S. representatives proposed a complete repeal of the federal Defense of Marriage Act (‘‘DOMA’’\textsuperscript{11}) and several federal lawsuits were filed\textsuperscript{12}, 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.

PART ONE:  LAWS ABOUT MARRIAGE MATTER


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.

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 groups. 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.” 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.

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

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.
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 marriage\(^\text{18}\) 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”.\(^\text{19}\) 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 marriage\(^\text{20}\), but one of the best ones is found in Evan Wolfson’s aptly titled book, \textit{Why Marriage Matters}\(^\text{21}\). Here are some of the key areas where marriage matters, organized alphabetically by broad category, as suggested in his book\(^\text{22}\).

\textbf{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.\(^\text{23}\)

\textbf{Death}

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

\textbf{Divorce}

Couples who are not legally married do not have access to the courts for divorce.\(^\text{27}\) 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.\(^\text{28}\) 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.\(^\text{29}\) Additionally, the Parental Kidnapping Prevention Act (“PKPA”)\(^\text{30}\) mandates full faith and credit for child custody

\textit{\footnotesize{\textsuperscript{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.}}


\textit{\footnotesize{\textsuperscript{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).}}


\textit{\footnotesize{\textsuperscript{22} See WOLFSON, supra note 2, at 13-15.}}

\textit{\footnotesize{\textsuperscript{23} See WOLFSON, supra note 2, at 13.}}

\textit{\footnotesize{\textsuperscript{24} Id.}}

\textit{\footnotesize{\textsuperscript{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).}}

\textit{\footnotesize{\textsuperscript{26} See, e.g., Jane A. Marquardt, \textit{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.).}}

\textit{\footnotesize{\textsuperscript{27} See WOLFSON, supra note 2, at 13-15.}}

\textit{\footnotesize{\textsuperscript{28} Id.}}

\textit{\footnotesize{\textsuperscript{29} Williams v. North Carolina, 317 U.S. 287, 303-04 (1942).}}

\textit{\footnotesize{\textsuperscript{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.’

However, there is concern that the Defense of Marriage Act, which notes that recognition need not be given to “a right or claim arising from [a same-sex] relationship” could also mean that the PKPA does not protect children of divorced same-sex couples.

**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.

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

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

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

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

**Insurance**
It may be hard for unmarried couples to sign up for joint insurance plans. Laws do not require coverage of unmarried couples, so many employers do not offer protections for same-sex couples or non-biological children. 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,”

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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.


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 visitation. 47 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:

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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.
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 lines;\(^{54}\) some also argue that the Full Faith and Credit Clause either explicitly or, more likely through longstanding tradition, has protected married couples from this problem;\(^{55}\) 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 Doma: 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].


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 they 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

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.
67 Id.
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.\textsuperscript{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.”\textsuperscript{71}


\textsuperscript{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.”

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. 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. States have passed amendments that prohibit same-sex couples from marrying. 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.

Five states allow same-sex marriage: Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire (began January, 2010). 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”.

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74 See Appendix I for a table with a comprehensive, current description of the laws.
76 See Appendix I for a thorough list of the laws of each state.
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”).
Two states – Rhode Island\(^{82}\) and New York\(^ {83}\) – and the District of Columbia\(^ {84}\) 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")\(^ {88}\) has two important components: first, it defines marriage as that between a man and woman for federal purposes;\(^ {89}\) second, it provides that states do not have to recognize same-sex marriages even under Full Faith & Credit Clause:\(^ {89}\)

**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.”\(^ {91}\)

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\(^{84}\) D.C. CODE § 46-405.01 (2009).

\(^{85}\) CAL. FAM. CODE § 308 (2010).

\(^{86}\) See Appendix I.


\(^{88}\) 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.


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. President Obama has stated that his “administration believes [DOMA] is discriminatory and should be repealed by Congress.”

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. 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.

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. 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. 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. The mayor expressed his view that the California Constitution required this. 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. Approximately 4,000 such marriages were performed.

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{105} As such, the court issued a mandate directing officials to carry out the laws unless and until they were determined to be unconstitutional.\textsuperscript{106}

Soon thereafter, the California Supreme Court did address the substantive question avoided in \textit{Lockyer}.\textsuperscript{107} In 2008, the court squarely faced the question of whether statutes limiting marriage to opposite-sex couples were unconstitutional.\textsuperscript{108} On one side were groups supporting gay marriage, including San Francisco officials, same-sex couples and organizations representing them.\textsuperscript{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.\textsuperscript{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.\textsuperscript{111}

First, it held that the right to marry was an integral part of an individual’s interest in personal autonomy protected by the \textit{privacy} and \textit{due process} provisions of the California Constitution.\textsuperscript{112} The court rejected the argument that there was no fundamental right to \textit{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.\textsuperscript{113}

The court next held that the marriage laws raised equal protection concerns.\textsuperscript{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...
interest in having their family relationships accorded the same respect enjoyed by opposite-sex couples. 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.

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. 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. The court acknowledged that the majority of states, and the majority of countries around the world, does not recognize gay marriage; however, this was not surprising given historical discrimination against homosexuals. 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. 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. 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.

Between June 16 and November 5, 2008, an estimated 18,000 same-sex couples were married in California. 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.”

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. 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. 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.
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. at105.
gubernatorial election. 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.

Prior California case law provided that substantial changes, either quantitative or qualitative, amount to revisions. The court noted that Proposition 8 was not a revision from a quantitative standpoint, given that it was only 14 words. 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.”

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. 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.

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. There was no express retroactivity provision in Proposition 8, and the ballot pamphlet did not say it was retroactive. 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.

There is currently a federal challenge to Proposition 8.

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.”
132 Id. at 75.
133 Id. at 98.
134 In re Marriage Cases, 183 P.3d at 449.
135 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.
136 Id. at 120-21.
137 Id.
The Hawaii Supreme Court issued an important decision in 1993\(^{139}\) that set the stage for the rights of same-sex couples and, ultimately, precipitated the Defense of Marriage Act\(^{140}\). 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

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\(^{141}\) 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.


\(^{147}\) 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).


\(^{150}\) 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.\textsuperscript{155} The court held, 4-3, that to forbid same-sex couples from marrying violated state equal-protection and due process guarantees.\textsuperscript{156}

The court noted that in Massachusetts, marriage has always been a secular institution, with no religious ceremony required.\textsuperscript{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.\textsuperscript{158} Children of married couples also benefit, through greater access to state and federal benefits.\textsuperscript{159}

The court held that the Massachusetts Constitution protects personal liberty to a greater degree than the U.S. Constitution.\textsuperscript{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.\textsuperscript{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.\textsuperscript{162} The court rejected these arguments.\textsuperscript{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.\textsuperscript{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.\textsuperscript{165} The court also noted that many same-sex couples are excellent parents, including several of the plaintiffs in this case.\textsuperscript{166}

The dissent argued, among other things, that it was the proper role of the legislature, and not the courts, to define marriage.\textsuperscript{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.\textsuperscript{168} The dissenters also pointed out that \textit{Lawrence v. Texas},\textsuperscript{169} which struck down anti-sodomy laws, expressly noted that the case did not involve the formal recognition of same-sex relationships.\textsuperscript{170} And they argued that

\textsuperscript{155} \textit{Id.} at 952-53.
\textsuperscript{156} \textit{Id.} at 978.
\textsuperscript{157} \textit{Id.} at 954.
\textsuperscript{158} \textit{Id.} at 948.
\textsuperscript{159} \textit{Id.} at 957.
\textsuperscript{160} \textit{Id.} at 959. This idea also supports the use of international law as a prism for evaluating freedoms.
\textsuperscript{161} \textit{Id.} at 961.
\textsuperscript{162} \textit{Id.} These are some of the same arguments being used in the Proposition 8 trial as well. \textit{See infra} notes 213-225 and accompanying text.
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.} at 963. These exact arguments are also currently at issue in the Proposition 8 case. \textit{See infra} notes 213-225 and accompanying text.
\textsuperscript{166} \textit{Id.}
\textsuperscript{167} \textit{Id.} at 351.
\textsuperscript{168} \textit{Id.} at 367.
\textsuperscript{169} 539 U.S. 558 (2003).
\textsuperscript{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.\textsuperscript{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.\textsuperscript{172} Most of the cases have ruled against the same-sex couples, finding that no discrimination existed.\textsuperscript{173}

One case, however, found 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.\textsuperscript{174} His request had been denied based on DOMA’s definition of a spouse.\textsuperscript{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.\textsuperscript{176} The Court concluded that the application of DOMA to the Federal Employees Health Benefits program violated Levenson’s Fifth Amendment due process rights.\textsuperscript{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.\textsuperscript{178} The court noted that the denial of federal benefits to same-sex couples cannot be justified by animus against homosexuals as a group\textsuperscript{179}, nor were the justifications given by Congress for DOMA sufficient.\textsuperscript{180} Finally, although the government’s interest in preserving its scare resources had been given as a justification for DOMA, the opinion noted that said any savings

\textsuperscript{171} Id. at 997.

\textsuperscript{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) (declaring 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. Noonor, 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 340 (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).

\textsuperscript{173} Id.

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

\textsuperscript{175} Levenson, 587 F.3d at 929.

\textsuperscript{176} Id.

\textsuperscript{177} Id.

\textsuperscript{178} Id. at 931.

\textsuperscript{179} Id. at 931, citing Romer v. Evans, 517 U.S. 620 (1996).

\textsuperscript{180} Id.
would be insignificant and founded an arbitrary ground.\textsuperscript{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.\textsuperscript{182}

\textbf{Current Cases}

Recently, four federal cases have been filed to challenge various provisions of DOMA. One of them has already been dismissed\textsuperscript{183}, 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.\textsuperscript{184}

\textit{Gill v. Office of Personnel Management}\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{188}

\textsuperscript{181} Id. at 934.

\textsuperscript{182} Id.

\textsuperscript{183} The case was dismissed for lack of standing. See Joel Zand, \textit{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, \textit{supra} note 93.


\textsuperscript{187} 1 U.S.C §7 (1996). See discussion \textit{infra} at notes 88-91 and accompanying text.

\textsuperscript{188} GLAD Challenges DOMA Section 3 – The Lawsuit, \textit{supra} note 186.
The lawsuit alleges that DOMA violates the Fifth Amendment Equal Protection Clause. 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.” 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.

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. As of March 1, 2010, both motions were awaiting decision.

Commonwealth of Massachusetts v. Department of Health & Human Services

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 Act is unconstitutional. 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.

The suit alleges DOMA violates the Spending Clause by conditioning federal funding on the violation of citizens’ constitutional rights. 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. 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. In addition, the suit alleges that DOMA violates the Tenth Amendment, arguing that until DOMA, the federal

190 Id.
191 Id.
197 Id.
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.”

The suit alleges that DOMA creates two classes of married persons in Massachusetts. For example, employees of the Commonwealth have the option of including their spouses on their health insurance. 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. Collecting those taxes is a multi-step, burdensome process, the suit alleges.

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. 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.

The suit alleges that DOMA codifies animus toward gays and lesbians. 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.

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

Perry v. Schwarzenegger

Immediately after the California Supreme Court upheld Proposition 8, in May 2009 two prominent attorneys filed a federal suit in the Northern District of California to challenge the

204 Id.
205 Id.
206 Id.
207 Id.
208 Id.
209 Id.
210 Id.
211 Id.
212 Id.
The constitutionality of Proposition 8.\footnote{215} The plaintiffs are all California residents.\footnote{216} The defendants are the key California officials responsible for enforcing the new law, including Governor Schwarzenegger and Jerry Brown, California’s Attorney General.\footnote{217}

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.” \footnote{218}

The trial itself lasted just over two weeks and included witnesses on both sides testifying about same-sex marriage.\footnote{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.” \footnote{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.” \footnote{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. \footnote{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." \footnote{223}

\footnote{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 \textit{Bush v. Gore} litigation. John W. Dean, \textit{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.

\footnote{216} \textit{Id.}

\footnote{217} 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).

\footnote{218} \textit{Id.}


\footnote{220} \textit{Id.}

\footnote{221} \textit{Id.}

\footnote{222} \textit{Id.}

\footnote{223} 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. 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.”

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. Additionally, judges have been asked to interpret state constitutional amendments that prevent same-sex couples from getting married. 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. 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.”

The Supreme Court in Lawrence v. Texas held that criminal sodomy statutes are unconstitutional because they violate the Due Process clause. 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.”).
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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{253} The Iowa court found that the statute did not withstand intermediate scrutiny because it was not substantially related to an important government objective.\textsuperscript{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.\textsuperscript{255} One court considered the intriguing argument that a state’s Equal Rights Amendment can implicate Equal Protection analysis:\textsuperscript{256}

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

\textsuperscript{246} Id. at 477.  
\textsuperscript{247} Id. at 479.  
\textsuperscript{248} Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).  
\textsuperscript{249} Id. at 887-8.  
\textsuperscript{250} Id. at 889.  
\textsuperscript{251} Id at 897-8.  
\textsuperscript{252} Id. at 889.  
\textsuperscript{253} Id. at 894.  
\textsuperscript{254} Id. at 906-7.  
\textsuperscript{255} Id.  
\textsuperscript{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 man 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.\textsuperscript{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.\textsuperscript{258}

The analogy to race based classifications – along with the argument that sexual orientation discrimination is as invidious as racial discrimination\textsuperscript{259} - raises the potential argument that same-sex marriage prohibitions violate equal protection just like the miscegenation statutes that the Supreme Court struck down in \textit{Loving v. Virginia}.\textsuperscript{260}

\textbf{Right to Marriage}\textsuperscript{261}

Another strong argument is that there is a constitutionally protected right to marriage. In \textit{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.\textsuperscript{262} The court cited \textit{Loving v. Virginia}\textsuperscript{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.\textsuperscript{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.”\textsuperscript{265}

\begin{footnotes}
\item [257] Id. at 585-6.
\item [258] Id.
\item [262] \textit{Goodridge}, 798 N.E.2d at 957 (citing \textit{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).
\item [263] 388 U.S. at 1.
\item [265] Samar, \textit{Privacy and Same-Sex Marriage}, 68 MONT. L. REV., at 360-61.
\end{footnotes}
Right to Privacy

The right to privacy has been raised in support of same-sex marriage as well. 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. 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. The California supreme court found that same-sex marriages were protected under this right.

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. 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.

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. 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.

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.

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.

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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.
Spending Clause

Massachusetts’ DOMA litigation against the federal government alleges that the Federal DOMA statute violates the Spending Clause. As discussed in the previous section, the argument is this: the Spending Clause prevents Congress from exercising its spending power in a way that induces any state to violate its citizens constitutional rights. 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. This, then violates the spending clause.

Other Attacks on the Federal DOMA Statute

In addition to the recent lawsuits, a number of articles have argued against the constitutionality of DOMA. 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. 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. No explicit delegation of power enables Congress to "restrict, abrogate or dilute," the mandates of the FFCC. 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.

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.
Arguments Against

Arguments against same-sex marriage have gained much national attention, and are oftentimes-heartfelt moral and religious objections. 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.”

Another book, focusing on Christian objections to same-sex marriage, 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.”

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.” 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 horribles that opponents have suggested.

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. 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.

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.”).

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

Id.


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. Without clear explanation as to its finding, the court noted that the Nebraska amendment was not similar to the one in *Romer* because unlike the amendment at issue there, the marriage amendment could be explained by reasons other than animus toward gays.

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. 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 . . . .”

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. They also contended the refusal amounted to cruel and unusual punishment. 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.... *Marriage 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.”

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

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298 *Citizens*, 455 F. 3d at 867-8.
299 *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971)
300 *Id.* at 196.
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.”

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.”

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;”

The idea behind custom is that it is, like treaty law, a consensual form of law. It is distinguishable from treaties because the legal rules in custom are implied, rather than explicit. 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. However, frequently custom is viewed as “general international law” and may be described as a “universal law of society”.

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. Some have argued that because the United States has not ratified many human rights treaties, a special importance must be given to custom. 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.

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. This article argues that rights instruments that reflect custom, and the modern trend, and the and 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. Although no document explicitly grants a right to same-sex marriage, several have provisions that could – and have – be 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.”

First, the Universal Declaration on Human Rights 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.”

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.”

313 See generally JANIS, supra note 307, at 43-57.
315 JANIS, supra note 307, at 44.
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.”).
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 Coevet 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:

“All State Parties 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...
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.\textsuperscript{331}

In the important and interesting case of\textit{Toonen v Australia}, the HCR found that the gender protection in Article 26 protection also encompassed sexual orientation.\textsuperscript{332} In that case, an Australian citizen alleged that Tasmania’s anti-sodomy laws\textsuperscript{333} 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.\textsuperscript{334} Australia urged Tasmania to repeal the offending laws, finally giving Tasmania a two-month deadline.\textsuperscript{335} Importantly, the decision affirmed the importance of homosexual rights within international law and “was a watershed for gay and lesbian rights advocates.”\textsuperscript{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.”\textsuperscript{337}

One article examined the Hawaii Supreme Court’s reasoning in \textit{Baehr v. Lewin}\textsuperscript{338} and found that it supported a reading of the ICCPR to protect same sex marriage:

“The \textit{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, \textit{Baehr}'s reasoning could successfully be applied to the ICCPR resulting in the same conclusion that the \textit{Baehr} court reached.”\textsuperscript{339}

\textsuperscript{331} Id. at art. 26.
\textsuperscript{333} Tas. Stat. R. §§ 122(a), (c) and 123.
\textsuperscript{336} See Sadler, supra note 324, at 419.
\textsuperscript{337} ICCPR, supra note 323, at art. 23. See discussion in Sadler, 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 Sadler, 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.”).
\textsuperscript{338} Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), discussed \textit{infra} at notes 139-48 and accompanying text.
\textsuperscript{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 greatly\(^{347}\), but this article argues that the trend\(^{348}\) seems to be in favor of same-sex marriage.\(^{349}\) This section describes some of the key laws at issue; Appendix II details the status of couples in many parts of the world.


\(^{341}\) Id.

\(^{342}\) Id.


\(^{346}\) 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 2001 – and most recent – Sweden, in 2009 - 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), Belgium (2003), Spain (2005), Canada (2005), South Africa (2005), Norway (2008) and Sweden (May, 2009).

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.

Argentina held the first same-sex marriage in Latin America in December, 2009, and a bill is will be discussed in Argentina’s Congress to allow same-sex marriage in that country. The Justice

340 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 it’s 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.


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

344 Id.


346 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).

347 THE PEW FORUM ON RELIGION AND PUBLIC LIFE, supra note 350; see also Wojcik, supra note 3, at 636-647.


349 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.

350 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.


Minister of Argentina has spoken out in favor of the bill.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{364}

The legislation to realize that directive may come as soon as 2010.\textsuperscript{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.\textsuperscript{366} As Appendix II details, civil unions and registered partnerships are allowed in a number of nations as well.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\begin{footnotes}
\footnotetext{362}{Id.}
\footnotetext{363}{Miguel Angel Gutierrez, \textit{Mexico City Allows Gay Marriage with Landmark Law}, \textsc{Reuters}, Dec. 22, 2009, \url{http://www.reuters.com/article/idUSTRE5BK47420091222}.
\footnotetext{365}{“Some Do, Some Don’t,” \textsc{West Australian Newspapers}, Nov. 21, 2009, \url{available at 2009 WLNR 23583346}.
\footnotetext{366}{\textsc{The Pew Forum on Religion and Public Life}, \textit{Gay Marriage Around the World} (2009), \url{http://pewforum.org/docs/?DocID=423}.
\footnotetext{367}{See infra Appendix II. See also \textsc{LGBT World Legal Wrap-Up Survey, November 2006, pdf \url{available at www.lsvd.de/756.0.html} (noting that some 20 countries have civil unions, domestic partnerships or other legal protections.)}.
\footnotetext{368}{In Jamaica, for example, “openly gay people must contend with the constant fear of violence… Many attacks [on homosexuals] go unreported.”. \textit{A Vicious Intolerance}, \textsc{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.” \textit{Same-Sex Marriage Law Takes Effect in S. Africa}, \textsc{Wash. Post}, Dec. 1, 2006 (Pg. Unavail. Online), \url{available at http://www.washingtonpost.com/wp-dyn/content/article/2006/11/30/AR2006113001370.html}.
\footnotetext{369}{See Fellmeth, supra note 3.}
\end{footnotes}
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 in 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.\(^{374}\)

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\(^{370}\) 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!'

\(^{371}\) 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 Gjul described the proposed bill as "… of an importance comparable to universal suffrage..." 382

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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.
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.
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 Codigo 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 http://translate.google.com/translate?hl=en&sl=es&u=http://www.boe.es/aeboe/consultas/bases_datos/doc.php%3Fcfeleccion%26id%3D2005/11364&ei=jqDHSbq3NZawMsLV0QH&sa=X&oi=translate&resnum=1&ct=result&prev=/search%3Fq%3Dhttp://www.boe.es/aeboe/consultas/bases_datos/doc.php%253Fcoleccion%253Diberlex%2526id%25262005%252611364%2526html%2526client%2526firefox-a%2526channel%2526sl%2526es%2526org.mozilla-Us%2526offical%25266h%252&sa%3DDG).
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.”

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. Thus, the treaty arm of international law is part of our legal system as well, and treaties can actually trump inconsistent statutes. 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.”

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.”

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”).
The courts and scholars have differed on how customary law should be used, but it is certainly safe to stay 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.” 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.

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. 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.

Early Supreme Court cases discuss the use of international law as means of constitutional interpretation. The Charming Betsy presumption is a cannon of statutory construction found in an historic case. The presumption is that whenever possible the Court should interpret statute of Congress so as not to conflict with the laws of nations. Ten years later the Court extended this rule to Constitutional interpretation in *Brown v. United States*. 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.

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. While Justice Story dissented, he did so based on the premise that the Chief Justice was wrong about the legal principles.

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


397 *Id.* (quoting Locker “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.


401 *Id.* at 126.

402 *Id.* at 125.
modern rule, and not that international law was irrelevant. 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.”

*The Paquete Habana* 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.

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.” 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. The Court has also used international law as support for its positions.

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. 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.” This use of international law as a default position is common. A more recent case cited *The Paquete Habana* for

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403 Id. at 132–35.
405 *The Paquete Habana*, 175 U.S. 677 (1900).
406 *The Paquete Habana*, 175 U.S. 677, 700 (1900).
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 are 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 Filartiga421

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

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.
422 Id. But see Adamu v Pfizer, Inc., 399 F. Supp. 2d 495 (S.D.N.Y. 2005) (holding that 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.”

Post Filartiga, a number of similar cases “in U.S. federal courts has successfully challenged gross human rights abuses committed abroad.” Some scholars had higher hopes for Filartiga 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.

The importance of Sosa

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. 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. 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.” 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.” 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).

243 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.”).

244 Filartiga, 630 F.2d at 886.

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


247 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.”).

248 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 arbitral 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. Peña-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)).


251 Sosa, 542 U.S. at 714.

252 Sosa, 542 U.S. at 715.

253 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.”

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.”

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 Ontario, which defined the common-law meaning of marriage as a remedy in a similar case. The Massachusetts court concurred, and redefined marriage “to mean the voluntary union of two persons as spouses, to the exclusion of all others.”

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*. Six of the nine Justice, including the two dissenting Justices, relied on foreign cases, opinions of international jurists, and even Roman law. Another early example is *Reynolds v. United States*. Moreover, this practice has continued in modern jurisprudence as well.

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

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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.*
438 *Id.*
440 *Id.*
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. Overruling Bowers, the court criticized that case for not considering the history of sodomy statues, 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.” 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.

Custom for Defining Unenumerated Rights

Numerous commentators see international law playing an important role in defining unenumerated rights. 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, which cited a 1975 West German Constitutional Court decision about the right to life. 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 clause or the Offenses clause. 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.

Custom and Other Constitutional Protections

Concerns over international practices have been key in analyzing the Eighth Amendment. 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. Similarly, the Court in Coker v. Georgia determined that international practice was relevant in analyzing the “evolving standards” regarding the death penalty for rape. 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. 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.
448 LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION 181 (2008); FARBER, supra note 396, at 183.
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.”
453 TRIBE, supra note 448.
454 Most recently in Roper v. Simmons, 125 S. Ct. 1183 (2005).
the Soviet Union and Western Europe. All of these show analysis similar to *The Paquete Habana* 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.” Additionally, in cases involving the due process and Habeas Corpus rights of alleged terrorists, the courts have turned to a consideration of international law.

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. 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.”

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

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459 The Paquete Habana 175 U.S. 677 (1900).
463 Roper, 543 U.S. at 578.
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?

These 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” argue customary international law does not have the status of federal common law.466 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”.467

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

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.”

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

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.)
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.\footnote{And here, the distinction between “foreign law” and “international law” is crucial.}

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.\footnote{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).} 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.”\footnote{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).}

Some have argued that all international human rights instruments form a part of customary international law.\footnote{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.} However, the courts have been reluctant to use customary international law\footnote{See discussion in Bayefsky, supra note 314 at 23; See also Strossen, supra note 421, at 815.} and some scholars have warned against too much optimism in this area.\footnote{Strossen, supra note 421, at 815 (stating that customary international law “should not be expected to produce widespread practical results in the immediate future”).}

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.\footnote{See generally id.} Professor Strossen describes it the following way, \footnote{Id. at 824. See id. at 825 n.90 for the citations.}  \footnote{See Harold Hongju Koh, Transnational Public Law Litigation, 100 YALE L.J. 2347, 2366 (1991) (citations omitted) noting:}

“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.”\footnote{Id. at 824. See id. at 825 n.90 for the citations.} In fact, Strossen describes a “scholarly consensus supporting this interpretive use of international human rights norms in domestic litigation”.\footnote{Id. at 815.}

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 law,\footnote{See Harold Hongju Koh, Transnational Public Law Litigation, 100 YALE L.J. 2347, 2366 (1991) (citations omitted) noting:} refuted this: “The growing codification and hence, accessibility of customary international
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.”

International law can be used as a source of law to help courts interpret constitutional norms, 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. 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.”

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 jurisdiction. 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.”)
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 song 487, 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 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 SILVER$UN 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.
<table>
<thead>
<tr>
<th>State</th>
<th>Law</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>State law and constitution ban same-sex marriage and recognition thereof.</td>
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<tr>
<td></td>
<td>“No marriage license shall be issued in the State of Alabama to parties of the same sex.”489</td>
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<tr>
<td></td>
<td>“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</td>
</tr>
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<td></td>
<td>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</td>
</tr>
<tr>
<td>Alaska</td>
<td>Constitution bans same-sex marriage and recognition thereof:</td>
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<td>“To be valid or recognized in this State, a marriage may exist only between one man and one woman.”492</td>
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<td>Same-sex partners of state employees are entitled to benefits under a court decision.493</td>
</tr>
<tr>
<td>Arizona</td>
<td>State law and Constitution ban same sex marriage and the recognition thereof.</td>
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<tr>
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<td>“Marriage between persons of the same sex is void and prohibited.”494</td>
</tr>
<tr>
<td></td>
<td>Same-sex marriages from other states and countries are not recognized.495</td>
</tr>
<tr>
<td></td>
<td>Constitutional amendment to same effect passed in 2008.496</td>
</tr>
<tr>
<td>Arkansas</td>
<td>State law and Constitution ban same-sex marriage and recognition thereof.</td>
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<tr>
<td></td>
<td>“(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</td>
</tr>
<tr>
<td></td>
<td>Arkansas recognizes foreign marriages, but not same-sex marriages from other states.498</td>
</tr>
<tr>
<td></td>
<td>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</td>
</tr>
</tbody>
</table>

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.
496 ARIZ. CONST. art. 30, § 1.
499 ARK. CONST. amend. 83, §1; § 2.
<table>
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<tr>
<th>State</th>
<th>Law</th>
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</table>
| California   | 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.  
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. Marriages that were performed between May and November are still valid. California has a domestic partnership registry, and a variety of rights and responsibilities have been extended to domestic partners. |
| Colorado     | State law and Constitution bans same-sex marriage and the recognition thereof. 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.  
Constitutional provision: Only a union of one man and one woman shall be valid or recognized as a marriage in this state. |
| Connecticut  | Allows same-sex marriage. 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). See also trial court order implementing the decision and ordering marriage licenses to issue. |
| Delaware     | Delaware law does not allow same-sex marriages. No constitutional provision.  
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.  
Note that Delaware Senate recently rejected a proposed constitutional amendment to define marriage as between a man and a woman. |
| District of Columbia | Has a domestic partnership law and recognizes partnerships from other jurisdictions.  
Law has been amended several times since it went into effect in 2002, most recently in 2008. D.C. recognizes same-sex marriages entered into in other jurisdictions. 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”). |

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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.
504 COLO. REV. STAT. § 14-2-104 (2009).
505 COLO. CONST. art. 2, § 31.
511 D. C. CODE § 46-405.01 (2009).
<table>
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<tr>
<th>State</th>
<th>Law and Constitution</th>
<th>Same-Sex Marriage and Recognition Thereof</th>
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</thead>
<tbody>
<tr>
<td>Florida</td>
<td>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.</td>
<td>Same-sex marriages are not recognized. Marriage is defined as that between one man and one woman. 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.</td>
</tr>
<tr>
<td>Georgia</td>
<td>State law and constitution ban same-sex marriage and recognition thereof. Same sex marriages are prohibited and foreign same-sex marriages are not recognized.</td>
<td>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...”</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Same-sex marriage not allowed under state law, but same-sex relationships are recognized under a reciprocal beneficiary statute.</td>
<td>Constitutional provision: “The legislature shall have the power to reserve marriage to opposite-sex couples.” Legislation was recently killed in the Senate that would have allowed civil unions.</td>
</tr>
<tr>
<td>Idaho</td>
<td>State law and Constitution ban same-sex marriage and recognition thereof.</td>
<td>“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.” 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.”</td>
</tr>
</tbody>
</table>

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. 1, § 4, ¶ 1
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
523 IDAHO CODE ANN. § 32-209 (2009)
524 IDAHO CONST. art. III, § 28
<table>
<thead>
<tr>
<th>State</th>
<th>Law on Same-Sex Marriage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Illinois</td>
<td>Bans same-sex marriage and the recognition thereof. No constitutional provision.</td>
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<tr>
<td></td>
<td>“§ 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</td>
</tr>
<tr>
<td></td>
<td>Same-sex marriages are prohibited 526 and are contrary to the public policy of the state. 527</td>
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<td></td>
<td>A House Bill is pending which would allow civil unions. 528</td>
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<tr>
<td>Indiana</td>
<td>Law bans same-sex marriage and the recognition of such unions from other states. 529</td>
</tr>
<tr>
<td></td>
<td>Note that this law was upheld against a state constitutional challenge. 530</td>
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<tr>
<td></td>
<td>No constitutional amendment.</td>
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<td></td>
<td>A constitutional amendment to ban gay marriage was recently proposed, but that it is not likely to be voted on this year. 531</td>
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<tr>
<td>Iowa</td>
<td>Allows same-sex marriage.</td>
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<td>The Iowa Supreme court found unconstitutional Iowa’s law providing that “only marriage between a man and a woman is valid.” 532</td>
</tr>
<tr>
<td></td>
<td>No constitutional amendment.</td>
</tr>
<tr>
<td>Kansas</td>
<td>State law and Constitution ban same-sex marriage and the recognition thereof.</td>
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<tr>
<td></td>
<td>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</td>
</tr>
<tr>
<td></td>
<td>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</td>
</tr>
<tr>
<td></td>
<td>Constitutional provision:</td>
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<tr>
<td></td>
<td>(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. □</td>
</tr>
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<td></td>
<td>(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</td>
</tr>
</tbody>
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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).
529 IND. CODE § 31-11-1-1 (2009) (“Only a female may marry a male. Only a male may marry a female.”).
535 KAN. CONST. art. XV, § 16.
<table>
<thead>
<tr>
<th>State</th>
<th>Law and Constitution ban same-sex marriage and the recognition thereof.</th>
</tr>
</thead>
</table>
| Kentucky   | “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 | Law also provides that marriages between people of same sex are void.  
537 |
|            | Constitutional provision:  
538 | “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.”  
539 |
| Louisiana  | Louisiana law and Constitution ban same-sex marriage and recognition thereof.  
540 | “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”.  
541 |
|            | Same-sex marriages from foreign jurisdictions are not recognized because they are against a strong public policy of the state.  
542 | Constitutional provision:  
543 | “Marriage in the state of Louisiana shall consist only of the union of one man and one woman…”  
544 |
| Maine      | State law bans same-sex marriage and the recognition thereof, but there is a domestic partner registry. No constitutional amendment.  
545 | Same-sex marriages are prohibited, and out-of-state same-sex marriages are not recognized.  
546 | 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.”  
547 | Domestic partner registry allows certain benefits, including property rights and guardianship if the partner becomes incapacitated.  
548 |

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.  
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<thead>
<tr>
<th>State</th>
<th>Description</th>
<th>Source</th>
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<tbody>
<tr>
<td>Maryland</td>
<td>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.</td>
<td></td>
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<tr>
<td></td>
<td>§ 2-201. Marriages which are valid “Only a marriage between a man and a woman is valid in this State.”[545]</td>
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<td>This was upheld by the Maryland Supreme Court.[546]</td>
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<td></td>
<td>Domestic partnership law:</td>
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<td>Allows for benefits in numerous areas, including hospital visitation, funeral arrangements, etc.[547]</td>
<td></td>
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<td></td>
<td>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]</td>
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<tr>
<td></td>
<td>There is pending legislation that would allow same sex marriage.[549]</td>
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<td>Massachusetts</td>
<td>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]</td>
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<tr>
<td>Michigan</td>
<td>State law and Constitution ban same-sex marriage and the recognition thereof.</td>
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<tr>
<td></td>
<td>Marriage is defined as being between a man and a woman.[551]</td>
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<tr>
<td></td>
<td>Same-sex marriages from other states are not recognized.[552]</td>
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<td>Constitutional Provision:</td>
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<td>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]</td>
<td></td>
</tr>
<tr>
<td>Minnesota</td>
<td>State law bans same-sex marriage and the recognition thereof. No constitutional amendment.</td>
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</tr>
<tr>
<td></td>
<td>Same-sex marriages are prohibited.[554]</td>
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<td></td>
<td>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]</td>
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</tr>
</tbody>
</table>

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.
549 2009 MD S.B. 565 (NS)).
554 MISS. CODE ANN. § 517.03 (2009); MISS. CODE ANN. § 517.01 (2009).
555 S.B. 2145, 86th Leg., Reg. Sess. (Minn. 2009).
<table>
<thead>
<tr>
<th>State</th>
<th>Description</th>
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<tbody>
<tr>
<td>Mississippi</td>
<td>State law and Constitution ban same-sex marriage and recognition thereof.</td>
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</tbody>
</table>
|            | “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.”  
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.” |
| Missouri   | State law and Constitution ban same-sex marriage and the recognition thereof.                   |
|            | "It is the public policy of this state to recognize marriage only between a man and a woman."  
“A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted.” |
Constitutional provision:  
“That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.” |
| Montana    | State law and Constitution ban same-sex marriage and recognition thereof.                      |
|            | “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.”  
“(1) The following marriages are prohibited: …(d) a marriage between persons of the same sex.” |
Constitutional provision:  
Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. |
| Nebraska   | Nebraska Constitution bans same-sex marriage and recognition thereof.                          |
|            | 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.  
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. |

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556 MISS. CODE ANN. § 93-1-1 (2009).  
557 MISS. CONST. art. XIV, § 263A.  
559 Id.  
560 Id. art. I, § 33.  
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).
<table>
<thead>
<tr>
<th>State</th>
<th>Status and Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nevada</td>
<td>Recognizes domestic partnerships, however, the Nevada Constitution bans same-sex marriage and recognition thereof. Constitutional provision: Only a marriage between a male and female person shall be recognized and given effect in this state. However, Nevada recognizes domestic partnerships.</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Civil unions law provides benefits. New Jersey allows “civil unions” with many privileges similar to marriage. “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.” A court case led to establishment of civil unions.</td>
</tr>
<tr>
<td>New Mexico</td>
<td>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. “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.” The same-sex partners of state employees can receive benefits.</td>
</tr>
<tr>
<td>New York</td>
<td>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. State law does allow some benefits for domestic partners, including hospital visitation and funeral arrangements.</td>
</tr>
</tbody>
</table>

569 Id.
570 Id.
573 Lewis v. Harris, 908 A.2d 196 (N.J. 2006).
574 N.M. STAT. § 40-1-4 (2009).
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...
<table>
<thead>
<tr>
<th>State</th>
<th>Law and Constitution Banning Same-Sex Marriage and Recognition Thereof</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Carolina</td>
<td>State law bans same-sex marriage and the recognition thereof. No constitutional amendment to that effect. 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.</td>
</tr>
<tr>
<td>North Dakota</td>
<td>North Dakota law and Constitution ban same-sex marriage and the recognition thereof. Marriage is defined as being between one man and one woman. Same-sex marriages from other jurisdictions are not recognized. 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.</td>
</tr>
<tr>
<td>Ohio</td>
<td>Ohio law and Constitution ban same-sex marriage and the recognition thereof. “A marriage may only be entered into by one man and one woman. …” Same-sex marriages from other jurisdictions are not valid. 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.” 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.</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>State law and Constitution ban same-sex marriage and the recognition thereof. “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.” Constitutional provision: “Marriage in this state shall consist only of the union of one man and one woman.”</td>
</tr>
</tbody>
</table>

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).

579 N.C. GEN. STAT. § 51-1.2 (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.
587 OKLA. STAT. tit. 43, § 3.1 (2009).
588 OKLA. CONST. art. II, § 35.
<table>
<thead>
<tr>
<th>State</th>
<th>Summary</th>
<th>References</th>
</tr>
</thead>
</table>
| Oregon    | Oregon law and Constitution ban same-sex marriage and recognition thereof, but a domestic partner registry exists.  
"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." Domestic Partnership Law provides the same rights and benefits as marriage under state law. 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." |
| Pennsylvania | Pennsylvania law bans same-sex marriage or the recognition thereof. No constitutional provision.  
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. |
| Rhode Island | Rhode Island has no explicit ban on same-sex marriages.  
However, the Legislature has extended some rights to same-sex couples. |
| South Carolina | State law and Constitution ban same-sex marriage and the recognition thereof.  
"A marriage between persons of the same sex is void ab initio and against the public policy of this State." 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.…" |
| South Dakota | State law and Constitution ban same-sex marriage and the recognition thereof.  
Marriage is defined as that between a man and a woman. Out of state same-sex marriages are not recognized. 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." |

590 O. R. S. T. 11, Ch. 106, Refs & Annos, OR ST T. 11, Ch. 106, Refs & Annos.  
591 OR. CONST. art. XV, § 5a.  
593 R.I. GEN. LAWS §§28-48-1, 36-12-4, 44-30-12, 45-49-4.3 (West 2010).  
595 S.C. CONST. art. XVII, § 15.  
598 S.D. CONST. art. XXI, § 9.
<table>
<thead>
<tr>
<th>State</th>
<th>Description</th>
<th>References</th>
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<tbody>
<tr>
<td></td>
<td>The only recognized marital union is between one man and one woman; foreign marriages that do not</td>
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<td>comply with that are not recognized.</td>
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<td></td>
<td>Constitutional provision:</td>
<td></td>
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<td></td>
<td>“The historical institution and legal contract solemnizing the relationship of one (1) man and one (1)</td>
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<td></td>
<td>woman shall be the only legally recognized marital contract in this state.”</td>
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</tr>
<tr>
<td>Texas</td>
<td>State law and Constitution ban same-sex marriage and the recognition thereof.</td>
<td>TEX. FAM. CODE ANN. § 2.001 (2010).</td>
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<tr>
<td></td>
<td>“(a) A man and a woman desiring to enter into a ceremonial marriage must obtain a marriage license</td>
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<td>from the county clerk of any county of this state; b) A license may not be issued for the marriage</td>
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<tr>
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<td>of persons of the same sex.”</td>
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<td>“A marriage between persons of the same sex or a civil union is contrary to the public policy of this</td>
<td></td>
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<td></td>
<td>state and is void in this state.”</td>
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<tr>
<td></td>
<td>Constitutional provision:</td>
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<td></td>
<td>“Sec. 32. (a) Marriage in this state shall consist only of the union of one man and one woman. (b)</td>
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<td>This state or a political subdivision of this state may not create or recognize any legal status</td>
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<td>identical or similar to marriage.”</td>
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<td></td>
<td>“The following marriages are prohibited and declared void: (5) between persons of the same sex.”</td>
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<tr>
<td></td>
<td>Marriages other than those between a man and a woman are not recognized in Utah.</td>
<td></td>
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<td></td>
<td>Constitutional provision:</td>
<td></td>
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<td>“(1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic</td>
<td></td>
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<tr>
<td></td>
<td>union, however denominated, may be recognized as a marriage or given the same or substantially</td>
<td></td>
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<td></td>
<td>equivalent legal effect.”</td>
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<td></td>
<td>Vermont allows same-sex marriage through legislation passed in April, 2009.</td>
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<td></td>
<td>Vermont had an extensive Civil union statute, but now, has replaced it with marriage:</td>
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<td>“Please note that the new marriage equality law, effective September 1, 2009, discontinues the need</td>
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<td>for the separate status of “civil unions” in Vermont. Civil unions entered into prior to September</td>
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<tr>
<td></td>
<td>1 will continue to be recognized as civil unions. Couples currently in a civil union who want to</td>
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<td></td>
<td>be married will need to go through the new marriage process.”</td>
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<tr>
<td>State</td>
<td>Description</td>
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<tr>
<td>------------</td>
<td>-----------------------------------------------------------------------------</td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>Virginia state law and Constitution ban same-sex marriage and the recognition thereof.</td>
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<tr>
<td></td>
<td>Marriages between persons of the same-sex are prohibited, as are civil unions and contractual partnership agreements.</td>
<td></td>
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<tr>
<td></td>
<td>Constitutional provision:</td>
<td></td>
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<tr>
<td></td>
<td>“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.”</td>
<td></td>
</tr>
<tr>
<td>Washington</td>
<td>Washington law bans same-sex marriage, but domestic partnership is available. No constitutional amendment.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Marriage is prohibited “when the parties are persons other than a male and a female” and same-sex marriages are not recognized. Washington expressly allows domestic partnerships that provide many of the same legal benefits as marriage.</td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td>State law bans same-sex marriage and the recognition thereof. No constitutional amendment.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Same-sex marriages are not recognized or given effect.</td>
<td></td>
</tr>
<tr>
<td>Wisconsin</td>
<td>State law and Constitution ban same-sex marriage and the recognition thereof.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>“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.”</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Wisconsin forbids its residents from getting married elsewhere to circumvent its laws, finds such marriages void, and even punishes such attempts.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Constitutional provision:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>“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.”</td>
<td></td>
</tr>
<tr>
<td>Wyoming</td>
<td>State law bans same-sex marriage and the recognition thereof. No constitutional provision.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>“Marriage is a civil contract between a male and a female person to which the consent of the parties capable of contracting is essential.”</td>
<td></td>
</tr>
</tbody>
</table>

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611 VA. STAT. ANN. § 20-45.3 (2009).
612 VA. CONST. art. I, § 15-A.
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.
# Appendix II: Country-by-Country Laws on Same-Sex Marriage

<table>
<thead>
<tr>
<th>Country</th>
<th>Same-Sex Marriage?</th>
<th>Rights for Same-Sex Couples</th>
<th>Relevant Law</th>
<th>Source of Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania</td>
<td>No.</td>
<td>Last year, the country’s prime minister proposed allowing same-sex marriage, but anti-discrimination legislation introduced in the country’s parliament in January did not include a same-sex marriage provision.</td>
<td>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. 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.</td>
<td>Statute</td>
</tr>
<tr>
<td>Andorra</td>
<td>No.</td>
<td>Yes. The country allows for registration of unions between both same- and opposite-sex couples. This registered cohabitation gives certain rights and responsibilities to couples, but is not equivalent marriage.</td>
<td></td>
<td>Statute</td>
</tr>
<tr>
<td>Argentina</td>
<td>No.</td>
<td>Civil unions are allowed in some cities.</td>
<td>In 2002, Buenos Aires became the first city in Latin America to allow civil unions for gay couples. The Argentine province of Rio Negro</td>
<td>Statute</td>
</tr>
</tbody>
</table>

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625 Id.
626 Id.
627 Id.
628 Id.
and Villa Carlos Paz, another Argentine city, also provides for same-sex civil unions.  

Federal government recognizes these state and territory civil unions for federal benefits. These civil unions are open only to the residents of the state or territory that authorizes them.

Cities including Melbourne and Sydney provide relationship declaration programs. These programs do not confer the rights of marriage, but may be relevant to establishing certain property rights and receiving inheritance rights.

However, Australian law defines marriage as solely between a man and a woman.

---

<table>
<thead>
<tr>
<th>Australia</th>
<th>No.</th>
<th>Civil unions in Australian Capital Territory, Tasmania and Victoria.</th>
<th>Federal government recognizes these state and territory civil unions for federal benefits. These civil unions are open only to the residents of the state or territory that authorizes them.</th>
<th>Statutes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Certain cities provide relationship declaration programs.</td>
<td>Cities including Melbourne and Sydney provide relationship declaration programs. These programs do not confer the rights of marriage, but may be relevant to establishing certain property rights and receiving inheritance rights.</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>However, Australian law defines marriage as solely between a man and a woman.</td>
<td></td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Austria</th>
<th>No.</th>
<th>Since 2003, the country has had unregistered cohabitation. This provides very limited rights after a specified period of cohabitation.</th>
<th>The right of unregistered cohabitation was extended following the European Court of Human Rights’ 2003 decision in Karner v. Austria, which held that a surviving same-sex partner was allowed to succeed his deceased lover’s tenancy.</th>
<th>Court decision and statute</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>

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630 Id.
631 Id.
633 Id.
634 Id.
635 Id.
641 Id.
<table>
<thead>
<tr>
<th>Country</th>
<th>Status</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belgium</td>
<td>Yes.</td>
<td>Same-sex marriage was first allowed in 2003, giving homosexual couples the same tax and inheritance rights as heterosexual couples. Adoption rights were added in 2006. Statute.</td>
</tr>
<tr>
<td>Brazil</td>
<td>No.</td>
<td>The state of Rio Grande do Sul allows civil unions. Court decision.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>No.</td>
<td>No.</td>
</tr>
<tr>
<td>Canada</td>
<td>Yes.</td>
<td>The Canadian Supreme Court had upheld that legislation as within the authority of Parliament and consistent with the Canadian Charter of Rights and Freedoms.</td>
</tr>
</tbody>
</table>

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642 ILGA-Europe, http://www.ilga-europe.org/europe/guide/country_by_country/austria/austrian_parliament_adopts_registered_partnership_law_for_same_sex_partners
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.
647 Id.
648 Id.
649 Id.
650 Id.
652 Id.
654 Id.
<table>
<thead>
<tr>
<th>Country</th>
<th>No.</th>
<th>Statute</th>
<th>Description</th>
<th>Source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colombia</td>
<td>No.</td>
<td></td>
<td>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. 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.</td>
<td>Press Release, Colombia Diversa, Colombia’s Constitutional Court Rules for Equality, (Jan. 28, 2009), <a href="http://www.colombiadiversa.org/dmdocuments/COLOMBIAN%20CONSTITUTIONAL2.pdf">http://www.colombiadiversa.org/dmdocuments/COLOMBIAN%20CONSTITUTIONAL2.pdf</a></td>
</tr>
<tr>
<td>Denmark</td>
<td>No.</td>
<td></td>
<td>Denmark allows for registered partnerships that provide limited rights. Adoption rights are limited, but same-sex partners may adopt each other’s children.</td>
<td>ILGA-EUROPE, COUNTRY-BY-COUNTRY, <a href="http://www.ilga-europe.org/europe/guide/country_by_country/Denmark">http://www.ilga-europe.org/europe/guide/country_by_country/Denmark</a> (last visited Feb. 11, 2010).</td>
</tr>
<tr>
<td>Dominican Republic</td>
<td>No.</td>
<td></td>
<td>Note that adoption of children is not permitted.</td>
<td>Constitution 667</td>
</tr>
<tr>
<td>Ecuador</td>
<td>No.</td>
<td></td>
<td>Civil unions 666</td>
<td></td>
</tr>
<tr>
<td>Estonia</td>
<td>No.</td>
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</tbody>
</table>

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.
660 Id.
661 Id.
663 Id.
664 Id.
667 Id.
<table>
<thead>
<tr>
<th>Country</th>
<th>Status</th>
<th>Legal Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>No.</td>
<td>France does not recognize same-sex unions from other countries.</td>
</tr>
<tr>
<td>Germany</td>
<td>No.</td>
<td>Registered partnerships provide limited rights.</td>
</tr>
<tr>
<td>Greece</td>
<td>No.</td>
<td>No.</td>
</tr>
<tr>
<td>Honduras</td>
<td>No.</td>
<td>No. A constitutional amendment bans marriage and adoption for same-sex couples.</td>
</tr>
<tr>
<td>Hungary</td>
<td>No.</td>
<td>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.</td>
</tr>
<tr>
<td>India</td>
<td>No.</td>
<td>No. but Irish parliament is currently debating a bill that would</td>
</tr>
<tr>
<td>Ireland</td>
<td>No.</td>
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</tbody>
</table>


*672 Id.*


*676 Id.*

*677 Id.*

*678 Id.*


*680 Id.*


*682 Id.*

*683 Id.*

<table>
<thead>
<tr>
<th></th>
<th>Civil Unions</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Italy</strong></td>
<td>No.</td>
</tr>
<tr>
<td><strong>Japan</strong></td>
<td>No.</td>
</tr>
<tr>
<td><strong>Latvia</strong></td>
<td>No.</td>
</tr>
<tr>
<td><strong>Liechtenstein</strong></td>
<td>No.</td>
</tr>
<tr>
<td><strong>Lithuania</strong></td>
<td>No.</td>
</tr>
<tr>
<td><strong>Mexico</strong></td>
<td>No.</td>
</tr>
<tr>
<td><strong>Moldova</strong></td>
<td>No.</td>
</tr>
<tr>
<td><strong>Montenegro</strong></td>
<td>No.</td>
</tr>
</tbody>
</table>

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689 Id.

690 Id.

691 Id.

692 Id.


694 Id.


697 Id.


<table>
<thead>
<tr>
<th>Country</th>
<th>Same-Sex Marriage Status</th>
<th>Rights and Laws</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nepal</td>
<td>Yes, although a court decision implementing that right has not yet been enacted.</td>
<td>First country to legalize same-sex marriage. Partners may adopt jointly adopt children and artificial insemination is available for lesbian couples.</td>
<td>Court decision, constitutional amendment pending.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Yes</td>
<td>Same-sex couples may marry or enter into a registered partnership. The country also provides registered cohabitating partners with limited rights.</td>
<td>Statute</td>
</tr>
<tr>
<td>Norway</td>
<td>Yes</td>
<td>Same-sex couples may jointly adopt children; artificial insemination is available for lesbian couples.</td>
<td>Statute</td>
</tr>
<tr>
<td>Poland</td>
<td>No</td>
<td>Same-sex couples can marry; registered cohabitating couples also have limited rights.</td>
<td>Statute</td>
</tr>
<tr>
<td>Romania</td>
<td>No</td>
<td>Statute prohibits recognition of same-sex marriage.</td>
<td>Statute</td>
</tr>
</tbody>
</table>

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702 Id.


704 Id.


707 Id.

708 Id.

709 Id.

710 Id.


<table>
<thead>
<tr>
<th>Country</th>
<th>Same-Sex Marriage</th>
<th>Adoption by Same-Sex Couples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Russia</td>
<td>No.</td>
<td>No.716</td>
</tr>
<tr>
<td>Serbia</td>
<td>No.</td>
<td>No.717</td>
</tr>
<tr>
<td>Slovakia</td>
<td>No.</td>
<td>No.718</td>
</tr>
<tr>
<td>South Africa</td>
<td>Yes. 719</td>
<td>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</td>
</tr>
<tr>
<td>Spain</td>
<td>Yes.722</td>
<td>Same-sex couples may adopt children, and artificial insemination is available for lesbian couples.723</td>
</tr>
<tr>
<td>Sweden</td>
<td>Yes.724</td>
<td>Statute.725</td>
</tr>
<tr>
<td>Uganda</td>
<td>No</td>
<td>No.726</td>
</tr>
<tr>
<td>Ukraine</td>
<td>No.</td>
<td>No.727</td>
</tr>
<tr>
<td>Uruguay</td>
<td>No.</td>
<td>Yes.728</td>
</tr>
</tbody>
</table>

715 Id.
720 Id.
723 Id.