

Comment,
UNITED STATES SURVEY ON
DOMESTIC PARTNERSHIPS

Introduction

This article will examine what forms of legal recognition of their relationship are available to same-sex couples. This recognition ranges from benefits provided to local government or corporate employees, to domestic partnership or marriage. The first section will examine how the institution of marriage has changed over time, and has varied across cultures, and how the demographics of families have changed in more recent decades. Part II will be a brief history of the existence of committed same-sex relationships, the recent visibility of the desire for legal protection and recognition of the relationship, and the political backlash against such acknowledgement. The third section will examine the arguments for and against legal recognition and protection of same-sex relationships, particularly of same-sex marriage. Part IV will discuss the development of the Defense of Marriage Acts, and the final section will explain what benefits are available to same-sex couples to protect the status of their relationship.

I. History of Marriage

Although many would argue that marriage is a historically static institution, overall, the concept of marriage is more fluid. Marriage, and what it means to be married, varies across cultures and has varied throughout time. For example, according to the Code of Hammurabi, women and men shared parental authority equally, and the women received a dowry after marrying.¹ In biblical times, polygamy was common in the Middle East and continues to be practiced in some Islamic cultures.² Polyandry

¹ CONSTANCE JONES, 1001 THINGS EVERYONE SHOULD KNOW ABOUT WOMEN'S HISTORY 17 (1998).

² American Bar Association Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 344 (2004) [hereinafter *ABA White Paper*].

(more than one husband) was common in Central Asia.³ In ancient Jewish culture, the wife was directed to call her husband “master,” in ancient China, husbands could sell their children and wives, and in Rome, “husbands could even bequeath [their wives] to other men in their wills.”⁴ In seventh century Greece, men and women were equal partners in the goal of breeding “strong warriors” and “wife sharing and selective breeding were common practices” to achieve that end.⁵ Arranged marriages have occurred throughout history, uniting families, clans and kingdoms, for political reasons or to increase fortunes.⁶

The legal traditions of marriage in the United States come from the English common law, where a woman lost her legal identity upon marriage, because it was merged into that of her husband, under the doctrine of coverture. A wife had no authority to own property, make a contract, be sued or earn any income that her husband did not control. The husband also had custody of any children born of the marriage.⁷ The purpose behind coverture was that a woman gave up her identity “in exchange for support and protection.”⁸ Colonial laws of marriage (a combination of statutes, common law and equity law) were designed to “preserve the interests of the community – by maintaining social order, preventing destitution, minimizing public expenditures, and facilitating the flow of capital.”⁹ Women’s roles in marriage have changed over time, and now women maintain their legal autonomy despite being married. They may own property, sign contracts and are responsible for their own torts and crimes.

Historically, before the existence of child labor laws and mandatory education of children, the age of consent to marry was generally lower than it is today.¹⁰ American culture has gradually moved toward the protection of children, and consequently the age of consent to marry, without or without parental

³ *Id.* .

⁴ JONES, *supra* note 1, at 125.

⁵ *ABA White Paper*, *supra* note 2, at 350.

⁶ JONES, *supra* note 1, at 162.

⁷ NANCY WOLOCH, *EARLY AMERICAN WOMEN: A DOCUMENTARY HISTORY 1600-1900* (1997).

⁸ *Id.*

⁹ WOLOCH, *supra* note 7, at 72.

¹⁰ Larry R. Peterson, Ph.D, *The History of Marriage as an Institution*, <http://www.pflagsanjose.org/advocacy/hist.html> (last visited May 4, 2008).

consent, has gradually increased in many states. Anti-miscegenation statutes, prohibiting marriage between people of different races, was also common until as recently as 1967, when the Supreme Court held the practice unconstitutional in *Loving v. Virginia*.¹¹ The state argued its interests for maintaining these laws were to preserve the homogeneity of the white race, and to preserve racial pride.¹² It also argued that this practice did not violate the Equal Protection clause because the law applied to all races equally.¹³

Today in the United States, marriage is not just a religious, ceremonial recognition of a relationship; marriage is a civil, secular contract, regulated by each individual state. Marriage is an institution that “has been covered over time in a thick coating of emotional, legal, religious, and cultural layers. Marriage is the focus of long-honored and emotionally freighted cultural practice that centers on places of worship.”¹⁴ It is also regulated by the government, and although the church has played a role in regulating behavior of couples entering marriage, “the state has also played a great and growing role in defining what marriage is, who may choose it, and what bonds of obligation and responsibility will be enforced over the life of the marriage and when it is over.”¹⁵ States still vary on the appropriate age of consent to marry, as well as consanguinity requirements.¹⁶ Some states require a blood test to prove that parties do not have a sexually transmitted disease.¹⁷ State regulations and procedures regarding marriage have historically been designed to regulate individual behavior and to achieve state interests, including protection of women and children, to ensure they will be financially provided for by their family instead of by the state.

Modern American families take many forms. Only one in four families today is a “traditional, nuclear family consisting of two married, heterosexual parents and their children.”¹⁸ Com-

¹¹ 388 U.S. 1 (1967).

¹² *Id.* at 7.

¹³ *Id.* at 8.

¹⁴ RAY SUAREZ, *THE HOLY VOTE* 93 (2006).

¹⁵ *Id.*

¹⁶ Cornell University School of Law, *Marriage Laws*, http://topics.law.cornell.edu/wex/table_marriage (last visited May 4, 2008).

¹⁷ *Id.*

¹⁸ JONES, *supra* note 1, at 163.

mon law marriage in some form still exists in nine states and the District of Columbia, and existed before the modern statutes regulating marriage.¹⁹ This is a relationship that arises by “operation of law through the parties’ conduct, instead of through a ceremony.”²⁰ Generally, all that is required to be in a common law marriage in these states is to have a mutual agreement between the parties, excluding all others, to be married, to perform the obligations and duties of a married couple, and to hold themselves out to others as married to others. Once married under common law, couples may only be divorced by a court proceeding. “The United States Constitution requires every state to accord ‘Full Faith and Credit’ to the laws of its sister states. Thus, a common-law marriage that is validly contracted in a state where such marriages are legal will be valid even in states where such marriages cannot be contracted and may be contrary to public policy.”²¹

Step-families have increased, due to rising divorce and remarriage rates, and the stigma of divorce has diminished somewhat over time. According to available U.S. Census Bureau data, more than fifty percent of families today are remarried or recoupled; one out of two marriages end in divorce and seventy-five percent of those divorcing will later remarry.²² Single parent families are also on the rise in the United States, according to the Census Bureau.²³ In 2005, one-third of custodial mothers, and 17.8 percent of custodial fathers had never been married.²⁴

Intergenerational families have existed historically out of economic need and a tradition of caring for elderly family members. As the Baby-Boomer generation ages, because of the escalating cost of healthcare and people generally living longer, families will likely increasingly include elderly parents and grand-

¹⁹ National Conference of State Legislatures, Common Law Marriage, <http://www.ncsl.org/cyf/commonlaw.htm> (last visited Apr. 23, 2008) (listing Alabama, Colorado, Kansas, Rhode Island, South Carolina, Iowa, Montana, Oklahoma, Pennsylvania and Texas, and the District of Columbia).

²⁰ *Id.*

²¹ *Id.*

²² Stepfamily Foundation, <http://www.stepfamily.org.statistics.html> (last visited May 4, 2008).

²³ About.com, Single Parents, <http://singleparents.about.com/od/legalissues/p/portrait.htm> (last visited May 4, 2008)

²⁴ *Id.*

parents. “Furthermore, trends in divorce and remarriage brought with them new dynamics in the care of biological and stepparents.”²⁵

A typical married couple or family in the United States no longer much resembles what it may have in the 1950’s, or in the 1890’s, or further back in history. The status of married men and women have changed, people divorce and remarry at higher rates, or choose not to marry at all. Change in what it means to be married is not a new phenomenon, and a definition of family as two opposite sex, first-time-married parents with two children excludes most of the population of the United States today.

II. Brief History of Same-sex Relationships

Same-sex relationships are also not a modern phenomenon, but in fact have been in recorded history as far back as ancient Greek and Roman societies²⁶ and in Europe²⁷ as well as on other continents, with varying degrees of acceptance. As an example of a more recent occurrence, in the nineteenth century, “Boston Marriages” were memorialized in the play by David Mamet of the same name, and “The Bostonians” by Henry James.²⁸ The term described households with two women living together, sharing a close intimate relationship.²⁹ At the time, the perception of women in general is that women did not have a sex drive; sex for women was seen as a duty rather than a desire, so the belief was that these relationships were not sexual.³⁰ “Although unmarried, they led conventional lives of domestic partnership and shared a great deal of emotional intimacy.”³¹

In popular culture, gay and lesbian characters and icons have existed long before Ellen DeGeneres and Rosie O’Donnell

²⁵ Shula Neuman, *Understanding Choices Adult Children Make to Care for Elderly Parents Should Help Policymakers*, <http://news-info.wustl.edu/tips/page/normal/7909.html> (last visited May 4, 2008).

²⁶ Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/homosexuality/> (last visited May 4, 2008).

²⁷ JOHN BOSWELL, *SAME-SEX UNIONS IN PRE-MODERN EUROPE* (1995).

²⁸ About.com, *Boston Marriage*, http://womenshistory.about.com/od/bostonmarriage/a/boston_marriage.htm (last visited May 4, 2008).

²⁹ *Id.*

³⁰ *Id.*

³¹ JONES, *supra* note 1, at 165.

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came out of the closet.³² However in the 1980's, the tone of the representation changed with the onset of AIDS. "More often than not sitcoms encouraged the perception that gays were to blame for AIDS."³³ Characters portrayed during this time were rather stereotyped and one-dimensional.³⁴ In the 1990's the LGBT (lesbian, gay, bisexual and transgender) population enjoyed more tolerance than in the 1980's, and television shows began to represent the community with more diverse portrayals.³⁵

"Family Values" was a prominent plank in the Republican platform, particularly during the Presidential election years of 1996, 2000, and 2004. The social conservatives ran for office with the support of the Christian Right on a family values agenda during these election years, riding a backlash against the perceived Hollywood permissiveness. The prominence of same-sex marriage used as a scare tactic during election years coincided with major changes in the rights of gays and lesbians. For example, in 1993, in *Baehr v. Lewin*,³⁶ the Hawaii Supreme Court said for the first time that it was unconstitutional to prevent same-sex marriage, based on an equal protection provision in the state constitution. The Hawaii decision prompted the U.S. Congress to limit the force of the decision, by passing the Defense of Marriage Act (DOMA) of 1996.³⁷ The Vermont Supreme Court decided *Baker v. State* in 1999,³⁸ which later led to the legislation allowing civil unions in that state.³⁹ *Goodridge v. Department of Public Health*

³² An Encyclopedia of Gay, Lesbian, Bisexual, Transgender & Queer Culture, American Television Situation Comedies, http://www.glbtc.com/arts/am_tv_sitcoms.html (last visited May 4, 2008) (listing Agnes Morehead, Dick Sargent and Paul Lynde from *Bewitched*, Charles Nelson Reilly from *The Steve Lawrence Show*, Mary's friend and neighbor Phyllis from *The Mary Tyler Moore Show*, and Jodie Dallas – portrayed by Billy Crystal – on *Soap*, as just a few examples from the 1960s and 1970s).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* (*Northern Exposure* had the first gay wedding in 1994, followed by same-sex weddings on *Roseanne* and *Friends*, in 1995 and 1996, respectively. However it was not until 2000 that two gay male characters would kiss on television, on *Will and Grace*).

³⁶ 852 P.2d 44, 68 (1993).

³⁷ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 28 U.S.C. § 1738C (2000)).

³⁸ 744 A.2d 864 (1999).

³⁹ DAVID A. J. RICHARDS, *THE CASE FOR GAY RIGHTS* 128 (2005).

was the Massachusetts decision in 2003 that paved the way for same-sex marriage in that state.⁴⁰ This decision incited more concerted efforts by President Bush to unsuccessfully attempt passage of an amendment to the U.S. Constitution, limiting marriage between a man and a woman.⁴¹ In advocating for the amendment to the Constitution, President Bush stated that “Marriage cannot be severed from its cultural, religious and natural roots without weakening the good influence of society. Government, by recognizing and protecting marriage, serves the interests of all.”⁴² It is difficult to determine who or what marriage is being protected against, and it can hardly be said to serve the interests of all since the proposed amendment would deny a fundamental constitutional right to a segment of the adult population.

There have been changes in the law regarding sexual expression, notably in the 2003 decision of *Lawrence v. Texas*,⁴³ which overruled the earlier decision of *Bowers v. Hardwick*.⁴⁴ In *Lawrence*⁴⁵, the court held that a Texas sodomy statute, criminalizing private consensual homosexual conduct, violated due process and equal protection. In Justice O’Connor’s concurrence, she said, “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.”⁴⁶ In 2004, the Bush administration then advocated for passage of the Marriage Protection Act,⁴⁷ which would “strip the federal courts of jurisdiction over legal challenges to the Defense of Marriage Act. . . .”⁴⁸ Although marriages are regulated by states, the federal government has continued to limit that power, targeted solely against same-sex relationships. Short of a U.S. Constitutional amendment, the federal government has been successful in this endeavor.

⁴⁰ 798 N.E.2d 941 (2003).

⁴¹ RICHARDS, *supra* note 39, at 128.

⁴² SUAREZ, *supra* note 14, at 93 (quoting President Bush, Feb. 24, 2004)

⁴³ 539 U.S. 558 (2003).

⁴⁴ 478 U.S. 186 (1986).

⁴⁵ 539 U.S. 558 (2003).

⁴⁶ *Id.* at 582.

⁴⁷ Marriage Protection Act of 2004, H.R. 3313 108th Cong. (2004).

⁴⁸ Cornell University, *The Rise of the Religious Right in the Republican Party*, <http://www.theocracywatch.org/homophob.htm> (last visited May 5, 2008).

III. Arguments Regarding Recognition of Same-sex Marriages

There are several common arguments against the legal recognition of same-sex relationships. One of the prominent arguments is that the primary purpose of marriage is procreation, and marriage provides legitimacy and presumption of parentage for children. A state legislature may limit marriage to opposite sex couples, because “those couples are ‘theoretically capable of procreation,’ they do not rely on ‘inherently more cumbersome’ non-coital means of reproduction, and they are more likely than same-sex couples to have children.”⁴⁹ As the *Goodridge* opinion points out, marriage has developed over generations to regulate sexual conduct, to provide legitimacy for children, and to encourage stable homes for children.⁵⁰ However, adoption, effective birth control, surrogacy, and assisted reproductive technology are relatively recent events in the history of marriage, and the illegitimacy of children is not as strongly stigmatized, so the “primary purpose” of procreation does not seem as pertinent for modern marriages, because men and women may become parents without marriage, or be married without becoming parents.⁵¹ Procreation, the ability to procreate, or the intention to procreate are not requirements for marriage in Massachusetts or in any other state.⁵² Additionally, many states allow for creation of families today in a variety of ways, regardless of method, sexual orientation of parent, or marital status of parent.⁵³ If the legitimate primary purpose of marriage is for the procreation of children, arguably states would change the requirements of marriage to include the ability and intent to have children, or, alternatively, limit the availability of assisted reproduction and adoption to married, heterosexual couples.⁵⁴ However, because

⁴⁹ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 951 (Mass. 2003), quoting lower court decision.

⁵⁰ *Goodridge*, 798 N.E.2d at 961.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 961-962.

⁵⁴ *Id.* at 962.

federal case law protects the fundamental rights to marry and to procreate,⁵⁵ at least for heterosexuals, this does not appear likely.

The state and the federal governments confer benefits to married couples, and consequently to any children of married couples: “marital children reap a measure of family stability and economic security based on their parents’ legally privileged status that is largely inaccessible to non-marital children.”⁵⁶ If the primary purpose of marriage is to care for children, that does not logically mean that marriage must be limited to heterosexual couples because they can procreate. Procreation is no longer limited to married, heterosexual couples by technology, law, or social acceptance. The law of marriage is what the state legislature decides it is, and the legislature may choose to protect children born to same-sex relationships just as it provides for children born during heterosexual marriage. Same-sex parents may wish to have their children born of a marriage, to confer the benefits that are associated with marriage.⁵⁷ While it is true that many children do not enjoy the benefits of married parents, such as children born to single parents, or couples who decide to not marry, the difference with same-sex couples is that they simply are not allowed to marry a person of their choice, and heterosexual couples may choose to do so without legal difficulty. There is no legitimate purpose in excluding children of same-sex parents from the protections and benefits that accompany marriage of their parents. The argument that marriage is defined by the ability to procreate, but not extending that restriction to those couples who cannot or will not have children, in reality exposes the prejudice of the restriction. Defining marriage to the exclusion of same sex couples denies them the fundamental right to marry, and denies their children the right to be in a family with

⁵⁵ *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵⁶ *Goodridge*, 798 N.E.2d at 956-957.

⁵⁷ Partners Task Force for Gay & Lesbian Couples, Parenting Options for Same-Sex Couples in the U.S., <http://www.buddybuddy.com/parent.html> (last visited May 5, 2008) (There are varying estimates on the number of children with same sex parents in the United States, likely because parents may be hesitant to disclose their orientation. The Family Law Section of the American Bar Association provides an estimate of eight to ten million children with same sex parents, while Lambda Legal estimates six to fourteen million children with same sex parents).

legal recognition and rights.⁵⁸ The law no longer punishes “bastard” or illegitimate children for the sins of their unmarried parents, and “extending the ability to marry to same-sex couples will safeguard the best interests of children . . . by placing all children on equal footing without regard to their parents’ marital status or . . . sexual orientation.”⁵⁹ There is no evidence that allowing same-sex marriage will deter heterosexual couples from marrying and having children, but parenting children is further complicated by the fact that their parents are not allowed to be married and enjoy the rights that attach.⁶⁰ The best interests of all children warrant access to the benefits available to married parents, and allowing same-sex couples the ability to choose that option for their children.

Another argument against the legalization of same-sex marriage is that the plain, every day meaning of the term “marriage” is between one man and one woman. However, the state regulations of marriage are licensing laws, determined by each state legislature. The issue is not what the law is, historically has been or what the dictionary definition is, but whether the state action restricting marriage is a legitimate exercise of the state’s authority to regulate conduct. Marriage is a creation of state licensing provisions, and therefore, the state decides who may marry, according to the state’s legitimate interests. The state creates and regulates marriage by exercise of its police power, and the state defines the terms to enter and exit the status of marriage.⁶¹ The legislature creates rules to regulate conduct as long as they are “necessary to secure the health, safety, good order, comfort or general welfare of the community.”⁶² Civil marriage is designed to encourage long-term, stable relationships, and confers duties and responsibilities upon those who enter into the marriage contract.⁶³ Marriage is not defined by the “characteristics of those to whom it always has been accessible, in order to justify the exclu-

⁵⁸ Madeline Marzano-Lesnevich & Galit Moskowitz, *In the Interest of Same Sex Couples*, 19 J. AM. ACAD. MATRIM. LAW. 255, 271 (2005).

⁵⁹ *Id.* at 271 & 275-76.

⁶⁰ *Goodridge*, 798 N.E.2d at 963.

⁶¹ *Id.* at 954.

⁶² *Id.*

⁶³ *Id.*

sion of those to whom it has never been accessible.”⁶⁴ The state provides a method to join and separate property, ensures that both adults and children are provided for, and establishes parentage. These goals would be achieved regardless of whether the marriage contract involved people of same or opposite sex.

Opponents argue that although marriage is a fundamental right, there is no fundamental right to same-sex marriage. The right to marry exists for everyone, so long as people marry a person of the opposite sex. However, the right to marry is somewhat hollow if one is not allowed to marry a person of one’s choice, “subject to appropriate government restrictions in the interests of public health, safety and welfare.”⁶⁵ This right to marry a person of their choice still excludes the ridiculous options suggested in the counterargument, such as marrying one’s pet, a child, or having multiple spouses.⁶⁶ Aside from the obvious reasons that pets and children do not have the capacity to consent to a marriage contract, the argument that same-sex marriage will open the flood gates to polygamy is a slippery slope argument that has not happened.⁶⁷ Traditional, religiously conservative polygamists do not typically align themselves with advocates of same-sex marriage. Moreover, the preference for polyamory is not the same thing as a sexual orientation.⁶⁸ The state’s interests here are protecting people in the marriage contract by ensuring they are able to legally consent, to attach duties to the parties to provide for necessities, and to create a stable, legal relationship between the parties with privileges and responsibilities.

The legal recognition of same-sex marriage or legal relationship in those states that provide for it has not undermined the character of marriage. “People had been getting married for months and the sky hasn’t fallen, the world hasn’t ended. If you

⁶⁴ *Id.*

⁶⁵ *Goodridge*, 798 N.E.2d at 958.

⁶⁶ SUAREZ, *supra* note 14, at 96.

⁶⁷ Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 34 Hofstra L. Rev. 1155, 1156 (2006), <http://www.law.ucla.edu/volokh/marriage/pdf> (last visited May 5, 2008).

⁶⁸ Dale Carpenter, *Gay Marriage and Polygamy*, <http://www.indogayforum.org/news/show/26668.html> (last visited May 1, 2008).

go looking for other harms, you just don't see it."⁶⁹ In fact, the argument that the institution of marriage will be destroyed if change is allowed has accompanied other changes to marriage in history, such as the Married Women's Property Acts, where women were granted independent legal status from their husbands. It seems that "anytime one tinkers with the basic principles of marriage (something that happens every other generation or so), someone is out there decrying the fall of civilization."⁷⁰ Allowing the legal recognition of same-sex relationships does not "diminish the validity or dignity of opposite sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race. If anything, it reinforces the importance of marriage to individuals and communities."⁷¹

One of the more compelling arguments for the legal recognition of same-sex relationships is that the marriage exclusion violates a state constitution's clauses of equal protection and due process. State laws must be substantially related to an important state objective. State objectives for marriage laws today are to provide for a legal method for people to join their lives, to provide for each other, share their resources, and possibly to start a family. The state wants to ensure that the people who enter into the contract are competent to make a contract, and therefore are able to understand the duties and obligations that attach to the contract. The state also, with consanguinity requirements, wants to ensure that those who decide to have children will not bear children with someone closely related to them, to guard against birth defects that could occur in the aggregate.⁷² None of these goals are frustrated by allowing same-sex marriage. By allowing same-sex couples to marry, the goals and the benefits are extended to people to whom they were not otherwise available, extending protection and stability to those couples. Marriage is "an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or

⁶⁹ SUAREZ, *supra* note 14, at 97 (quoting Lee Swislow, Executive Director of Gay and Lesbian Advocates and Defenders).

⁷⁰ JENNIFER SMITH, *THE GAY RIGHTS MOVEMENT* 127 (2003).

⁷¹ *Goodridge*, 797 N.E.2d at 965.

⁷² BBC News, *Your Views: Cousin Marriage*, <http://news.bbc.co.uk/1/hi/programmes/newsnight/4442646.stm> (last visited May 5, 2008)

social projects.”⁷³ The exclusion of same-sex couples to obtain the license to marry does not achieve any legitimate purpose, and the only purpose it serves in actuality is to discriminate against a group of people. Discrimination is not a permissible legislative objective, even if the United States does not recognize the LGBT community as a protected class.⁷⁴

The *Loving v. Virginia*⁷⁵ decision ended the discriminatory miscegenation statutes in the United States. The Supreme Court decided that the lack of popular consensus favoring integration in the United States, including interracial marriage, should not deter the court from holding that miscegenation statutes violated the equal protection clause of the Constitution.⁷⁶ Proponents of same-sex marriage argue that miscegenation statutes are very similar to the limitation of marriage to couples of opposite sex.⁷⁷ Those opposing same-sex marriage argue that “while two individuals who wish to marry may be equally aggrieved by State action denying them that opportunity, they do not ‘share’ the liberty and equality interests at stake.”⁷⁸ Thus the right to marry does not belong to couples, or groups, but is an individual right. However, the right to marry does not mean anything “if it does not include the right to marry the person of one’s choice, subject to appropriate government restrictions in the interests of public health, safety and welfare.”⁷⁹ To say that a person still has the right to marry, as long as he or she marries a person of the opposite sex, is very similar to the miscegenation argument that Caucasians and African Americans both have the right to marry, as long as they marry someone of the right color. That is discriminatory, and so is the limitation of marriage to opposite sex couples.

⁷³ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

⁷⁴ *Romer v. Evans*, 517 U.S. 620 (1996).

⁷⁵ 388 U.S. 1 (1967).

⁷⁶ *Id.*

⁷⁷ Stephen Clark, *Same-Sex But Equal: Reformulating the Miscegenation Analogy*, 34 RUTGERS L.J. 107 (2002) available at <http://www.prof-clark.net/pubs/texts/ssbe.pdf> (last visited May 1, 2008).

⁷⁸ *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 957 (Mass. 2003).

⁷⁹ *Id.* at 958.

IV. Defense of Marriage Laws

The Hawaii decision of *Baehr v. Lewin*⁸⁰ startled the federal government into passing a law to prevent a portion of the adult population from accessing a fundamental right. *Baehr* precipitated the passage of the federal Defense of Marriage Act, signed by President Bill Clinton in 1996.⁸¹ Until the Defense of Marriage Act, there was no explicit requirement that the parties applying for a marriage license must be of the opposite sex.⁸² “Worried legislatures in other states passed laws banning same-sex marriage, also called ‘Defense of Marriage’ acts, or ‘DOMAs’.”⁸³

The federal Defense of Marriage Act⁸⁴ has two parts: the first defines marriage according to federal law, as between one man and one woman; and the second part explains that each state is not required to recognize marriages from other states, contrary to the full faith and credit historically given to common law and legal marriages across state lines.⁸⁵ Therefore, legally joined same-sex couples legally joined in one state are not required to be recognized as such in other states, even in those states that also recognize same-sex relationships. For example, if a same-sex couple marries in Massachusetts, they will not necessarily be recognized as married outside of Massachusetts, but the couple may be required to register a domestic partnership or civil union instead, if they want to remain protected in other states.⁸⁶

There are only five states, as of March 2009, without statutory or constitutional DOMAs: Massachusetts, New Jersey, New Mexico, New York and Rhode Island. Thirty states have constitutional amendments defining marriage as between one man and one woman. The remaining states define the parameters via stat-

⁸⁰ 852 P.2d 44 (1993). In *Baehr*, the Hawaii Supreme Court determined that Hawaii was discriminating according to sex, and thus the marriage law deserved strict scrutiny analysis.

⁸¹ DOMA Watch, <http://www.domawatch.org/about/federaldoma.html> (last visited May 5, 2008).

⁸² *Id.*

⁸³ HAYDEN CURRY, DENIS CLIFFORD & FREDERICK HERTZ, A LEGAL GUIDE FOR LESBIAN & GAY COUPLES, 1/18 (2005).

⁸⁴ 28 U.S.C. § 1783C (Supp. III 1997).

⁸⁵ DOMA Watch, *supra* note 81.

⁸⁶ *Id.*

utory law or both amendment and statute.⁸⁷ Similar to the federal DOMA, “These laws and amendments often define marriage as a contract between a man and a woman, prohibit same-sex marriages, or prohibit the recognition of same-sex marriages performed in other jurisdictions.”⁸⁸ The passage of the federal act also prevents same-sex couples who are legally joined in their state from enjoying the federal benefits available to other married couples, because of the new federal definition/limitation of marriage. There are 1,138 rights and responsibilities associated with marriage, and denied to same-sex couples.⁸⁹ These rights include those associated with family law, health care, taxes, government programs, labor, and bankruptcy.⁹⁰ Because the federal government has passed a DOMA, and many states have passed their own DOMAs, “different state and local governments across the country will make different decisions in differing circumstances.” For example, different agencies or governments may handle name changes differently, or dissolving relationships may or may not be accomplished outside the state they were created.⁹¹

DOMAs were a reaction to many cultural and political events, including the *Baehr*⁹² and *Goodridge*⁹³ decisions, and the Supreme Court decision of *Lawrence v. Texas*.⁹⁴ Allowing same-sex couples to marry in Massachusetts in 2003 “was almost too good to be true. Here was an issue guaranteed to energize and enflame older, more rural, more religious, and more conservative voters.”⁹⁵ For President Bush and his re-election campaign, it was a “gift, wrapped in a lavender bow” from the home state of the future Democratic Presidential nominee, John Kerry.⁹⁶

However, with each subsequent marriage or union by another couple, the argument that these relationships will bring

⁸⁷ *Id.*

⁸⁸ State Stat. Surveys Defense Marriage, Thompson/West (2007).

⁸⁹ GAO-04-0353R *Defense of Marriage Act- Update to Prior Report*, <http://www.buddybuddy.com/mar-g03.html> (last visited May 1, 2008).

⁹⁰ *ABA White Paper*, *supra* note 2, at 346-47.

⁹¹ CURRY, CLIFFORD & HERTZ, *supra* note 82, at 1/19

⁹² 852 P.2d 44 (1993).

⁹³ 798 N.E.2d 941 (Mass, 2003).

⁹⁴ 539 U.S. 558 (2003).

⁹⁵ SUAREZ, *supra* note 14, at 94

⁹⁶ *Id.*

down the centuries old institution of marriage is minimized. The LGBT population is not collectively hiding their sexuality in the closet any longer, and they cannot continue to be demonized as “other.” The LGBT community is among the general population, and we know them as our neighbors, coworkers, friends and family members. One commentator has stated:

Generally, people don’t want any one religion or group of religions imposing their morality on the rest of us. A lot of the religious opposition to marriage equality is based on a morality that sees homosexuals as fundamentally immoral, and sinful, and wrong. If you hammer home that message enough, people get desensitized. After a while, if you don’t share that strong revulsion for gay people, you say, well actually, why not?⁹⁷

V. Form of Union for LGBT Couples

A. Marriage

Marriage is currently available to same-sex couples in Massachusetts, after the *Goodridge*⁹⁸ decision in 2004, in Connecticut, after the *Kerrigan*⁹⁹ decision in 2008, and briefly in California. Couples who marry in Massachusetts only receive the benefits offered by the state, however, because of the federal DOMA restricting the federal benefits that follow marriage generally. The process and requirements to marry in Massachusetts are the same for opposite and same-sex couples.¹⁰⁰ Massachusetts law also specifies that parties must not reside in a state that prohibits same-sex marriage, unless the parties plan to reside in Massachusetts in the immediate future. GLAD (Gay and Lesbian Advocates and Defenders) reads the Massachusetts marriage statute as saying that if a couple obtains a civil union or

⁹⁷ *Id.* at 108.

⁹⁸ 798 N.E.2d 941.

⁹⁹ 957 A.2d 407 (2008).

¹⁰⁰ Lambda Legal, Massachusetts Relationship Recognition, <http://www.lambdalegal.org/our-work/states/massachusetts.html> (last visited May 5, 2008). The requirements for marriage are: the parties must be residents, 18 years of age or older or have permission from a judge, and may not marry if they are already married, and may not be closely related. The process requires the parties to: appear at city hall for license application, send a notice of intent to the state registry of vital records, pay a fee, have a three day waiting period, and have a solemnization ceremony within sixty days by an authorized professional.

domestic partnership from another state, the marriage statute does not preclude that couple from later marrying in Massachusetts.¹⁰¹ If a couple later separate, they may also need to live in Massachusetts for a time in order to dissolve their marriage, since some states that do not recognize same-sex marriage are seemingly hesitant even to dissolve them.¹⁰²

Connecticut enacted a civil union statute in 2005, which gave couples the same rights and responsibilities as in marriage, and included a provision limiting marriage to a man and a woman.¹⁰³ The statute was challenged in the case of *Kerrigan v. State*¹⁰⁴ and in 2008 was found to be unconstitutional by the Connecticut Supreme Court. Connecticut became the second state to recognize same-sex marriage.

California is, at this writing, in a state of flux with regard to same-sex marriage. California currently has a domestic partnership statute, which will be discussed later in this article. California's marriage statute was challenged in the case of *In Re Marriage Cases*,¹⁰⁵ and was found to be unconstitutional, paving the way for same-sex marriage in May 2008. California's court found that laws focused on the gay and lesbian population were subject to strict scrutiny, and that marriage is a fundamental right under the California Constitution.¹⁰⁶ In November, 2008, Proposition 8 was on the general election ballot, which asked the voters to consider an amendment to the state Constitution, limiting marriage to a man and a woman. The proposition began as an initiative, originating from a public petition drive rather than the legislature. The proposition narrowly passed, and immediately went into effect. The California Supreme Court denied a stay of Prop 8 and marriage in California was again limited to opposite sex couples. Lambda Legal, the American Civil Liberties Union, and the National Center for Lesbian Rights filed a writ disputing the validity of the proposition with the California Supreme Court immediately following the election, and the court

¹⁰¹ GLAD, Your Rights, LGBT Issues, http://www.glad.org/rights/massachusetts_lgbt.shtml#civilunions (last visited May 5, 2008).

¹⁰² *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007).

¹⁰³ Conn Gen Stat 46b – 3800 (2005).

¹⁰⁴ 957 A.2d 407

¹⁰⁵ 183 P.3d 384 (2008).

¹⁰⁶ *Id.*

heard oral arguments in March, 2009. The issues to be decided are whether the proposition was actually an amendment to the Constitution, or a revision of the Constitution. A revision of the Constitution requires an amendment be passed by the legislature before being placed on the ballot – the public may not decide on radical changes of the Constitution. Lambda Legal argues that Proposition 8 is a revision because the court has already granted the rights to the minority population, these fundamental rights cannot be rescinded via popular vote.¹⁰⁷ If the proposition is upheld, the court will also determine the fate of the estimated 18,000 marriages that occurred between June and November, 2008, and thus if the amendment should be retroactive to undo those marriages.¹⁰⁸ The proponents of Proposition 8, voiced by Kenneth Starr, argue that the will of the people should prevail, so not only should the amendment stand, but the marriages should be dissolved.¹⁰⁹ The court is expected to issue its decision within ninety days.

B. *Civil Union*

Civil unions are very similar to marriages with respect to the overall rights and responsibilities that attach to the relationship but this form of union is still short of a marriage. Civil unions are currently lawful in New Jersey,¹¹⁰ Vermont,¹¹¹ and New Hampshire.¹¹²

New Jersey passed its civil union statute in response to the *Lewis v. Harris* decision in 2005,¹¹³ amending the New Jersey

¹⁰⁷ Lambda Legal: CA Supreme Court Hears Prop 8 Challenge, <http://www.lambdalegal.org/publications/articles/proposition-8-challenged.html> (last visited March 13, 2009).

¹⁰⁸ *Id.*

¹⁰⁹ Proposition 8: What Happens to the Married Couples, <http://opinion.latimes.com/opinionla/2009/03/proposition-8-w.html> (last visited March 13, 2009).

¹¹⁰ New Jersey Vital Statistics, How to Apply for a Civil Union License, http://www.state.nj.us/health/vital/civilunion_apply.shtml (last visited May 5, 2008).

¹¹¹ VT. STAT. ANN. tit. 15 § 8 (2005).

¹¹² N.H. REV. STAT. ANN. § 457-A (2008).

¹¹³ 875 A.2d 259 (N.J. Super. Ct. 2005).

Domestic Partnership Act.¹¹⁴ The New Jersey Supreme Court decided that barring same-sex couples from marrying in New Jersey violated the equality provisions under the state constitution.¹¹⁵ The court gave the legislature 180 days to address the inequality, and the legislature chose to create civil unions, rather than to allow same-sex marriage.¹¹⁶ The parties to a New Jersey civil union are eligible for the same protections, benefits, and responsibilities as spouses in a New Jersey marriage.¹¹⁷

Vermont passed its civil union statute in 1999, after the *Baker v. State* decision,¹¹⁸ where the Vermont Supreme Court decided that same-sex couples are constitutionally entitled to all the protections, privileges and benefits under the Common Benefits clause of the state Constitution. However, the court decided that there was no fundamental right to same-sex marriage, and it was up to the legislature to determine how to grant those rights. The Vermont legislature chose to deny marriage and grant civil unions, but the parties enjoy all the privileges, rights, and responsibilities as spouses in a Vermont marriage.¹¹⁹ Vermont does have a DOMA, so it does not recognize the marriage of same-sex couples from Massachusetts, but it does honor civil unions and domestic partnerships from other states.

New Hampshire's Civil Union Act took effect January 1, 2008. The legislature passed the law without a court case directing it to do so, and the law recognizes that same-sex couples

¹¹⁴ New Jersey Department of Health and Senior Services, <http://www.state.nj.us/health/vital/dp2.shtml> (last visited May 5, 2008).

¹¹⁵ Lambda Legal, New Jersey Relationship Recognition Information, <http://www.lambdalegal.org/our-work/states/new-jersey.html> (last visited May 5, 2008).

¹¹⁶ *Id.*

¹¹⁷ *Id.* The requirements are as follows: the parties must be of the same sex, be over age 18 unless with parental permission, must not be closely related, and must not be a party to another civil union, domestic partnership or marriage. The procedure requires that the parties obtain a license from municipal licensing agent, have a witness and pay a fee; a license will be issued after a 72 hour waiting period. The couple must have a ceremony, officiated by an authorized person, within thirty days after the license is issued, and two witnesses must be present at the ceremony.

¹¹⁸ 744 A.2d 864 (1999).

¹¹⁹ Vermont Secretary of State, Civil Unions/Marriage, <http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html> (last visited May 5, 2008).

have the same rights and responsibilities of married couples.¹²⁰ It is unclear if the parties to the civil union must be residents of New Hampshire. There is a New Hampshire law that says non-residents may not marry in the state if that marriage is void in their state of residency,¹²¹ so the argument could be made that because this is a civil union instead of a marriage, the statute is not applicable. However, because the civil union statute directs that civil unions will be subject to all the marriage laws, it is possible that includes the residency requirement. This could require residency for civil unions, unless they are allowable in the home state of the parties.¹²²

C. *Domestic Partnership*

Domestic partnerships are very similar to marriage and civil unions in the rights that attach to the relationship, but couples only need to file a form to complete the process. No solemnization ceremony is required. Domestic partnerships are available in California,¹²³ Maine,¹²⁴ Washington,¹²⁵ and Oregon.¹²⁶ California's domestic partnership law, recognizes nearly all the same rights and responsibilities as a marriage, and provides a state reg-

¹²⁰ GLAD New Hampshire Civil Unions, <http://www.glad.org/uploads/docs/publications/nh-civil-unions.pdf> (last visited May 5, 2008). The requirements: the parties must be at least 18, unlike civil marriage, where 14 year old boys and 13 year old girls may marry with permission. The parties must be unmarried and not part of another civil union; they must be of the same sex, and not closely related. The procedure requires that both parties must appear in person at a local government clerk's office, pay a fee and complete an application. After the application for a license, the couple has ninety days to have a solemnization ceremony, by an authorized person. The couple must return the license, with witness signatures, within sixty days of the ceremony to the clerk who issued the license for validation.

¹²¹ N.H. REV. STAT. 457: 44 (2007).

¹²² GLAD New Hampshire Civil Unions, <http://www.glad.org/uploads/docs/publications/nh-civil-unions.pdf> (last visited May 5, 2008).

¹²³ CAL. FAM. CODE § 297.5 (2007).

¹²⁴ Maine Department of Health and Human Services, Domestic Partner Registry, <http://www.maine.gov/dhhs/bohodr/domstcrprtnrspge.htm> (last visited May 5, 2008).

¹²⁵ Pub. L. No. 156, S.B. 5336 (2007).

¹²⁶ Oregon Family Fairness Act, http://www.basicrights.org/?page_id=19 (last visited May 5, 2008)

istry for domestic partners.¹²⁷ California does have a statutory DOMA; restricting marriage to one man and one woman, but it does recognize civil unions and domestic partnerships from other states.¹²⁸

Maine's domestic partnership act, created in 2004, provides a state registry and includes some, but not all of the protections and responsibilities of marriage.¹²⁹ Maine's protections are limited to matters related to probate guardianships and conservatorships, inheritance, and protection from domestic abuse.¹³⁰ Partners will have the benefit of the same inheritance rights as a spouse, but without the tax exemptions. Partners will be treated as a spouse if seeking a guardianship or conservatorship for an incapacitated partner, and will be considered next of kin for end of life arrangements. Partners are also protected under the state's domestic violence laws, and so are eligible to receive orders of protection.¹³¹

¹²⁷ California Secretary of State, Domestic Partners Registry, <http://www.sos.ca.gov/dpregistry/> (last visited May 5, 2008)(Requirements: must be at least 18 years old, of the same sex, but may be of opposite sex if over age 62, in some circumstances. Parties must share a residence and agree to be responsible for each other's living expenses. Neither person may be married or in another domestic partnership, and cannot be too closely related to each other in a way that would prevent the couple from being married under state law. Procedure: parties must complete a form, have it notarized, and send to the Secretary of State's office, along with a filing fee. It is not a requirement to be a California resident, but both parties must reside at the same address. If the parties want to later dissolve the partnership within five years and the dissolution is uncontested, the parties must file another notarized form with the state. If the parties' partnership lasted longer than five years, the dissolution is contested, or if there is mutual property or children of the partnership, the parties must dissolve the partnership by court action similar to dissolution of a civil marriage).

¹²⁸ National Center for Lesbian Rights, The California Domestic Partnership Law, <http://ncflr.convio.net/site/DocServer/AB205.04.2007.pdf?docID=1264> (last visited May 5, 2008).

¹²⁹ ME. REV. STAT. ANN. tit. 22, § 2710 (2005).

¹³⁰ Maine Department of Health and Human Services, Domestic Partnership Registry, <http://www.maine.gov/dhhs/bohodr/domstcprtnrspge.htm> (last visited May 5, 2008).

¹³¹ *Id.* The requirements regarding age, competency, and consanguinity include: The couples must be legally domiciled together in Maine for at least one year before filing with the domestic partner registry. Neither party can be married or in a domestic partnership with another person, and each person must be the sole partner of the other and the parties must expect to remain partnered

Washington established a domestic partnership registry in 2007.¹³² Domestic partners in Washington may inherit property if their partner dies without a will, and may be named to administer their partner's estate. Partners may visit an ailing partner in the hospital and make medical decisions just as a spouse would. Partners are also eligible for the same power of attorney rights as a spouse in a marriage, and seek wrongful death damages. Partners are able to authorize an autopsy and make anatomical gifts. Washington state employees are allowed to include their domestic partners on their health insurance policies.¹³³

Oregon passed the Oregon Family Fairness Act in May, 2007, granting domestic partnership status beginning January 2008. The partnership act provides for most of the same rights and benefits that attach to marriage, including the ability to access dissolution procedures in the event the partners want to later dissolve their partnership.¹³⁴ As of April 2008, there are continuing efforts to repeal the law.

indefinitely. The procedure requires the parties to submit a notarized Declaration of Domestic Partnership form and a filing fee to the Office of Vital Records, and the office will return two certified copies of the declaration back to the couple. The partnership may be terminated by one or both of the parties by filing a termination notice with the Office of Vital records and submitting a fee. If one of the partners files for termination, the other partner must receive notice of the termination. The partnership is also automatically terminated if one of the partners gets married.

¹³² Pub. L. No. 156, SB 5336 (2007).

¹³³ *Id.* The requirements are that the parties must: share a common residence, be unmarried and not in a domestic partnership with someone else, be at least 18 years old if of the same sex, and at least 62 years old if of the opposite sex. The parties must be competent to legally consent to a contract, and not closely blood related. The procedures state that the parties may register in person or online, and they must complete a declaration form and get it notarized, pay a filing fee and return to the secretary of state's office. If the partners want to later dissolve the partnership, they must file a notice of termination with the state, notarize the form, pay a fee and send it to the secretary of state's office. If the termination is contested, the terminating partner must file for an affidavit of service to have notice served to the other partner.

¹³⁴ Basic Rights Oregon, Domestic Partnership Resource Guide, http://www.basicrights.org/?page_id=101, (last visited May 6, 2008) The requirements: the parties must be of the same sex, at least age 18 and competent to consent to a contract. One of the parties must be an Oregon resident. The parties must not be married, or closely related by blood. The procedures: the partners must complete a declaration form at the county clerk's office, get the form

D. *Reciprocal Beneficiaries*

This is a partnership between two people who are not allowed to marry by law. Not only may same-sex couples enter into this relationship, so may close relatives. Reciprocal beneficiary relationships are currently available in Vermont and Hawaii.¹³⁵ Vermont's reciprocal beneficiary provision predates the civil union statute in that state, and the parties receive the same benefits and responsibilities of spouses in limited areas, including medical decision making, decision making regarding anatomical gifts and disposition of remains, and durable power of attorney for health care.¹³⁶

Hawaii's reciprocal beneficiary provision¹³⁷ creates a legal partnership between two people who are not allowed to marry under Hawaii law. Hawaii's law provides survivorship and inheritance rights, next-of-kin recognition for visiting a partner in the hospital and making anatomical gifts, benefits related to jointly owned property, and there is legal standing for wrongful death suits and domestic violence protection.¹³⁸ Since 1997, the benefits associated with the reciprocal beneficiary provision have been reduced. Hawaii no longer provides eligibility to state employees' partners to health insurance, retirement benefits or life insurance.¹³⁹ Hawaii passed a DOMA¹⁴⁰ limiting marriage between one man and one woman. The DOMA was passed after the *Baehr v. Lewin*,¹⁴¹ where the court decided that the state was

notarized, pay a filing fee, and the county clerk will give the couple a domestic partnership certificate.

¹³⁵ VT. STAT. ANN. tit. 15 § 1304, HAW. REV. STAT. § 572C-4 (2005).

¹³⁶ Vermont Civil Unions, <http://www.vermontcivilunion.com/union/faq.html> (Last visited May 6, 2008) The requirements are that the parties must be at least 18 years old, and not in another reciprocal beneficiary relationship, civil union or marriage. The parties must present a notarized declaration of their consent to the commissioner of health. If one of the parties to the reciprocal beneficiary relationship were to get married or enter into a civil union, that act will terminate the reciprocal beneficiary relationship.

¹³⁷ HAW. REV. STAT. § 572C-2 (1997).

¹³⁸ Partners Task Force for Gay & Lesbian Couples, Reciprocal Beneficiaries, <http://www.BuddyBuddy.com/d-p-hawa.html> (last visited May 6, 2008).

¹³⁹ *Id.*

¹⁴⁰ DOMA Watch, <http://www.domawatch.org/stateissues/hawaii/index.html> (last visited May 6, 2008) HAW. CONST. Art. 1, § 23, HAW. REV. STAT. § 572-1 (1997).

¹⁴¹ 852 P.2d 44 (1993).

discriminating against sex in preventing same-sex marriage, in violation of Hawaii's equal rights amendment. The passage of the state DOMA ended the hope after the *Baehr* decision, of providing for a stronger legal relationship between same-sex partners. Hawaii does not recognize same-sex marriage, nor does it recognize civil unions or domestic partnerships.¹⁴²

E. *Other Options*

Many state and municipality governments that offer same-sex couples some benefits, irrespective of whether the overall law in the state legalizes the relationship. Those benefits provided are usually limited to government employees, and related to employment and health benefits. States currently offering benefits include California, Connecticut, Illinois, Iowa, Maine, Montana, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington. There are 144 city and county governments, 304 colleges and universities, 270 Fortune 500 companies, and 8,653 private sector companies that provide benefits to domestic partners.¹⁴³ Some cities provide what is called an "equal benefits ordinance," requiring businesses that work with the state or local government to offer equal benefits to its employees as well.¹⁴⁴

¹⁴² Hawaii Health Department, <http://hawaii.gov/health/vital-records/vital-records/reciprocal/index.html> (last visited May 6, 2008). The requirements are that the parties must be two people who cannot otherwise marry each other in Hawaii, and be at least 18 years old. Neither person may be in another reciprocal beneficiary relationship and both must have capacity to consent to a contract. People with close consanguinity may also enter into this relationship. The procedures: the couple must register the relationship with the state Department of Health, and can do so by downloading a form on the state health department's website. The form must be notarized. The parties then must mail the form, with a fee, self addressed stamped envelopes to the Hawaii Reciprocal beneficiary office. The state office will register the couple and send them both copies of the certificate. If the couple wants to later terminate the relationship, the process is the same.

¹⁴³ Human Rights Campaign, http://w3.hrc.org/Template.cfm?Section=search_the_Database&Template=/CustomSource/WorkNet/srch.cfm&searchtypeid=3&searchSubTypeID=1 (last visited May 6, 2008).

¹⁴⁴ Samir Luther, Domestic Partner Benefits, <http://www.hrc.org/documents/Guide-to-Employer-Trends-and-Benefits-Equivalency-for-the-GLBT-Family.pdf> (last visited May 1, 2008) (including the state of California; Berkeley, California; King County, Washington; Los Angeles, California; Miami

Businesses and corporations are increasingly offering benefits to same-sex couples, usually limited to employment and health benefits. The majority of the Fortune 500 companies today provide health insurance benefits to the partners of their employees.¹⁴⁵ According to the Human Rights Campaign, the “higher a company ranks on Fortune magazine’s list of the most successful businesses, the more likely it is to provide comprehensive protections and benefits to [LGBT] employees.”¹⁴⁶ Businesses providing benefits may provide their own parameters for what a domestic partner means for their purposes of eligibility.¹⁴⁷ “Typically, employers require that the partners are emotionally and financially interdependent, do not have a different domestic partner or spouse, have reached the age of consent and are not related.”¹⁴⁸ Some state constitutional amendment DOMAs have been used to prohibit partner benefits for government employees.

VI. Conclusion

This article explored the alternatives available to same-sex couples to provide them with legal protection. Increasingly, corporations and municipalities are offering benefits to same-sex partners. States have been slower in recognizing same-sex relationships, and many more states than not have Defense of Marriage Acts or constitutional amendments, discouraging recognition of same-sex relationships. The state designs marriage licensing laws to protect state interests—interests that are still achieved if same-sex relationships are allowed. Legally recognizing same-sex relationships will finally provide same-sex couples with the same constitutionally protected right to marry that is so

Beach, Florida; Minneapolis, Minnesota; Oakland, California; Olympia, Washington; Sacramento, California; San Francisco, California; San Mateo County, California; Seattle Washington; Tumwater, Washington. Cities with similar ordinances include: Salt Lake City, Utah; Portland, Maine; Broward County, Florida; Atlanta, Georgia).

¹⁴⁵ Human Rights Campaign, GLBT Equality at the Fortune 500, <http://www.hrc.org/issues/workplace/fortune500.htm> (last visited May 1, 2008).

¹⁴⁶ *Id.*

¹⁴⁷ Human Rights Campaign, http://www.hrc.org/issues/workplace/benefits/domestic_partner_benefits (last visited May 1, 2008).

¹⁴⁸ *Id.*

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easily available to opposite sex couples, and will provide protection and stability for the adults and children in these relationships.

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