OPENING CIVIL MARRIAGE TO SAME-GENDER COUPLES: A NETHERLANDS-UNITED STATES COMPARISON

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I. INTRODUCTION

This Article examines and compares the legal developments in the Netherlands and the United States concerning the right of same-gender couples to marry. These two countries were selected for this comparison because, in December of 2000, the Dutch Parliament enacted legislation that changed the definition of marriage to include same-gender couples, and in the United States, several courts have struck down, as unconstitutional, statutes that limit marriage to opposite-gender couples. However, the routes that each country has taken to open marriage to same-gender couples have come from completely different directions. For example, in both countries same-gender couples have filed lawsuits seeking to marry. In the 1990s, five different cases were filed in the U.S., and the judges in at least three of these cases have been receptive to the petitioners’ attempts to obtain marital rights. In the states of Hawai‘i and Alaska, lower court judges have held that the denial of marriage licenses to same-gender couples is unlawful discrimination in violation of state constitutional provisions. In the state of Vermont, the highest appellate court has ruled that the Vermont Constitution requires same-gender couples be granted the

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equivalent rights as married opposite-gender couples. Court challenges to the marriage laws in the Netherlands, however, have been unsuccessful and the Dutch judges have been unwilling to find that same-gender couples have a right to marry.4

On the other hand, in December of 2000, the Dutch Parliament enacted legislation that allows same-gender Dutch couples to marry one another in civil ceremonies.5 Ironically, just the opposite legislative activity is occurring in many of the U.S. states. In fact, in Hawaii and Alaska, state legislators and citizens recently passed constitutional amendments to limit marriage to opposite-gender couples, to prevent the court decisions in those states from taking effect.6

This article discusses and compares the contrasting legal developments in the United States and the Netherlands concerning the right of same-gender couples to marry. It does so by discussing the case law and the current legislative activity, first in the Netherlands and then in the United States, dealing with the right of same-gender couples to marry. The next section analyzes and compares the Dutch and United States legal histories concerning opening civil marriage to same-gender couples. This section examines how the differences in the two countries’ legal systems, as well as the social status of homosexuals and the legal status of non-marital cohabitation, have influenced the contrasting routes these two countries have taken toward opening marriages to same-gender couples.

II. LEGAL DEVELOPMENTS IN THE NETHERLANDS

A. Dutch Case Law

1. Challenging Prohibitions Against Marriages of Same-Gender Couples: The 1990s Cases

In 1990, two Dutch courts were confronted with the issue whether a same-gender couple could marry. The first issue in these cases involved the statutory


6. See ALASKA CONST. art. I, § 25; see HAW. CONST. art. 1, § 23. In Alaska, sixty-eight percent of voters voted in favor of upholding traditional marriage as opposed to thirty-two percent opposing the constitutional amendment. By a margin of sixty-nine percent to twenty-nine percent, Hawaii voters upheld a constitutional amendment giving the Legislature “the power to reserve marriage to opposite-sex couples.” See Cheryl Wetzstein, Gays Can’t “Marry,” “2 States Say, THE WASHINGTON TIMES, Nov. 5, 1998, at A16.
construction of the marriage statute. Because the marriage statute, Article 30, Book 1 of the Dutch Civil Code (Burgerlijk Wetboek),\(^7\) did not contain gender-specific language, the petitioners argued that there was no statutory requirement that the marriage partners must be of opposite genders. The courts, one a district court in Amsterdam,\(^8\) and the other, the highest appellate court of the Netherlands, the Supreme Court (Hoge Raad),\(^9\) disagreed with the petitioners that the statutory language could be interpreted to allow same-gender individuals to marry one another. The district court of Amsterdam agreed with the petitioners that the statutory language in Article 30, Book 1 did not limit marriage to opposite-gender individuals. However, the court relied on the legislative history of the statute, and found that, at the time the law was enacted, marriage was only possible for persons of opposite genders. Consequently, even though the language of the Code did not limit marriage to opposite-gender individuals, the district court held that it was the legislators' intent to limit marriage to opposite-gender persons when they enacted the marriage laws.

The decision of the Hoge Raad several months later, in October of 1990, was in accordance with the Amsterdam district court's analysis of the language of Article 30, Book 1. In addressing the petitioners' argument that the statutory language did not prohibit same-gender persons from marrying each other, the Hoge Raad found that this argument was based on a literal interpretation of a number of articles of Book 1, which was an incorrect way of reading the statutes given the history of the enactment of Book 1 of the Netherlands Civil Code.\(^10\) The court also stated that, even if later social developments supported the idea that prohibiting same-gender individuals from marrying one another was no longer justified, this change in public opinion would not support a reinterpretation of the Code, “especially as the subject matter relates to public order, and whereby legal certainty is an important issue.”\(^11\)

The petitioners in both Dutch cases also argued a second issue—that the denial of a marriage license infringed on certain individual rights and violated laws on equal treatment and nondiscrimination. Specifically, the petitioners maintained that the refusal to issue them a marriage license violated Articles 8 and 12 of the

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10. For example, same-gender marriages were considered void ab initio at the time of the enactment of the Civil Code.
European Convention on Human Rights (ECHR)\(^{12}\) and Article 23 of the International Covenant on Civil and Political Rights (ICCPR),\(^ {13}\) which guarantee the freedom to have a family and the freedom to marry, and Article 14 of the ECHR\(^ {14}\) and Article 26 of the ICCPR,\(^ {15}\) which prohibit discriminatory behavior.\(^ {16}\)

12. Article 8:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ECHR Art. 8 (entered into force Sept. 3, 1953).

Article 12: "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." ECHR Art. 12 (entered into force Sept. 3, 1953).

13. ECHR, Article 23:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.


14. Article 8: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." ECHR Art. 8 (entered into force Sept. 3, 1953).

15. Article 26:

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.


16. The petitioners in the Amsterdam district court case also maintained that the registrar’s treatment—refusing to issue them a marriage license—was humiliating and in
The Amsterdam district court declined to rule on the issue of whether the registrar's refusal to issue a marriage license to the petitioners violated international treaties, stating that to do so would fall outside the scope of the role of the judiciary. In essence, the district court was saying that it was not up to the judiciary to remedy claims of inequality between same and opposite-gender couples. In addition, the district court noted that granting the petition, thereby allowing same-gender couples to marry, would have tremendous consequences in society and this issue was one that should be left to the legislature to solve because there was no need to deal with this issue quickly. Consequently, the Amsterdam district court refused to decide the second issue raised in this case, deferring instead to Parliament.

In the second case, however, the Netherlands Supreme Court did address the petitioners' allegations of violations of the Netherlands Constitution and of international law. The petitioners first argued that an interpretation of the language in the marriage statute to limit marriage to opposite-gender couples violated Article 1 of the Netherlands Constitution, which prohibits discrimination on any ground. The Netherlands Supreme Court did not accept this argument. It held that Article 1 of the Constitution "cannot change," the legislative intent of the marriage statute, which was to limit marriages to opposite-gender couples.

violation of Article 3 of the ECHR, and the petitioners in the Hoge Raad case claimed a violation of Article 2 of the ICCPR. Article 3 of the ECHR states: "No one shall be subjected to ... degrading treatment ..." and Article 2 of the ICCPR states under section 1:

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

18. The court referred to legal rights granted same-gender couples in California, presumably domestic partnership enactments, and in Denmark, presumably registered partnership legislation (Lov om registreret partnerskab, 7 juli 1989), as supporting its position that it was the legislative function to find solutions to the issues in this case.
19. The annotation that accompanied the Amsterdam district court case criticized the court's refusal to rule on the violations of the treaties because there was a case precedent in 1989 in an intermediate appellate court, the Hof Den Haag, which held that the refusal to issue a marriage license to a same-gender couple did not violate these provisions of the treaties. Hof Den Haag 2 juni 1989, NJ 1989, 871. (It was this case in the Hof Den Haag that was eventually referred to the Hoge Raad, which is also being discussed in this section of the article. HR 19 oktober 1990, NJ 1992, 192). In addition, the annotation states that the court should have ruled on the issue of treaty violations because treaty provisions take precedence over any domestic laws that might be incompatible with treaty provisions. Finally, the annotation mentioned that it was also surprising that the court did not rule on the issue of the possible violation of those particular treaty provisions that could be enforced directly by the petitioners. Rb Amsterdam 13 februari 1990, NJCM-Bulletin 1990, p. 456-460, m.nt. K. Boele-Woelki en P.C. Tange.
Next, the petitioners claimed that limiting marriage to opposite-gender couples violated Articles 8 and 12 of the ECHR and Article 23 of the ICCPR, which guarantee the freedom to have a family and the freedom to marry. The Hoge Raad, however, referred to two decisions of the European Court of Human Rights involving transgendered individuals who were seeking the right to marry.\(^{21}\) In these decisions, the European Court held that Article 12 of the ECHR refers to the "traditional concept of marriage."\(^{22}\) Thus, the Hoge Raad found that it was bound by this precedent and was not in a position to interpret Article 12 more broadly than the European Court of Human Rights.\(^{23}\) Given this interpretation of the right to marry under Article 12 of the ECHR, the Netherlands Supreme Court also stated that it should be assumed that Article 23 of the ICCPR also referred to the "traditional marriage involving persons of opposite sexes."\(^{24}\) In addition, the petitioners' claim that a refusal to allow same-gender couples to marry interfered with one's private and/or family life, as stated in Article 8 of the ECHR, was rejected by the Hoge Raad because of its interpretation of the term "marriage" in Article 12. Consequently, there had been no "interference by a public authority with the exercise of this right" as provided in Article 8.\(^{25}\)

Because the Hoge Raad defined marriage in Article 12 of the ECHR and Article 23 of the ICCPR as meaning "traditional marriage involving persons of opposite sexes," it found there was no claim under the nondiscrimination provisions of Article 14 of the ECHR and Article 2 of the ICCPR that the petitioners were being denied their right to marry a person of the same gender, because that right was limited by the definition of marriage, which only applied to persons of opposite genders.

Finally, the Netherlands Supreme Court examined whether there had been a violation of Article 26 of the ICCPR, which contains a broader nondiscrimination, equal protection, provision than Article 2 of the same treaty. In its opinion, however, this was "not the case." The opinion continued as follows:

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\(^{23}\) "Since this Court [the European Court of Human Rights] clearly established the scope of Article 12 recently, the Hoge Raad has not found any freedom for a more liberal interpretation of the provisions of the treaty." HR 19 oktober 1990, NJ 1992, 192, m.nt. EAAL en EAA (homohuwelijk; trans. Duck Oobbink).

\(^{24}\) Id.

\(^{25}\) ECHR, Art. 8.
Civil marriage is since time immemorial understood to be an enduring bond between a man and a woman to which a number of legal consequences are attached, which partly relate to the difference in sex and the consequences connected therewith for the descent of children. Marriage has these characteristics not only in the Netherlands but in many countries. Moreover, it cannot be said that the general opinion in the legal community has developed such that the considerations just mentioned do not justify the distinction in treatment on the grounds of sexual orientation, which can manifest itself in the impossibility to enter a relationship-like marriage with a person of the same sex as oneself.26

However, the Supreme Court’s decision did recognize the “possibility” that other benefits of marriage denied to same-gender couples may not be justifiable, therefore inferring that it may be discriminatory to deny these other benefits to same-gender couples. The Hoge Raad stated, though, that a “question of this kind—which anyway could only be addressed by the legislature—was not raised in these proceedings.”27

2. Challenging Prohibitions Against Marriages of Same-Gender Couples: An Analysis of the Dutch Case Law

The Dutch cases set out the two main arguments that have been made in both the United States and in the Netherlands when same-gendered couples sued for the right to marry. The first argument was one of statutory construction. Because the text in the marriage statutes does not state specifically that marriage only involves a man and a woman, the petitioners asserted that they should be issued a marriage license. However, this argument was not successful in any of the cases, because, as the Dutch courts pointed out, the lawmakers assumed, when they enacted the statutes, that marriages would involve only opposite-gender individuals.

The second argument made in these cases was that, if marriage is limited to opposite-gender couples, then the marriage statutes violate certain rights found in constitutions or, in the Dutch cases, in international treaties. The most prominent rights asserted were the right to marry and the right to have a family, as well as provisions against unequal treatment. The Dutch cases exemplify one of two possible directions the courts could take within the context of this second argument—either the courts could raise the “separation of powers” analysis and thereby refuse to

27. Id.
deal with the arguments, or the courts could determine whether limiting marriage to opposite-gender couples was a violation of human rights principles. The Dutch district court took the first direction; it refused to analyze the human rights claims by stating that the inclusion of same-gender couples in the institution of marriage was a legislative, not a judicial question. Consequently, the court deferred to the legislature to deal with this issue. In the second case, however, the Netherlands Supreme Court did address the arguments, but the analysis seemed to be a repetition of the previous rationale found in the statutory interpretation issue. The Supreme Court determined that the rights protected in the treaties were limited by the “traditional” definition of marriage. In other words, there was no discrimination nor denial of human rights because the treaty provisions were drafted to protect only those individuals who fit into that traditional definition of marriage and family life, i.e., opposite-gender couples. Therefore, the Netherlands Supreme Court did not go beyond this argument to ask the more probing questions of whether marriage was, in fact, much more than merely a method of regulating procreation and the legitimation of children.

In defense of the Netherlands Supreme Court, however, this restrained approach was not unexpected, given the prior decisions of the European Court of Human Rights concerning the right of transgendered individuals to marry. Also, it would have been inappropriate for the Netherlands Supreme Court to give a much more liberal interpretation to the provisions of the international treaties, an interpretation that would be unanticipated by, and unacceptable to, the other signatories of the treaties. In fact, the Netherlands Supreme Court did acknowledge that discrimination arguments may become more relevant when examining the benefits opposite-gender couples acquire through marriage. The Supreme Court understood that the inability of same-gender couples to marry prevented them from receiving these benefits. On the other hand, however, the Supreme Court declined to investigate this more expansive view of the marriage relationship, and again relied on the separation of powers analysis, stating that this was an issue for the legislature. In doing so, the Netherlands Supreme Court did not take the opportunity to instruct the legislature to remedy this “possibility” of inequality, as it had in some other family law cases.28

B. Dutch Legislation

1. Moving Toward Equality: Registered partnership Legislation

28. For example, the Netherlands Supreme Court instructed the Parliament to remedy the unequal treatment involving the exercise of joint parental authority, because the legislation was not treating divorced and unmarried parents the same as married parents. See HR 4 mei 1984, NJ 1985, 510, involving the unequal treatment of divorced parents and HR 21 maart 1986, NJ 1986, 585, involving unmarried parents.
Because same-gender couples were not successful in obtaining marriage licenses through litigation in the Dutch courts, a new strategy was developed involving the power of municipalities to maintain "registers." Dutch law permits municipalities to maintain an unlimited number of registers. As a result, same-gender couples began to request that their relationships be registered under a new municipal register, referred to as the "marriage register." In 1991, the first same-gender relationship was registered in the town of Deventer, and within a few years over 130 municipalities were registering same-gender couples' relationships. Although these registrations had no legal status, the willingness of the municipalities to provide these registers carried great political and symbolic significance.

In other European countries, political developments concerning the recognition of same-gender relationships also took place during the same period. In 1989, Denmark became the first country to enact legislation creating the institution of "registered partnerships." In general, registered partnership laws allow same-gender couples almost all the benefits that heterosexual couples obtain through marriage. More countries followed Denmark's lead, and by 1996 Norway, Sweden, Greenland, and Iceland also had enacted registered partnership legislation.

The Netherlands was not far behind—in 1992, the Dutch government's Commissie voor de toetsing van wetgevingsprojecten (Advisory Commission for Legislation) issued a report recommending the adoption of registered partnership legislation similar to the Danish laws and, in 1994, a partnership bill was submitted to Parliament. Persons who are unable to marry because of a legal disability were to be allowed to register their partnership. This included not only same-gender couples, but also couples within prohibited degrees of relationship. Nonmarried, nonregistered adults were to be allowed to register.


30. "Dutch gay couples can register their partnerships with local authorities, but recognition of such marriage contracts by third parties such as insurance companies cannot currently be enforced by law." Reuter, Committee Looks into Legalizing Same-Sex Marriages, May 28, 1996, <http://www.coc.nl/index.html? file=marriage_07>.

31. The registration would also be limited to Dutch nationals and European Union citizens who are lawful residents of the Netherlands, or alternatively, those seeking registration had to have been lawful residents of the Netherlands for at least a year prior to their request for registration. The consequences of registered partnership under this bill would have been the same as those of marriage, in most respects, except if this result was prevented by international or EU law. One other major exception involved the status of children; the registration would not change the status of any children of either registered partner, who might be living with the couple. See Caroline Forder, The Netherlands, An Identity Crisis: The Outer Limits of Euthanasia, the Abolition of Chivalry and Other Adventurous Provisions, in: A. Bainhaim,
The bill stalled in the Parliament, however, in part because the government believed that the Dutch people were not ready for equal marital rights for same-gender couples. However, a public opinion poll in the summer of 1995 refuted this belief. When asked "Do you think that gays and lesbians who so wish should legally be allowed to marry, just like heterosexual couples?" seventy-three percent answered, "Yes." The poll's next question concerned the way in which this should be accomplished. The answer that received the highest percentage was the one that proposed including gay and lesbian couples in the existing civil marriage laws, as opposed to creating a parallel system such as registered partnership.

In September of 1995, the government published a memorandum that proposed amendments to the registered partnerships bill. The most controversial proposal was to open partnership registration to opposite-gender couples. Consequently, unlike the Scandinavian legislation on registered partnership, which limited registration to same-gender couples, the Dutch government's proposal created a dual system for heterosexual couples, who could choose between traditional marriage and registered partnership. At the same time, the government decided that there was not enough interest in allowing persons who fell within prohibited degrees of relationship to enter into registered partnerships, so instead of allowing this group to become registered partners, these individuals were excluded from forming registered partnership, just like in marriage.

The lower chamber of parliament, however, was not content with merely offering registered partnerships to same-gender couples and continued to push for including these couples within the marriage laws. In April of 1996, members of the lower chamber passed a resolution demanding that civil marriage laws include same-gender couples, by a vote of eighty-one to sixty.


33. In 1995, this was 44 percent; currently it is over 50 percent of those polled. See supra note 29.


35. The Chamber, having heard the debate, noting that often in our society two people of different sexes and of the same sex want to enter into a lasting and committed relationship; noting furthermore that according to the Civil Code the concluding of a civil marriage is permitted to two people of different sexes; being of the opinion that in line with the General Equal Treatment Act there is no objective justification for the marriage prohibition for same-
remained opposed to opening civil marriage to same-gender couples if the marriage of two same-gender persons carried with it the presumptions of parentage for children born into these marriages. If marriage resulted in automatic parentage of same-gender partners, the Cabinet members feared these marriages would not be granted legal recognition in other countries. In addition, if married same-gender couples were granted all of the same rights as married opposite-gender couples, then same-gender couples would be able to adopt children together. The Dutch Cabinet's position was that this consequence would discourage foreign countries from placing their children for adoption in the Netherlands. Because the majority of Dutch adoptions involve foreign-born children, if this fear was justified, there would be little opportunity for heterosexual Dutch couples to adopt children. Because of the government's reluctance, and the continued insistence by the majority of members of the lower chamber of parliament to have a law allowing same-gender couples to marry, the Ministry of Justice appointed a committee to study this issue and to report its findings to the government.

Meanwhile, it appeared that both houses were ready to enact the registered partnership bill and, eventually in 1997, Parliament approved two separate acts amending the Netherlands Civil Code and more than one hundred other statutes, establishing a system of registered partnerships for both homosexual and sex couples resolves, that the legal marriage prohibition for two people of the same sex be lifted; requests the government to embark as soon as possible on the preparation of legislation to this effect, taking into account the international aspects, especially in a European context; and also requests the government, because of the width of substance of the aforementioned preparation, to appoint a non-departmental commission in which different relevant disciplines will be represented, and to instruct it to complete a pre-draft of a bill on this matter before 1 August 1997.

Kamerstukken II 1995/96, 22 700, nr. 18 (replacing 22 700, nr. 9); proposed by Ms. Van der Burg (labor) and Mr. Dittrich (democrats); adopted on April, 16, 1996 (81 votes in favor, 60 against; see Handelingen II 1995/96, pp. 4883-4884); Dutch Parliament Demands Legislation to Open up Marriage and Adoption for Same-Sex Couples, Resolution on Same-Sex Marriages, April 17, 1996, <http://www.coc.nl/index.html?file=marriage_08>.

36. See Forder, supra note 34.
37. See NRC Handelsblad, March 26, 1996, at 5, 7, 9.
38. See infra Part II.B.2.
heterosexual couples. According to the new laws, persons registering their partnerships are to obtain almost all the legal rights that accrue to a heterosexual marriage. However, there are several notable exceptions. For example, the law only applies to Dutch citizens or foreigners who are residents of the Netherlands. Also, registered partnerships can be ended without seeking the permission of a court, whereas marriages must be terminated through court proceedings. In addition, the new laws do not affect the legal status of each of the partner’s children; persons in registered partnerships do not even have joint parental authority over each other’s children. Another difference is that homosexuals cannot adopt their partners’ children, whereas later legislation permitted unmarried heterosexual couples to adopt each other’s children. The Dutch parliament appears to have recognized this inconsistency in the adoption law, because in December of 2000, it enacted legislation allowing same-gender couples to adopt children together.

40. Allowing heterosexual couples the option of entering into a marriage or a registered partnership has been criticized by many Dutch academics. See Caroline Forder, The Netherlands, An Undutchable Family Law: Partnership, Parenthood, Social Parenthood, Names and Some Article 8 ECHR Case Law, in: A. Bainhaim, ed., THE INTERNATIONAL SURVEY OF FAMILY LAW 1997 (The Hague: Martinus Nijhoff, 1999), 260 n.3. Interestingly, within ten months after enactment, the second largest group of registrants consisted of heterosexual couples (1,291 couples). The largest number of couples registering under the new law consisted of male couples (1,507) and the smallest number of female couples (1,198). Kees Waaldijk, Registered partnerships fairly popular in the Netherlands, December, 1998, <http://www.coc.nl/index.html?file=statistics>. The most recent statistics show that in 1999 and 2000, heterosexual couples were registering in greater numbers than same-gender couples. In 1999, 1495 registrations were issued to heterosexual couples and only 897 male couples and 864 female couples registered; in 2000 heterosexual couples obtained 1322 registered partnerships but only 815 male couples and 785 female couples registered. See <www.cbs.nl>.

41. Stb. 1997, 324, Art. 80a lid 2 BW.

42. Stb. 1997, 324.

43. Art. 227 BW. Also, Dutch homosexuals cannot adopt foreign children; Wet van 8 December 1988, houdende regelen inzake de opneming in Nederland van buitenlandse plegtikinderen met het oog op adoptie (Wet opneming buitenlandse plegkinderen), Stb. 1988, 566. In addition, under the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, which was adopted by the Hague Conference on Private International Law, foreign or intercountry adoptions are allowed only if the couples are married, although one person, regardless of whether he or she is single or in a relationship, may also adopt under the provisions of the Convention. The Netherlands ratified this convention on October 1, 1998.


45. This legislation was enacted on the same day Parliament enacted legislation opening civil marriage to same-gender couples, which demonstrates the close connection between these two issues. For a detailed legislative history of the Dutch legislation opening adoption to
2. Opening Civil Marriage to Same-Gender Couples: The Report of the Kortmann Committee

In October 1997, the committee that the Ministry of Justice appointed to study the question of opening up civil marriage, Commissie inzake openstelling van het burgerlijk huwelijk voor personen van hetzelfde geslacht (Committee on Opening Up Civil Marriage to Same-Gender Partners), known as the Kortmann Committee, issued its report. While the committee members agreed unanimously that, legally, there should not be more than two types of relationships between two people, they were divided on what these two types of relationships should be. The minority of committee members favored an option in which the two types would be heterosexual marriage and registered partnership. The majority of the members, however, favored another option in which the two types would be slightly different forms of civil marriage—heterosexual marriages, with the current presumptions of paternity of the children, and a second type of marriage in which there is no automatic parentage presumed when a child is born to the couple. The majority’s position was that:

same-sex couples can only be afforded equal treatment if they are allowed to enter into civil marriages. These members do not view the new type of marriage as a break with tradition; after all, marriage has always been a flexible institution which has kept pace with changes in society. They feel that their proposal represents a step towards recognizing homosexual relationships, and might in fact inspire other countries to extend proper recognition to homosexual couples.


46. This committee was named after its Chairperson, Professor S.C.J.J. Kortmann.
47. Commissie inzake openstelling van het burgerlijk huwelijk voor personen van hetzelfde geslacht, RAPPORT (Den Haag, oktober 1997).
that between a man and a woman, if only in terms of reproduction. ... [T]hey question whether legislators are free to redefine marriage in a way that effectively removes one of its core elements - reproduction." 49 The second concern was that opening civil marriage to same-gender couples "would raise serious problems internationally which should not be underestimated." 50

3. Changing the Legal Definition of Marriage: The Final Step

Four months after the Kortmann Committee issued its report, the Dutch Cabinet issued a statement that it would not pursue legislation to put into effect the majority's recommendation to open civil marriage to same-gender couples. 51 Instead, it recommended changes broadening registered partnership legislation, which had gone into effect two months earlier, in January of 1998. The lower chamber of the Dutch Parliament expressed its disagreement with the Cabinet's position by passing another resolution, demanding the Dutch government to prepare legislation to open civil marriage to same-gender couples by January of 1999. 52 No legislation was forthcoming, however, because the resolution was passed on the last day of the parliamentary year and general elections were going to be held in three weeks' time. The elections resulted in a liberal/social democratic/labor coalition, which was favorable to opening civil marriage to same-gender couples, and the coalition's official program included a statement to that effect: "In the interest of strengthening the equal treatment of homosexual and lesbian couples, the Cabinet shall before 1 January 1999 introduce a bill to open civil marriage to persons of the same sex." 53

Pursuant to its promise of legislation on allowing marriages for same-gender couples, the Dutch Cabinet approved a bill in December of 1998, which was then forwarded to the Council of State (Raad van State) for advice. 54 Finally, on July 8, 1999, the Dutch government formally introduced the bill in Parliament, thereby

49. Id.
50. Id.
making its provisions public. The bill amends Article 30, Book 1 of the Netherlands Civil Code to read as follows:

Article 30

1. A marriage can be contracted by two persons of different sex or of the same sex.
2. The law only considers marriage in its civil relations.\(^{55}\)

Consequently, the bill does not create a parallel relationship with heterosexual marriage, but changes the definition of marriage to include same-gender couples.

The bill also provides for a re-evaluation of registered partnerships five years after enactment, to determine whether registered partnerships should be converted into marriages and whether registered partnership legislation should be repealed. In addition, the explanatory memorandum accompanying the bill points out that there are two consequences of marriages of same-gender couples that will differ from marriages of opposite-gender couples—the presumption of the parentage of the children born during the marriage and problems with international recognition of marriages contracted by same-gender couples.

In explaining the difference concerning the presumption of the parentage of children born during the marriage, the memorandum states that:

[i]t would be pushing things too far to assume that a child born in a marriage of two women would legally descend from both women. That would be stretching reality. The distance between reality and law would become too great. Therefore this bill does not adjust chapter 11 of Book 1 of the Civil Code, which bases the law of descent on a man-woman relationship. Nevertheless, the relationship of a child with the two women or the two men who are caring for it and who are bringing it up, deserves to be protected, also in law. This protection has partly been realised through the possibility of joint authority for a parent and his or her partner (articles 253t ff.) and will be completed with a proposal for the introduction of adoption by same-sex partners [introduced 8 July 1999, Parliamentary Papers II 1998/1999, 26 673], with a proposal for automatic joint authority over children born in a marriage or registered partnership of two women [introduced 15 March 2000, Parliamentary Papers II 1999/2000, 27 047], and

with a proposal to attach more consequences [such as inheritance] to joint authority [not yet introduced].

Consequently, there will be no automatic parentage for children born to marriages of same-gender couples.

As to the issue of the international aspects that may affect marriages of same-gender couples, the explanatory memorandum stated that:

[a]s the Kortmann-committee has stated (p. 18) the question relating to the completely new legal phenomenon of marriage between persons of the same sex concerns the interpretation of the notion of public order to be expected in other countries. Such interpretation relates to social opinion about homosexuality. The outcome of a survey by the said committee among member-states of the Council of Europe was that recognition can only be expected in very few countries. This is not surprising.

Apart from the recognition of marriage as such, it is relevant whether or not in other countries legal consequences will be attached to the marriage of persons of the same sex.

As a result of this spouses of the same sex may encounter various practical and legal problems abroad. This is something the future spouses of the same sex will have to take into account. . . . However, this problem of “limping legal relations” also exists for registered partners, as well as for cohabiting same-sex partners who have not contracted a registered partnership or marriage.


57. Arguments have been made that it is discrimination to deny automatic parentage to same-gender married couples who have children during their marriage, see Frieda van Vliet, Door de zij-ingang naar niemandsland? Commentaar op het wetsvoorstel ‘adoptie door personen van hetzelfde geslacht’ NEMESIS 2000 nr. 2 and Nancy G. Maxwell, Reflections on Frieda van Vliet’s “Side Exit to No Man’s Land”: Taking the Side Exit in the United States, NEMESIS 2001 nr. 1. For the Dutch law on parentage, see generally Ineke de Hondt, NÉT TROUWEN, WEL KINDEREN: JURIDISCHE ASPECTEN VAN HET ONGEHUWD OUDERSCHAP (De Haag:VUGA, 1998).

The Council of State presented a report on the bill and the government responded to this report when it introduced the bill into Parliament. The various political parties issued comments on the bill, to which the government then responded. After three days of plenary debate on the bill in the lower chamber, the members of the lower chamber passed the bill on September 12, 2000, by a vote of 109 in favor and 33 opposed to opening civil marriage to same-gender couples. The bill then proceeded to the upper chamber of parliament where its members discussed the bill for three days. On December 19, 2000, the upper chamber approved the bill and two days later the Queen and the Minister of Justice signed the bill into law. The Dutch parliament then enacted legislation to harmonize existing statutes with the new law opening civil marriage to same-gender couples. Finally, on April 1, 2001, the new law took effect, thereby making the Netherlands the first country in the world to change the legal definition of marriage to include same-gender couples.

III. LEGAL DEVELOPMENTS IN THE UNITED STATES

A. United States Case Law

1. Challenging prohibitions Against Marriages of Same-Gender Couples: An Overview of the Constitutional Analyses in the U.S. Cases

59. See Kamerstukken II 1998/99, 26 672, B. The original text of the proposed bill, to which the Raad van State was reporting on, can be found at Kamerstukken II 1998/99, 26 672, A. For the parliamentary history discussed hereafter, see the following documents: response of the government: Kamerstukken II 1998/99, 26 672, nr. 1-3; parties’ comments: Kamerstukken II 1998/99, 26 672, nr. 4; response of the government: Kamerstukken II 1998/99, 26 672, nr. 5. (There also was a technical amendment introduced on the same day; Kamerstukken II 1998/99, 26 672, nr. 6); plenary debate: Handelingen II 1999/00, nr. 97, p. 6292-6343, Handelingen II 1999/00, nr. 98, p. 6380-6404, and Handelingen II 1999/00, nr. 99, p. 6421-6447; vote: Handelingen II 1999/00, nr. 100, p. 6468; legislative history in the upper chamber: Kamerstukken I 1999/00, 26 672, nr. 348. For a more detailed discussion of the parliamentary reports, political party comments, and the parliamentary debates, see Caroline Forder, To Marry or Not to Marry: That Is the Question, forthcoming in THE INTERNATIONAL SURVEY OF FAMILY LAW 2000.

60. The upper chamber of the Dutch Parliament does not have the authority to amend bills passed by the lower chamber.


The court decisions in the United States cases are similar to the Dutch cases, both of which begin with a statutory analysis of each jurisdiction’s marriage code. Many of the U.S. decisions, however, also contain substantial constitutional analysis, based on the petitioners’ arguments that they have been denied individual rights or subjected to unequal treatment because they were refused marriage licenses. Consequently, the cases in the United States are important because they contain detailed analyses of claims of discrimination and individual rights violations, arguments that are not found in the Dutch cases because the Dutch courts deferred to the Parliament to solve the issue of whether to open marriage to same-gender couples. Thus the U.S. cases become an interesting study of the different ways the various individual rights issues are argued, and decided, by the courts.

In addition, the U.S. marriage cases are examples of the federalist system in operation. All of the courts that denied the petitioners’ constitutional claims did so based on an analysis of the federal constitution, in particular, the right to privacy, due process claims, and equal protection concepts that have been developed by the United States Supreme Court. In the other three cases that found in favor of the petitioners’ claims of discrimination, however, the courts did so by relying on state constitutional provisions. Because these state constitutions also contain provisions granting rights of privacy, due process, and equal treatment protections, one might expect that the analysis under a state constitutional provision would parallel the federal constitutional analysis. However, the federal constitution only establishes a minimum level of protection for United States citizens. A state’s judiciary has the authority to interpret its own constitution more broadly, thereby providing more protection to its citizens from individual rights violations. Also, because the highest appellate court in a state is the final authority on that state’s constitution, these decisions cannot be appealed to the more politically conservative United States Supreme Court. Finally, the Tenth Amendment to the United States Constitution reserves certain powers to the states; included in this reservation of power is the right to control family law legislation. Therefore, each state has the authority under this amendment to develop its own family law principles, more or less free from federal intervention. This is particularly true if the family law principles are based on interpretations of a state constitution, granting more protection to the petitioners than is found under the federal constitution.

In order to sort out this state/federal distinction, it is helpful to have an overview of the basic federal constitutional claims that appear in the U.S. case law. The first of these claims falls under a “fundamental right” analysis, based on the right

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64. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.
to privacy or on a due process analysis. The second claim is based on an equal protection analysis.

When petitioners argue the first claim, that a statute interferes with their privacy interests or infringes on their due process rights, this claim is based on an assertion that the operation of the statute denies the petitioners a fundamental right. To make a determination of whether a fundamental right is involved, the court analyzes whether the right is "deeply rooted in this Nation's history and tradition,"\(^65\) whether it is "implicit in the concept of ordered liberty,"\(^66\) and whether it has its "source in the belief that neither liberty nor justice would exist if [the right was] sacrificed."\(^67\) In the U.S. marriage cases, the petitioners argue that marriage statutes prevent them from obtaining a marriage license, thereby denying them the right to marry, which is a fundamental right. Consequently, this denial of the fundamental right to marry infringes on the petitioners' right to privacy and their due process rights.

The claims under the equal protection analysis, however, are more complicated. When a petitioner claims there has been a violation of equal protection rights, then there are different standards of review that the court must apply to decide the constitutionality of the statute. The first issue the court must determine is the basis for the discrimination claim. For example, if the unequal treatment is based on race, alienage, or national origin, the U.S. Supreme Court has designated these classifications "suspect classes" requiring the court to apply "strict scrutiny" to the statute. The statute will be declared unconstitutional unless the state can provide a "compelling state interest" justifying the unequal treatment. The strict scrutiny standard of review is the highest standard established by the U.S. Supreme Court, and most statutes are struck down as unconstitutional under this analysis. On the other hand, if no suspect classification is involved, then the court applies the lowest standard of review, the "rational basis" test. Under this analysis, the petitioner has the burden of showing that the unequal treatment is not rationally related to a legitimate government interest. Generally statutes are upheld as constitutional under this standard of review because the court finds a rational basis for the difference in treatment by identifying a legitimate government interest. There also is a "middle tier" or "intermediate" standard of review that appears in a number of the marriage cases as well. According to this middle-level standard of review, certain classifications are identified as "quasi-suspect" and given "heightened scrutiny," requiring the state to show that the legislative use of the classification "reflects a reasoned judgment consistent with the ideal of equal protection that furthers a

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67. Id. (quoting Palko, 302 U.S. 319).
substantial interest of the State." In earlier U.S. Supreme Court cases, classifications based on gender and illegitimacy fell within this middle-tier analysis, although more recent cases appear to be moving away from using an intermediate standard of review.

Petitioners in the U.S. marriage cases use two different classifications in their claims of unequal treatment, classifications based on sexual orientation and classifications based on gender. The United States Supreme Court applies the lowest level of review, the rational basis test, to claims of unequal treatment based on sexual orientation. However, if the petitioners allege unequal treatment based on gender, relying on the federal constitution, then some of the judges in the U.S. marriage cases apply the middle-tier analysis. There may be a different result, though, if the gender discrimination claim is based on a state constitutional provision. Because some states have amended their state constitutions specifically prohibiting gender discrimination, then the issue in those cases becomes one of determining whether gender is a suspect class under the state constitution. Consequently, it becomes important when analyzing the constitutional arguments in the U.S. cases to distinguish between an analysis under the federal constitution, as opposed to an analysis under an individual state’s constitution.

2. Challenging Prohibitions Against Marriages of Interracial Couples

There are two different periods in United States case law in which same-gender couples have attempted to obtain the right to marry, in the 1970s and the 1990s. In the 1970s, the petitioners alleged that the state’s refusal to grant them a marriage license violated federal constitution provisions because, during this time frame, the United States Supreme Court was liberalizing and expanding the application of the Constitution. In particular, the United States courts were involved in protecting the civil rights of racial minorities by striking down, as unconstitutional,

68. Id. at 339 (quoting Plyler v. Doe, 457 U.S. 202, 217 (1982)).


70. Under this level of review the Court upheld a statute that criminalized same-gender sodomy, Bowers v. Hardwick, 478 U.S. 186 (1986). Interestingly, the Court also has found legislation unconstitutional using the rational basis test when the unequal treatment involved classifications based on sexual orientation. See Romer v. Evans, 517 U.S. 620 (1996), in which the Supreme Court struck down a Colorado provision that prohibited the enactment of nondiscrimination provisions involving homosexuals.
racially discriminatory legislation. Among these laws were state statutes that made it a crime for persons of different races to marry one another.71

The case of Loving v. Virginia72 involved an appeal of the conviction of a Caucasian man and an African-American woman under a Virginia penal statute that made it a felony for a "white" person and a "colored" person to marry one another.73 The Virginia trial court upheld the conviction, basing its decision, in part, on "higher authority" by stating that:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.74

The Supreme Court of Appeals of Virginia also upheld the conviction, citing a previous case in which it had found that Virginia’s anti-miscegenation statutes furthered legitimate state purposes, which were "to preserve the racial integrity of its citizens" and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride."75 In addition, the Virginia appellate court determined that the regulation of marriage was reserved to the states in the Tenth Amendment of the United States Constitution.

On appeal before the United States Supreme Court, the state of Virginia argued that the statute was not discriminatory because it did not treat the races differently—all whites and all "coloreds" were treated equally because neither group could marry the other. Because each group was treated equally, according to this argument, there was no discrimination or unfavorable treatment of either group based on a racial classification and, consequently, no violation of the Fourteenth Amendment Equal Protection Clause.

72. 388 U.S. 1 (1967).
73. VA. CODE ANN. § 20-59 (Repl. Vol. 1960). Marriages between a white person and a colored person were void under VA. CODE ANN. § 20-57 (Repl. Vol. 1960). The Virginia statutes prohibiting marriages between a white person and a colored person had existed in the state since colonial days and the statutes were portions of the so-called Racial Integrity Act of 1924. For a history of Virginia’s anti-miscegenation laws, see W. Wadlington, The Loving Case: Virginia’s Anti-Miscegenation Statue in Historical Perspective, 52 VA. L. REV. 1189 (1966).
74. Loving, 388 U.S. 1, 2, 87 S. Ct. 1817, 1819, 18 L. Ed. 2d 1010, 1013.
75. Id. at 7, (quoting Naim v. Naim, 87 S.E. 2d. 746, 756 (1955)).
The state of Virginia also argued that, assuming all races are being treated equally, then the Supreme Court must review the constitutionality of the statute using the lowest standard of review, the rational basis test. According to the state's argument, the rational basis was that scientific evidence on interracial marriages "is substantially in doubt" and the U.S. Supreme Court "should defer to the wisdom of the state legislature in adopting its policy of discouraging interracial marriages." 76

The Supreme Court rejected both arguments and held that the Virginia statute violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution. 77 Concerning the first argument, that the races were being treated equally, the Court stated that it "rejects the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations, . . ." 78 Thus, the statute could not be reviewed under the rational basis test, but rather, a classification based on race must be strictly scrutinized, requiring the state to show a compelling state interest to justify the classification. 79 This the state of Virginia failed to do. The Supreme Court held that because the Virginia statute prohibited only interracial marriages involving white people, the statute was merely "designed to maintain White Supremacy." 80 The Court also found that the freedom to marry "has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness." 81 Consequently, to deny a fundamental right based on racial classifications denied the Lovings of their due process rights. According to the Court:

Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all of the State's citizens of

76. Id. at 8, 87 S. Ct. at 1821, 18 L. Ed. 2d at 1015-16.
77. "... nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
78. Loving, 388 U.S. at 8.
79. "At the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the "most rigid scrutiny," and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." Id. at 11, 87 S. Ct. at 1823, 18 L. Ed. 2d at 1015. [Citations omitted].
80. Id.
81. Id. at 11-12.
liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.82

Because the U.S. Supreme Court held that marriage was a fundamental right, this argument would reappear in the cases involving same-gender couples who were seeking the right to marry.

3 Challenging Prohibitions Against Marriages of Same-Gender Couples: The 1970s Cases

The atmosphere of heightened awareness of individual rights in the 1960s fostered more activism among sexual minorities and, in 1969, contributed to the gay patrons in the Stonewall nightclub resorting to self-defense during a New York City police harassment raid. The Stonewall “riot” became a symbolic event, one which United States sexual minorities identified as the initial step in fighting for their fundamental human rights. Consequently, because of the judicial activism involving racial discrimination, and the consciousness-raising that was occurring among sexual minorities, it was logical that lawsuits to end prohibitions against marriage by same-gender couples would be initiated during this time frame.

In 1971, the Minnesota Supreme Court decided the first United States appellate case involving a same-gender couple’s application for a marriage license.83 Two more cases followed, one in Kentucky in 1973 and another in the state of Washington in 1974.84 The applicants in all three cases supported their request for a marriage license making two primary arguments.85 As in the Dutch cases, this first argument involved the statutory interpretation of the language in the marriage statutes. According to the petitioners, they should have been issued marriage licenses because the state statutes did not limit applications for marriage licenses to persons of opposite genders. The three states’ appellate courts, however, rejected this argument using the “plain meaning rule” of statutory construction.86 Under this rule, if a term

82. Id.
85. In the Singer case, the petitioner had a third argument, alleging that the denial of same-gender couples to marry violated the state of Washington’s Equal Rights Amendment.
86. “[I]f a writing, or provision in a writing, appears to be unambiguous on its face, its meaning must be determined from the writing itself without resort to any extrinsic evidence.” BLACK’S LAW DICTIONARY 1170 (7th ed. 1999).
was not defined in the statute, the court must apply the plain meaning of the term.\textsuperscript{87} Both the Minnesota Supreme Court and the Court of Appeals of Kentucky relied on dictionary definitions of marriage to ascertain the plain meaning of the word.\textsuperscript{88} According to the legal dictionary cited in both cases, marriage was defined as "a civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex."\textsuperscript{89} Although the plain-meaning rule did not require the courts to discern the legislative intent of the drafters when the statutory language was unambiguous, the courts in these cases addressed this argument as well. They discerned the legislative intent of the word "marriage" by examining the language in other statutes involving marriage,\textsuperscript{90} in addition to stating that the meaning of the term marriage, historically, was understood to be a legal relationship between persons of opposite genders.\textsuperscript{91}

The second issue that the petitioners raised was the argument that limiting marriages to opposite-gender couples violated certain constitutional provisions. The petitioners argued that interpreting the marriage statutes as applying only to opposite-gender couples denied them their fundamental right to marry. In deciding this issue, the Kentucky court held that no constitutional rights were involved, stating "[w]e find no constitutional sanction or protection of the right of marriage between persons of the same sex."\textsuperscript{92} The other two appellate courts, however, analyzed and discussed

\begin{itemize}
  \item \textsuperscript{87} "Directing our attention to appellants' first assignment of error, it is apparent from a plain reading of our marriage statutes that the legislature has not authorized same-sex marriages." Singer, 522 P.2d at 1189. "The sections of Kentucky statutes relating to marriage do not include a definition of that term. It must therefore be defined according to common usage." Jones v. Hallahan, 501 S.W.2d at 589. "Minn. St. c. 517, which governs 'marriage,' employs that term as one of common usage . . . ." Baker, 191 N.W.2d at 185-86.
  \item \textsuperscript{88} The Minnesota Supreme Court relied on the definition of marriage as set forth in two different dictionaries, Webster's Third New International Dictionary, and Black's Law Dictionary. In addition to these two dictionaries, the Court of Appeals of Kentucky also cited the definition of marriage in the Century Dictionary and Encyclopedia.
  \item \textsuperscript{89} BLACK'S LAW DICTIONARY (4th ed.) p. 1123, as cited in Baker, 191 N.W.2d at 186 n.1.
  \item \textsuperscript{90} For example, the Minnesota Supreme Court cited other statutes in the Minnesota code regulating marriage that referred to the "husband" and "wife" and the "bride" and "groom," and the Court of Appeals of Washington cited language in another Washington statute that referred to the marriage license applicants as "the female" and "the male."
  \item \textsuperscript{91} "It is unrealistic to think that the original draftsmen of our marriage statutes, which date from territorial days, would have used the term in any different sense [than the dictionary definition]." Baker, 191 N.W.2d at 186. "Marriage was a custom long before the state commenced to issue licenses for that purpose . . . [M]arriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary." Jones v. Hallahan, 501 S.W.2d at 589.
  \item \textsuperscript{92} See Jones v. Hallahan, 501 S.W.2d at 590. The court continued by stating that there was no violation of the free exercise of religion nor was there a violation of the prohibition
Opening Civil Marriage to Same-Gender Couples

The petitioners' arguments that restricting marriage to opposite-gender couples denied them a fundamental right, violated their right to privacy, and contravened the Equal Protection and Due Processes Clauses of the Fourteenth Amendment to the United States Constitution. The petitioners, relying on the holding in the interracial marriage case of *Loving v. Virginia*, alleged that, because it was invidious discrimination to deny one the right to marry on the basis of one's race, it followed that it was invidious discrimination to deny one the right to marry on the basis of one's gender. Therefore, a court must apply the strict scrutiny standard of review when dealing with statutes that restricted one's right to marry based on gender classifications.

Although the Court of Appeals of Washington agreed that, under Washington state law, classifications based on gender were inherently suspect and required strict judicial scrutiny, the court refused to accept the argument that the denial of a marriage license to a same-gender couple was gender discrimination. The court stated that the petitioners were not denied a marriage license because of their gender, "rather, they were denied a marriage license because of the nature of marriage itself." The appellate court also cited, with approval, the language in the Court of Appeals of Kentucky case. "In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage."95

The Supreme Court of Minnesota used similar logic, relying, interestingly, on the "higher authority" of religious beliefs to support its position, stating that:

The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis . . . . "Marriage and against cruel and unusual punishment because the court did not consider the refusal to issue a marriage license to the petitioners a "punishment." Free exercise of religion is guaranteed by the First Amendment to the U.S. Constitution; cruel and unusual punishment is prohibited in the Eighth Amendment to the U.S. Constitution. Both of these amendments have been incorporated through the Fourteenth Amendment and apply to the states.

93. In the Minnesota case, the petitioners argued that the fundamental right to marry was protected by the right to privacy, relying on an interpretation of the Ninth Amendment of the United States Constitution. They also claimed violations of the First Amendment's protection of religious freedom and the Eighth Amendment's prohibition against cruel and unusual punishment. In the Washington state case, the petitioners raised the Ninth Amendment right to privacy claim and the Eighth Amendment's prohibition against cruel and unusual punishment.

94. The Washington state constitution has been amended to include the Equal Rights Amendment (ERA), which prohibits discrimination based on gender. The ERA states: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex." *Singer*, 522 P.2d at 1190. Consequently, the ERA requires the Washington state courts to strictly scrutinize classifications based on gender.

95. *See Jones v. Hallahan*, 501 S.W.2d at 590.
procreation are fundamental to the very existence and survival of the race.” This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which the petitioners contend.

The Minnesota Supreme Court rejected the petitioners’ arguments that because opposite-gender persons who could not conceive children were not prohibited from marrying, marriage was more than merely for the purpose of procreation and the raising of children. The court stated that “abstract symmetry” was not required by the Fourteenth Amendment. Finally, the Minnesota Supreme Court distinguished the holding in the Loving v. Virginia case from the facts in a case involving a same-gender couple.

*Loving* does indicate that not all state restrictions upon the right to marry are beyond the reach of the Fourteenth Amendment. But in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex.

In the Washington case, the petitioners raised one additional argument—that limiting marriage to opposite-gender couples discriminated against homosexuals and that treating people differently based on sexual orientation created an inherently suspect classification. Consequently, according to the petitioners, the court should apply the highest standard of review, strict scrutiny, to this classification and require the state to show that the classification furthered a compelling state interest. The court rejected this standard of review, however, and applied the rational basis test in upholding the classification.

For constitutional purposes, it is enough to recognize that marriage as now defined is deeply rooted in our society. Although, as appellants hasten to point out, married persons are not required to have children or even to engage in sexual relations, marriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the

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97. *Id.* at 187.
98. *Id.*
opening civil marriage to same-gender couples
protection of its marriage law to the legal union of one man and one woman.\textsuperscript{100}

The court then quoted from the Minnesota Supreme Court that marriage "as old as the book of Genesis" and concluded by stating that this "historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which the petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring it by judicial legislation."\textsuperscript{101} Instead, the court deferred to the legislature. "The societal values which are involved in this area must be left to the examination of the legislature .... [A]lthough the legislature may change the definition of marriage within constitutional limits, the constitution does not require the change sought by the appellants."\textsuperscript{102}

An analysis of these three cases reveals that, in the early 1970s, claims of marital rights for same-gender couples were, for the most part, inconceivable. The courts could not look beyond the formalistic definition of marriage; in the courts' logic, "the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage"\textsuperscript{103} and "[a]ppellants were not denied a marriage license because of their sex; they were denied a marriage license because of the nature of marriage itself."\textsuperscript{104} However, the definition of marriage in the court decisions contained notions of marriage which were no longer accurate. For example, Black's Law Dictionary definition stated that marriage was a union "in law for life,"\textsuperscript{105} and yet every state allowed parties to end their marriages through divorce.\textsuperscript{106} Also, the courts' reliance on Black's Law Dictionary could be criticized because it defined marriage as a union "for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex."\textsuperscript{107} This definition appears to classify one's role in the

\textsuperscript{100}Id. at 1197.
\textsuperscript{101}Id.
\textsuperscript{102}Id.
\textsuperscript{103}See Jones v. Hallahan, 501 S.W.2d at 588, 590 (Ky. 1973).
\textsuperscript{104}Singer, 522 P.2d at 1196.
\textsuperscript{105}Baker, 191 N.W.2d at 186 (citing BLACK'S LAW DICTIONARY 1123 (4th ed.). This phrase was removed in later editions of the Black's Law Dictionary.
\textsuperscript{106}In fact, during this same time frame, the 1970s, many state legislatures were liberalizing their divorce laws, moving from a fault-based system to a no-fault system of divorces in which the grounds for divorce included "incompatibility" (for example, see KAN. STAT. ANN. § 60-1601; (incompatibility was adopted as a grounds for divorce in Kansas in 1971); "irreconcilable differences" (for example, see N.D. CENT. CODE, § 14-05-03 (1971)), and an "irretrievably broken marriage" (for example, see MO. ANN. STAT. § 453.320 (West 1977)).
\textsuperscript{107}BLACK'S LAW DICTIONARY 1123 (4th ed.). This phrase was removed in later editions of the Black's Law Dictionary.
marriage by one's gender, a concept that was being attacked in other contexts as gender discrimination and unconstitutional. In addition, the courts narrowly defined the purpose of marriage in terms of procreation and survival of the species. There was little or no mention of the cultural, societal, emotional, psychological, familial, or economical advantages of this state-sanctioned relationship. For example, the Court of Appeals of Washington stated that "it is apparent that no same-sex couple offers the possibility of the birth of children by their union. Thus the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination 'on account of sex.'" Consequently, the earlier court decisions were unable to "deconstruct" the marriage relationship and ask the deeper questions about the benefits, rights, and obligations the state created in allowing persons to marry. And interestingly, reliance on religious references, which were clearly repugnant when read in the context of justifying prohibitions against interracial marriages, were freely mentioned in these cases.

4. Challenging Prohibitions Against Marriages of Same-Gender Couples: The 1990's Cases

Since the 1970s, five more United States jurisdictions have addressed the issue of whether same-gender individuals can marry each other. In Hawaii and Vermont, the courts accepted the petitioners' arguments that it is discriminatory to limit marriage to opposite-gender couples, and, in Alaska, a trial court determined that limiting marriage to opposite-gender couples may violate a person's fundamental right to marry. The petitioners in the two other jurisdictions, New York and the District of Columbia, however, were not successful in asserting their rights to marry their same-gender partners.

108. For example, during this same time frame, the United States Supreme Court struck down, as unconstitutional and a violation of the Equal Protection Clause, a statute in the state of Idaho that gave preference to fathers over mothers as administrators of their children's estates, Reed v. Reed, 404 U.S. 71, (1971), as well as a federal statute that provided certain dependent benefits to the wives of males in the military service without regard to whether the wives actually were dependent on their husbands, but did not provide benefits to females in the service, unless their husbands were, in fact, dependent on their wives' income, Frontero v. Richardson, 411 U.S. 677, (1973).


The majority of the 1990s cases were markedly different from their predecessors twenty years earlier. Most notable was that, for the first time, some of the courts were holding that the states’ marriage statutes were unconstitutional. Another difference was that the decisions favorable to the petitioners were not based on interpretations of the federal constitution, but based on the interpretations of state constitutions. Finally, it was interesting to note that each of the arguments advanced in the earlier cases was analyzed in the later opinions, and one by one, they were criticized and rejected.

a. Jurisdictions Limiting Marriage to Opposite-Gender Couples: District of Columbia and New York

In 1995, the District of Columbia Court of Appeals ruled against a same-gender couple seeking to marry and, a year later in 1996, a trial court in New York joined the D.C. court in denying marriage licenses to same-gender couples. The legal analysis in these two cases was quite similar to both the Dutch cases and the 1970s U.S. cases. In the D.C. case, the three D.C. Court of Appeals judges affirmed the opinion of the trial court, which held that: 1) the statute did not allow same-gender couples to marry, 2) the failure to issue a marriage license to the plaintiffs did not unlawfully discriminate against them under the District of Columbia Human Rights Act, and 3) there was no constitutional right, protected by the Due Process Clause of the Fifth Amendment, for same-gender individuals to marry one another.

Although the majority issued its opinion per curium, there was a lengthy concurring and dissenting opinion of Judge Ferren, with the majority being formed by the other two judges concurring in portions of Judge Ferren’s opinion. In writing the concurring opinion, Judge Ferren relied on legislative history, rules of statutory construction, and the decisions in the 1970s cases. He began the opinion with an analysis of the statutory language of the marriage statute, which did not have specific provisions limiting marriage to opposite-gender couples. However, unlike the earlier cases in which there was no legislative history addressing the issue of whether the marriage statutes applied to same-gender couples, there was, in fact, legislative history about this issue in the D.C. case. In 1975, the District of Columbia Council

115. See id.
117. The Due Process Clause appears in two places in the U.S. Constitution, in the Fifth Amendment and in the Fourteenth Amendment. The Fifth Amendment prohibits the federal government from denying the due process of the law, while the Fourteenth Amendment prohibits the states from denying citizens of the United States the due process of the law. Because the District of Columbia is under federal jurisdiction, the Fifth Amendment, not the Fourteenth Amendment, applies in this case.
considered, but did not adopt, a bill that would have amended the D.C. Code so that it implicitly allowed same-gender couples to marry.118 Because this amendment was never adopted and there had been no other material amendments to the D.C. marriage statute, Judge Ferren next looked at the intent of the Congress when it enacted the original marriage statute in 1901.119 Reading the statute with other provisions in the Code, the judge interpreted the word “marriage” to apply only to opposite-gender couples, and that this was the plain meaning of the term at the time the marriage statutes were originally enacted.120 Judge Ferren also cited the 1970s cases as coming to the same conclusion about the definition of marriage.

Petitioners in the D.C. and New York cases also claimed that the refusal to issue them a marriage license denied them a fundamental right: the right to marry. Once again, both decisions followed much of the same analysis found in the 1970s cases. In determining whether a right “deeply rooted in this Nation’s history and tradition,”121 was involved in these cases, the courts asked whether the history and tradition of marriage in the United States included marriages of same-gender couples. Obviously, the answer to that question was “no.” Because there was no fundamental right to marry someone of the same gender, the courts held that there were no constitutional violations in limiting marriages to opposite-gender couples.122

118. The District of Columbia Marriage and Divorce Act, Bill 1-89 (May 6, 1975, with amendments proposed July 7, 1975). The bill provided that a court could invalidate a marriage if a party lacked the physical capacity to consummate the marriage by sexual intercourse “provided that this clause shall not apply to married persons of the same sex.” Id., § 30-112.

119. The United States Congress is the legislative body for the District of Columbia.

120. Judge Ferren relied on the definitions of marriage in effect at the time of the enactment, as well as modern definitions of marriage. It is interesting to note that the Black’s Law Dictionary definition, which had stated that marriage was a union of one man and one woman “for life, for the discharge to each other and the community of the duties legally incumbent on those whose associations is founded on the distinction of sex” had been changed in the intervening twenty years to state simply that marriage was the “[l]egal union of one man and one woman as husband and wife.” BLACK’S LAW DICTIONARY 972 (6th ed. 1990).

121. Dean, 653 A.2d at 331, (citing Moore v. City of East Cleveland, 431 U.S. 494, 503, 97 S.Ct. 1932, 1938, 52 L. Ed. 2d 531 (1977)).

122. In addition, Judge Ferren in the D.C. case gave two other reasons that supported the finding that prohibiting same-gender marriages did not involve a fundamental right. Because the United States Supreme Court held, in Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), that there was no fundamental right for homosexuals to engage in same-sex sodomy and that a state could criminalize such conduct without violating the right to privacy under the Due Process Clause, this decision meant that marriage of same-gender couples, who would be engaging in this type of sexual conduct, also could not be considered a fundamental right. In addition, the fundamental right to marry, according to Judge Ferren, is tied to its relationship to procreation, which, by its very nature, refers to opposite-gender couples.
Concerning the petitioners' allegations that they had been denied equal protection of the laws, the New York trial court found that there was no equal protection claim. However, it was on this issue, the denial of equal protection, that Judge Ferren's opinion in the D.C. case departed from the majority and he issued a dissenting opinion. In his dissent, Judge Ferren stated that, although there may not be a fundamental right involved under the due process analysis, there may be violations of the equal protections of the laws, which would require a different type of analysis. The judge examined the attributes of marriage to determine if limiting marriage to a certain group of individuals would invoke an equal protection analysis. In this analysis, he relied on a United States Supreme Court decision that struck down a state statute that forbid prisoners from marrying. Although the Supreme Court acknowledged that, while in prison, prisoners could not engage in the primary purpose of marriage, procreation, the U.S. Supreme Court found there were other important attributes of marriage. These other attributes of marriage included its emotional support, religious or spiritual significance, and governmental and other benefits, such as Social Security, property rights, and inheritance rights. Judge Ferren accepted the idea that these attributes of marriage could apply to same-gender couples and that, in fact, many same-gender couples were forming families through adoption or assisted reproduction, so that even a broader view of procreation could be attributed to same-gender relationships. Because these attributes of marriage attached to both same-gender and opposite-gender couples, Judge Ferren determined that the question of limiting marriage to opposite-gender couples did, in fact, meet equal protection analysis requirements.

Judge Ferren noted that issues of equal protection have different standards of review, depending on the classification involved. In this case, the classification was based on sexual orientation and, therefore, the lower trial court applied the lowest standard of review, the "rational basis" test. In upholding the difference in treatment between opposite-gender couples and same-gender couples, the trial court

123. Storrs v. Holcomb, 168 Misc. 2d 898; 645 NY 2d. 286 (1996). Although the specific issue of whether a same-gender couple could be issued a marriage license had not been decided in New York, the trial judge relied on a 1990 New York appellate court decision involving a man claiming he was entitled to a share of another man's estate because he was the "surviving spouse." In the estate case, the appellate court, relying heavily on the rationale in the earlier Minnesota case of Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), stated that "[t]his court holds that persons of the same sex have no constitutional rights to enter into a marriage with each other. Neither due process nor equal protection of law provisions are violated by prohibiting such marriages." Estate of Cooper, 149 Misc. 2d 282, 283, 564 N.Y.S.2d 684, 685 (1990).

124. Although there is no specific equal protection clause in the Fifth Amendment, the equal protection of the laws, which is applied to the states explicitly through the Fourteenth Amendment, is extended to the District of Columbia through its incorporation in the Due Process Clause of the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497 (1954).
had given three legitimate state interests that were rationally related to limiting marriage to opposite-gender couples: marriage was for the purpose of procreation, the state could limit marriage to heterosexuals in order to discourage same-sex sodomy and changing the definition of marriage would be "social tinkering with one of the most sacred institutions known to mankind, namely marriage."125 The trial court’s opinion also stated that not only were the three reasons rationally related to a legitimate state interest, but that these reasons were sufficient to show a "compelling state interest" under the highest level of review, strict scrutiny.

Judge Ferren initially agreed that, if the rational basis test was the proper standard of review, then there existed a legitimate state interest to limit marriage to heterosexuals, i.e., to regulate and legitimate the procreation of children. Judge Ferren disagreed, however, that the lowest standard of review should be used in cases involving classifications based on sexual orientation or homosexuality. Instead, he believed the trial court should have investigated the possibility that homosexuals may form a suspect or quasi-suspect class, which would require the government to show a compelling state interest to exclude same-gender couples from marriage.

This investigation required a review of the United States Supreme Court decision of Bowers v. Hardwick,126 to determine whether the decision in that case, which upheld a state anti-sodomy law, implied that homosexuals were not a suspect or quasi-suspect class. Judge Ferren first pointed out that the decision was based on a due process, fundamental right, analysis, and not on equal protection. The judge noted that under the due process analysis, the focus of the court's inquiry was looking at the past, protecting rights that have traditionally existed in the Anglo-American legal system. The equal protection analysis, however, "is forward-looking; it is intended to invalidate traditions, however long-standing, that become invidiously discriminatory as times change and disadvantaged groups call attention to their treatment."127 Consequently, even though the Hardwick case allowed a state to outlaw consensual sodomy between homosexuals without violating the due process clause, it did not necessarily follow that a state could prohibit homosexual couples from marrying, while allowing heterosexual couples to do so, without violating equal protection principles. Judge Ferren pointed out that a state also could criminalize heterosexual consensual sodomy under a due process analysis because heterosexual sodomy, like homosexual sodomy, was not "deeply rooted in this Nation's history and tradition." But no one would suggest that by criminalizing heterosexual sodomy,

125. Dean, 653 A.2d at 333-334, (Ferren, dissenting) (quoting the trial court opinion).
127. Dean, 653 A.2d at 342 (Ferren, dissenting). In Judge Ferren’s discussion, he refers to a law review article that analyzes this distinction between a due process claim and a claim under the denial of equal protection: Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U.CH.L.REV. 1161 (1988).
heterosexuals should not be allowed to marry because they might engage in illegal sexual practices within the marriage. And although there might be an argument that consensual heterosexual sodomy may be protected within the confines of marriage under a right to privacy analysis, this analysis only strengthened the denial of equal protection for homosexual couples, who were forbidden from getting married and having the right to privacy protection.  

Determining that the *Hardwick* case did not foreclose an equal protection analysis, Judge Ferren proceeded to apply four factors that a court should examine to determine if homosexuality was a suspect class. The first factor was whether homosexuals as a group have suffered a history of purposeful discrimination. After reviewing past case law and law journal articles that detailed a long and sometimes violent history of discrimination against homosexuals, Judge Ferren stated that no judge could reasonably conclude “that homosexuals have not been the objects of purposeful discrimination.”

As to the second factor, whether deep-seated prejudice caused inaccurate stereotypes that did not reflect the class members’ abilities, the judge cited one such stereotype—that gay men and lesbians were sexually promiscuous and did not want to “settle down” in long-term, committed relationships to raise families. There was, however, powerful evidence to the contrary because there were millions of gay and lesbian parents, raising children together. Therefore, Judge Ferren could not say that, as a matter of law, gay men and lesbians were not victims of inaccurate stereotyping.

In analyzing the third factor, whether homosexuals were defined as a class by an immutable trait that was beyond a class member’s control, Judge Ferren found

128. According to Judge Ferren, a due process analysis “begs the question presented by the equal protection clause: can the state discriminate against homosexual couples by denying them a status, marriage, solely because of conduct, consensual sodomy, which heterosexual couples either (1) have a constitutional right to engage in, at least when formalized by marriage, or (2) do not have the constitutional right to engage in—and are even vulnerable to criminal prosecution for doing so—but yet, despite so, retain the right to marry.” *Dean, 653 A.2d* at 344 (Ferren, dissenting).

129. At the time of the D.C. appellate court decision in this case, four lower federal appeals courts had issued opinions interpreting *Bowers v. Hardwick* as supporting the proposition that homosexuals did not belong to a suspect class. Judge Ferren’s analysis of these cases, however, found that the cases misapplied the *Hardwick* case. The first distinguishing factor for the judge was that the *Hardwick* case specifically stated that it was being decided under a due process analysis, not an equal protection analysis. Secondly, two of the cases that did consider the equal protection claim “applied the equal protection analysis merely by asserting that homosexuality is not immutable, entirely ignoring a substantial body of scientific research to the contrary.” *Id.* at 342.

130. *Id.* at 344-45.

131. “Approximately three million gay men and lesbians in the United States are parents, and between eight and ten million children are raised in gay or lesbian households.” *Id.* at 345.
that there existed conflicting evidence on this factor. Much of the evidence fell along one of two propositions—that homosexuality was biologically determined or that it was learned behavior. Judge Ferren noted, however, that the studies showed sexual orientation was usually set at a very early age and was highly resistant to change. In addition, there was evidence that efforts to change one’s sexual orientation could be traumatic and self-destructive. Consequently, sexual orientation appeared to be similar to race, gender, alienage, and national origin, because it was beyond the control of the individual. Since these classifications were protected under the equal protection analysis, the judge believed that sexual orientation also should be granted equivalent protection. 132

The last factor that was important in determining whether homosexuality was a suspect or quasi-suspect classification was whether the members of the group were a politically powerless minority. In analyzing this factor, Judge Ferren noted that political powerlessness is measured “not only by the extent to which the minority group, for example, is represented in legislative bodies, but also, more subtly, by the extent to which ‘deep-seated prejudice’ prevents the group’s full participation in the political process.” 133 The judge pointed out that the trial court actually addressed this issue in its opinion stating that “homosexuals today are not so lacking in political power as to warrant enhanced constitutional protection. Witness, for instance, the recent passage by the City Council and signing by the Mayor of the Domestic Partnership Bill. Gays and lesbians are, in the 1990’s, a political force that any elective officeholder may ignore only at his or her peril.” 134 However, since the trial court decision, the United States House of Representatives essentially vetoed the domestic partnership legislation by preventing the District of Columbia from spending any money on the legislation. And contrary to what the district court stated, the District of Columbia Delegate said that there was no support for the domestic partnership legislation because members of Congress feared they would not be re-elected if they supported the bill. 135 In addition, the judge pointed out that voters in Colorado and Cincinnati had passed legislation in attempts to prevent the adoption of any legislation that would prohibit discrimination against homosexuals.

132. In addition, in a federal district court case in which there was an extensive evidentiary hearing on the issue whether homosexuality was an immutable characteristic, the federal district court determined that sexual orientation was beyond the control of the individual and granted quasi-suspect status to homosexual classifications. Equality Foundation of Greater Cincinnati, 860 F. Supp. 417, 437 (S.D. Ohio 1994).

133. Dean, 653 A.2d at 349 (Ferren, dissenting) (citations omitted).

134. Id. at 350.

135. “The scare word here was ‘homosexual marriages.’ Several members [of Congress] told me they saw 30-second commercials coming saying they supported homosexual marriages. The closer we get to an election, the worse the fortunes of any controversial legislation.” Id., (citing Kent Jenkins, Jr., House Votes Referendum on D.C. Death Penalty; Lawmakers Gut City’s Domestic Partnership Law, WASHINGTON POST, Sept. 25, 1992, at A1).
Finally, noting that gays can "pass" as straight and that many are "in the closet" because of prejudice against them, Judge Ferren recognized the particular powerlessness of homosexuals in this context, quoting from a recent law review article by John C. Hayes. "Prejudice effectively silences homosexuals and renders them unable to counter and remedy invidious government discrimination caused by that prejudice. Public officials sympathetic to the plight of homosexuals, or themselves [closeted] homosexuals, are also silenced by fear of damage to their political futures." Consequently, Judge Ferren believed homosexuals also lacked political power, the fourth characteristic necessary for them to be considered a suspect or quasi-suspect class.

Given these conclusions about classifications based on homosexuality, Judge Ferren stated that the case should have been sent back to the trial court for the purpose of hearing evidence on whether the state could show a compelling or substantial interest in prohibiting marriages of same-gender couples. Judge Ferren pointed out, however, that the state would succeed in this showing only if it could prove by reliable evidence that prohibiting same-gender couples from marrying would actually deter persons from adopting homosexual conduct, assuming that conduct was deemed "anti-social" and the state had a compelling interest in deterring it.

That is to say, if the government cannot cite actual prejudice to the public majority from a change in the law to allow same-sex marriages, such as a predictable increase in antisocial homosexual behavior, then the public majority will not have a sound basis for claiming a compelling, or even substantial, state interest in withholding the marriage statute from same-sex couples; a mere feeling of distaste or even revulsion at what someone else is or does, simply because it offends majority values without causing concrete harm, cannot justify inherently discriminatory legislation against members of a constitutionally protected class—as the history of constitutional rulings against racially discriminatory legislation makes clear.

Therefore, Judge Ferren dissented from the majority opinion concerning the equal protection analysis. Because he repeatedly saw the need for taking more facts in this case, he would have sent the case back to the trial court for a determination on

137. Dean, 653 A.2d at 355 (Ferren, dissenting).
the issue of whether classifications based on homosexuality should be examined at a higher standard of review under the equal protection analysis.

Regardless of Judge Ferren's in-depth dissent, the end result of the D.C. case, as well as the New York trial court case of Storrs v. Holcomb\(^\text{138}\) was that the refusal to issue marriage licenses to same-gender couples was not a violation of due process, equal protection nor a denial of a fundamental right.


Unlike the District of Columbia and New York cases, which ruled against the petitioners by applying federal constitutional analyses, the three cases that accepted the petitioners' discrimination arguments have a much different focus, relying on state constitutional analyses instead. In both the Hawaii and Alaska cases, the court interpreted the petitioners' rights of privacy and equal protection rights under the state constitution, and, in the recent Vermont case, the Vermont Supreme Court applied the Common Benefits Clause of the Vermont Constitution, a clause that does not exist within the federal constitution. Consequently, Hawaii and Alaska cases can be analyzed simultaneously, but the Vermont case needs separate consideration.


The Hawaii case of Baehr v. Lewin\(^\text{139}\) (later known as Baehr v. Miike\(^\text{140}\)) and the Alaska case, Brause v. Bureau of Vital Statistics,\(^\text{141}\) were the first United States cases to accept the petitioners' arguments that the denial of marriage licenses to same-gender couples may be impermissible discrimination. In both cases, the

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140. The Hawaii case changed names during its eight-year history because the person holding the state office, the Director of the Department of Health of Hawaii, who was the named defendant in the lawsuit, changed within that eight-year period. The first name of the case was Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). When the trial court decided the case on remand from the Hawaii Supreme Court, it was named Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct.). The supreme court retained this name, Baehr v. Miike, in reversing the trial court's decision after the enactment of a constitutional amendment that gave the authority to the legislature to limit marriage to opposite-gender couples. See <http://mano.icsd.hawaii.gov/jud/20371.htm>.
petitioners alleged violations of state constitutional provisions guaranteeing the right to privacy and the equal protections of the laws based on gender classifications. What was significant about the state constitutions in both Hawaii and Alaska was that, unlike the United States Constitution which does not have a specific provision guaranteeing the right to privacy, both the Hawaii and Alaska state constitutions have the right to privacy written specifically into their state constitutions. In addition, both state constitutions have provisions that specifically prohibit unequal treatment based on gender. Consequently, the issue before the Hawaii and Alaska courts was whether the right to privacy, and the equal protection of the laws based on gender classifications, would be interpreted more broadly under the state constitutional provisions than under a federal constitutional analysis.

The Hawaii case started in 1991 when the plaintiffs filed suit against the Director of the Hawaii Department of Health, claiming that "to deny same-sex couples access to marriage licenses violates the plaintiffs' right to privacy, as guaranteed by article I, section 6 of the Hawaii Constitution, as well as to the equal protection of the laws and due process of law, as guaranteed by article I, section 5 of the Hawaii Constitution." The trial court found that "the right to enter into a homosexual marriage is not a fundamental right" protected by the Hawaii Constitution under the right of privacy and because homosexuals were not members of a suspect class, there was no denial of equal protection rights under the Hawaii Constitution because the state had met its burden of showing a rational basis for limiting marriage to opposite-gender couples. Consequently, the trial court granted judgment on the pleadings to the defendant. On appeal to the Hawaii Supreme Court the issue was a procedural one—whether, as a matter of law, the defendant was entitled to a judgment on the pleadings. In other words, the appellate court asked whether "it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief under any alternative theory [of law]." The five judges on the

142. The United States Supreme Court has interpreted several provisions in the Bill of Rights of the United States Constitution as creating a right to privacy, which emanates from the Bill of Rights.

143. "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." HAW. CONST. art. I § 6. "The right of the people to privacy is recognized and shall not be infringed." ALASKA CONST. art. I § 22.

144. "No person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry." HAW. CONST. art. I § 5. "Civil rights. No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin." ALASKA CONST. art. I § 3.

145. Baehr, 852 P.2d at 50.
146. Id. at 54.
147. See id.
148. Id.
Hawaii Supreme Court who handled this case did not form a majority in issuing a decision. Two judges formed the plurality decision (hereinafter referred to as the plurality), written by Judge Levinson, in which the case was remanded to the trial court for the purpose of taking evidence on the equal protection claim. A third judge concurred with this plurality, agreeing that issues of facts remained in the case. Therefore, the concurring judge joined the part of the plurality decision that held the trial court’s judgment on the pleadings was reversible error and the case should be remanded for trial. Two other judges dissented, issuing an opinion that was similar to the opinions in the earlier cases in the 1970s.

Writing the plurality opinion, Judge Levinson first addressed the right to privacy issue, noting that, although the Hawaii Constitution has a specific right to privacy, this right had been interpreted as comparable to the right to privacy that emanated from the federal constitution. Consequently, the Hawaii courts would look to the federal cases to interpret whether the right to privacy’s recognition of the fundamental right to marry applied in the situation involving same-gender couples seeking to marry one another. In deciding this issue, the Hawaii Supreme Court found that no fundamental right was involved because marriages of same-gender couples was not a right rooted in tradition and the collective conscience of the citizens. Therefore, a denial of this right would not violate principles of liberty and justice.149

In the Alaska case, however, the Alaska superior court disagreed with the way that the Hawaii court had stated the issue under the fundamental right analysis. The Alaska judge agreed that it was self-evident that permitting marriages of same-gender couples was not a traditional and deep-rooted right in the United States, however, “[t]he relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one’s life partner is so rooted in our traditions. Here the court finds that the choice of a life partner is personal, intimate, and subject to the protection of the right to privacy. . . .”150 According to the Alaska judge, because a fundamental right was involved, the highest standard of review, strict scrutiny, would apply. Consequently, the state would be required to show a compelling state interest in order to restrict such an important and personal decision as choosing one’s life partner. The judge also stated that, even if the marriage statutes had not infringed on a fundamental right, restricting marriage to opposite-gender couples also implicated the Alaska constitution’s equal protection provision, which specifically prohibited unequal treatment based on gender.151

149. Id. at 57.
151. If there had been no fundamental right involved, which requires the highest standard of review—strict scrutiny—then the analysis of the gender discrimination issue would have
The plurality judges in the Hawaii case also found that the refusal of marriage licenses may be discriminatory behavior under the equal protection analysis of the Hawaii Constitution. The plurality opinion first noted that the benefits of marriage, which was a state conferred status, were significant and the opinion listed fourteen specific benefits that existed only within the marital relationship. These benefits of marriage included preferred treatment under tax law, inheritance laws, child custody and support laws, spousal support laws, wrongful death laws, and social security and pension laws. The Hawaii Attorney-General, who represented the defendant, the Director of the Department of Health, relied on the 1970s cases to argue that same-gender partners were not being discriminated against because of their gender, but because it was not biologically possible for same-gender couples to marry. The plurality was not persuaded by this statement of the issue; the plurality judges found that it was a circular and unpersuasive argument to say that a same-gender couple cannot marry because the definition of marriage means a union of a man and a woman. As the judges aptly pointed out, before the United States Supreme Court decided the Loving v. Virginia case, marriage also was defined as a status that could not be acquired by persons of different races. Just as the Virginia courts were incorrect in stating that the right to marry did not extend to interracial couples because "custom and God" did not intend for them to exist, the plurality judges believed that the same argument was unpersuasive in the case of same-gender couples. The plurality opinion stated that "we do not believe that trial judges are the ultimate authorities on the subject of Divine Will, and, as Loving amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order."

Because the plurality judges found that the marriage statute was a gender-based classification, the remaining issue was establishing the standard of review the trial court should apply in determining whether this gender-based classification violated the equal protection clause. The plurality opinion pointed out that the United States Supreme Court had not, as yet, found gender to be a suspect classification which would require the highest level of review, strict scrutiny. The federal constitution, however, did not have provisions that specifically prohibited required the state to meet the "intermediate" level of scrutiny, which the Alaska Supreme Court applies to gender classifications. Id. at *6.

152. For the purposes of analyzing the equal protection claim, the plurality opinion applied statutory interpretation principles to the Hawaii marriage statute, finding that the plain language of the marriage statute restricted the marriage to a male and a female.


154. Loving, 388 U.S. at 8, 87 S. Ct. at 1822, 18 L. Ed. 2d at 1015. At the time the Lovings challenged their convictions for violating Virginia's anti-miscegenation statute in 1964, sixteen states still outlawed interracial marriages. Only fifteen years earlier, thirty of the forty-eight states prohibited interracial marriages. See Baehr, 852 P.2d at 62.

155. Id. at 63.
unequal treatment based on gender. The Hawaii Constitution, on the other hand, had two provisions that specifically mentioned discrimination based on gender. These provisions were the equal protection clause\textsuperscript{156} and a provision known as the Equal Rights Amendment (ERA), which stated that "[e]quality of rights shall not be denied or abridged by the State on account of sex."\textsuperscript{157} In addition, in one of the United States Supreme Court cases that dealt with gender discrimination, a majority of the justices intimated that the highest standard of review, strict scrutiny, would apply to gender classifications if the federal constitution contained an ERA.\textsuperscript{158} Based on these two reasons, the plurality determined that the gender-based classifications in the marriage statute should be strictly scrutinized and, unless the defendant could show a compelling state interest justifying the unequal treatment, the statute should be struck down as unconstitutional.

The plurality also rejected the argument that the marriage statute was not discriminatory because both genders were treated equally; i.e., if all females were prevented from marrying females and all males were prevented from marrying males, then both genders were being treated equally. The plurality opinion pointed out that this argument was rejected in \textit{Loving v. Virginia}, when applied to racial classifications. In that case, the Virginia Attorney General had argued there was no impermissible racial classification because both races were being treated the same, i.e. all whites could only marry whites and all "coloreds" could only marry "coloreds," therefore the races were being treated equally. The plurality quoted the decision in \textit{Loving}, in which the U.S. Supreme Court held, "the fact of equal application does not immunize the statute from the heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race."\textsuperscript{159} According to the plurality, by substituting the word gender for race and substituting the Hawaii Equal Protection Clause for the Fourteenth Amendment, one reaches exactly the same result in this case as the United States Supreme Court reached in \textit{Loving}. Finally, as to the dissent's claim that this issue should be left to the legislature to determine, Judge Levinson responded that "[t]he result we reach today is in complete harmony with the [United States Supreme] Court's observation that any state's powers to regulate marriage are subject to the constraints imposed by the constitutional right to the equal protection of the laws."\textsuperscript{160}

Consequently, a majority of the judges on the Hawaii Supreme Court ordered the

\textsuperscript{156} "No person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry." HAW. CONST. art. I § 5 (1978).

\textsuperscript{157} HAW. CONST. art. I § 3 (1978).

\textsuperscript{158} Fronterio v. Richardson, 411 U.S. 677 (1973).

\textsuperscript{159} Loving, 388 U.S. at 8, 87 S. Ct. at 1822, 18 L. Ed. 2d at 1016.

\textsuperscript{160} Baehr, 852 P.2d at 68.
case back to the trial court, requiring the state to justify the marriage statute's classification based on gender.  

Three years later, Judge Chang presided over the trial of this case, noting that the Hawaii Supreme Court had directed that on "remand, in accordance with the 'strict scrutiny' standard, the burden will rest on [the defendant] to overcome the presumption that [the Hawaii marriage statute] is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights." Pursuant to this directive, the defendant argued in his pre-trial memorandum the following:

The State of Hawaii has a compelling interest to promote the optimal development of children . . . . It is the State of Hawaii's position that, all things being equal, it is best for a child that it be in a single home by its parents, or at least by a married male and female . . . . The marriage laws further the compelling state interest of securing or assuring recognition of Hawaii marriages in other jurisdictions . . . . The marriage law furthers the compelling state interest in protecting the public fisc from the reasonably foreseeable effects of approval of same-sex marriage.

To support these statements of compelling state interests, the defendant presented testimony through four expert witnesses, three of whom the trial court found to be credible. All three of these witnesses testified that the optimal development of children was in an intact family, being raised by their mother and father. However, the first two witness agreed that single parents, adoptive parents, lesbian mothers, gay fathers, and same-gender couples can, and do, create stable family environments and raise healthy and well-adjusted children and that gay and

161. The plurality opinion did not find that there was unequal treatment based on sexual orientation. The judges stated that under the Hawaii statute, homosexuals were not prohibited from marrying; they could marry, but they must marry someone of the opposite gender.

162. During the interim, there had been a stay of the trial proceeding, pending the action of the Commission on Sexual Orientation and the Law and the action by the Eighteenth Legislature concerning enactment of legislation allowing same-gender couples to register as domestic partners.

163. The case had been renamed Baehr v. Miike, to reflect the fact that the Director of Health for the state had changed from Mr. Lewin to Mr. Miike.

164. Baehr, 1996 WL 694235 at *2 (Haw. Cir. Ct.).

165. Id. at *3.

166. The defendant's witnesses were Kyle D. Pruett, M.D., David Eggebeen, Ph.D., Thomas S. Merrill, Ph.D., and Richard Williams, Ph.D. As to Dr. Williams's testimony, the court stated that "Dr. Williams is not persuasive or believable because of his expressed bias against the social sciences, which include the fields of psychology and sociology." Id. at *8.
lesbian couples can, and do, make excellent parents. Both witnesses also testified that same-gender couples should be allowed to adopt children and provide foster care. Although the first witness testified that same-gender relationships did not provide the same learning model or experience for children as a mother and father because there was little information about one of the genders, the witness also testified that same-gender parents raised children who have a clear gender identity.

The second witness also testified that persons married as a "gateway to becoming a parent" and that marriage was synonymous with having children; however, he admitted that persons married without intending to have children, that the inability to have children did not weaken the institution of marriage and that persons should not be prohibited from marrying because they could not have children. In addition, both the second and third witnesses\(^{167}\) testified that children should not be denied benefits such as health care, education or housing because of the status of their parents. The second witness further stated that children of same-gender couples would be helped if their families had the benefits of marriage such as tax advantages, inheritance rights, payment of child support, the right to sue for wrongful death and welfare payments. He also agreed that it would be helpful for children of same-gender couples if their families received the social status that accompanied marriage.

Although the petitioners did not have the burden of proof at trial, they presented four expert witnesses as well.\(^{168}\) All four expert witnesses supported the testimony of the defendant's witnesses that gay and lesbian parents and same-gender couples were fit parents and that sexual orientation was not an indicator of parental fitness. For example, the first witness, who was one of the leading experts on children raised in same-gender households, testified that she did not believe children should be denied benefits and protections because of the status of their parents. In addition, she testified that opening marriage to same-gender couples would not dishonor marriage, but would have a positive impact on marriage and society in general.

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167. The defense’s third witness stated there was insufficient evidence regarding the effects of being raised by gay or lesbian parents on the development of children and that he had no opinion regarding these children’s development nor could he say whether children raised in same-gender households would develop into healthy, well-adjusted adults. The trial court noted, however, that this witness, who was a clinical psychologist, had limited clinical experience with only one or two gay or lesbian parents and that he had not participated in, nor conducted, any study that focused on children of homosexual parents.

168. The first two experts, Pepper Schwartz, Ph.D., and Charlotte Patterson, Ph.D., were leading researchers in the area of United States children raised by gay or lesbian parents. The third expert, David Brodzinsky, Ph.D., had done substantial research with adoptive and foster care families. Dr. Brodzinsky, as well as the fourth expert, Robert Bidwell, M.D., had worked with a substantial number of same-gender parent families.
The second witness had studied eighty families who conceived a child through the services of a sperm bank; fifty-five of the families were headed by lesbian mothers and the other twenty-five were headed by heterosexual couples. The research had reached three conclusions:

(1) As a group, the children born as a result of donor insemination were developing normally;
(2) sexual orientation of the parents was not a good predictor of how well children do in terms of a child’s well-being and adjustment; and
(3) irrespective of their parents’ sexual orientation, children who live in a harmonious family environment had better reports from parents and teachers. 169

The third witness testified that, because the current evidence was that lesbian and gay parents were providing warm and loving environments, same-gender parents should be allowed to adopt. This witness, who is an expert on adoptive families, was asked what his opinion was on the defendant’s position “that we somehow need to identify a best family for children, or as between mothers and fathers, we have to pick a best parent.” 170 The expert responded:

I find it offensive because it tends to suggest that there’s only one way of being a parent. It excludes all nonbiological parenting which would be adoptive parenting, stepparenting, foster parenting, parenting by gay and lesbians. It suggests that there are some additional issues that come with some of these nontraditional families that should be reason for excluding rather than taking that information and using it not in a punitive way but in a proactive, kind of supportive way to help families deal with the inevitable issues that come up in life. And there are going to be some unique issues in varying forms of family. But to talk about one form of family that is best, I find that, you know, truthfully offensive and a distortion of the research literature. 171

The witness concluded by stating that there was no reason related to the promotion of the development of children that would support a position of preventing same-gender couples from marrying.

170. Id. at *15.
171. Id.
The petitioners’ final witness was a pediatrician who treated adolescents, including a number of children who lived in households headed by homosexual parents. The doctor testified that these parents raised children who were just as healthy as children with heterosexual parents. The doctor admitted that some teenagers in these families have experienced embarrassment, distress or have had a difficult time because of their nontraditional family structure. He went on to say, however, that “they get through these periods. And, if anything, I think they grow stronger through that experience. They learn about life. They learn about diversity... The research confirms that— that teenagers get through this period.” This last witness also testified that the health, development, and adjustment of children in same-gender relationships would be benefitted if the couple could marry.

After summarizing the testimony of the witnesses, Judge Chang’s decision set out numerous findings of fact and conclusions of law. Many of the findings of fact addressed the defendant’s assertion that there was a compelling state interest in prohibiting same-gender couples from marrying because the optimal development of children would be adversely affected. The court’s findings, however, were that the sexual orientation of parents was not an indicator of the overall adjustment and development of children, that same-gender individuals were allowed to adopt children and provide foster care, and that these couples could provide children with a nurturing relationship and a nurturing environment that was conducive to the development of happy, healthy, and well-adjusted children.

Because of these findings, the trial court held that the defendant had failed to establish a causal link between allowing same-sex marriage and adverse effects upon the optimal development of children. In fact, the court found just the opposite. “Contrary to Defendant’s assertions, if same-sex marriage is allowed, the children being raised by gay or lesbian parents and same-sex couples may be assisted, because they may obtain certain protections and benefits that come with or become available as a result of marriage.” Consequently, the trial court stated that the defendant had failed to show a compelling state interest that would overcome the presumption that the Hawaii marriage statute was unconstitutional because it discriminated against same-gender couples by using an impermissible classification based on gender. In addition, the court held that, even if the defendant had proved that limiting marriage to opposite-gender couples promoted a compelling state interest, the defendant failed to show that the marriage statute was narrowly written to avoid unnecessary violations of constitutional rights.

172. Id. at *16.

173. Id. at *18. In addition, the defendant failed to present sufficient evidence on the other two alleged compelling state interests, which were that allowing same-gender couples to marry would adversely affect the public funds and would cause difficulty with the recognition of Hawaii marriages in other jurisdictions.

174. Id. at *21.
Although Judge Chang issued a ruling that enjoined the defendant from denying the plaintiffs an application for a marriage license, he stayed his ruling, pending the defendant’s appeal of the judgment to the Hawaii Supreme Court. Pending the appeal, however, the Hawaii legislature passed a proposed amendment to the Hawaii Constitution which stated that “The legislature shall have the power to reserve marriage to opposite-sex couples.” In an election on this amendment in November of 1998, Hawaii citizens approved this amendment to the Constitution, by a margin of sixty-nine percent to twenty-nine percent. Shortly thereafter, the Hawaii Supreme Court requested the parties in the *Baehr* case to file supplemental briefs explaining the effect of the marriage amendment on the disposition of the case. Thirteen months later, on December 9, 1999, the Hawaii Supreme Court unanimously reversed the trial court's holding that the marriage statute was unconstitutional and entered judgment for the defendant. In doing so the court held that:

> [t]he marriage amendment validated [the Hawaii marriage statute] by taking the statute out of the ambit of the equal protection clause of the Hawai‘i Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite-sex couples. Accordingly, whether or not in the past it was violative of the equal protection clause in the foregoing respect, [the marriage statute] no longer is. In light of the marriage amendment, [the Hawaii marriage statute] must be given full force and effect.

Consequently, the Hawaii Supreme Court reversed the first American case to hold that it was discriminatory to deny same-gender couples a marriage license, and no marriage licenses were ever issued to the petitioners, who had filed the lawsuit nine years earlier.

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175. HAW. CONST. Art. 1, Sec. 23.
178. When the Hawaii Supreme Court reversed the trial court decision, only two of the justices were on the court when it issued its original decision in 1993—Chief Justice Moon and Justice Levinson, the same two judges who had formed the plurality in the 1993 decision. In addition, Justice Rami! filed a concurring opinion with the 1999 decision, in which he disagreed with the original 1993 decision of the court, arguing that opening marriage to same-gender couples was a legislative, not judicial, function. “[I]t was improper for this court to usurp the people’s role by making our own policy decision in favor of same-sex marriage.” *Id.* (Rami!, concurring).
In Alaska, the voters also enacted a similar constitutional amendment to prevent the lawsuit challenging the Alaska marriage statute from proceeding to the appellate level. The amendment provided that “To be recognized in this State, a marriage may exist only between one man and one woman.”\(^{179}\) In November of 1998, the amendment was enacted by the citizens of Alaska with sixty-eight percent of voters in favor of upholding traditional marriage, as opposed to thirty-two percent opposing the constitutional amendment.\(^{180}\) The constitutional amendment effectively overrode the trial court’s decision, thus ending the Alaska lawsuit.

d. The Vermont case: \textit{Baker v. State}\(^{181}\)

The Vermont Supreme Court has been the most recent court to rule on the issue whether same-gender couples have a right to marry one another. This case carried particular interest because six years earlier the Vermont Supreme Court became the first appellate court in the United States to interpret its state’s adoption code to allow a same-gender co-parent to adopt her lesbian partner’s biological children without affecting the parental rights of the biological mother.\(^{182}\) In other words, the Vermont Supreme Court held that its interpretation of the Vermont adoption code allowed a same-gender co-parent adoption, resulting in the children having two mothers and no father.

With this background, it is not surprising that the petitioners’ first argument involved issues of statutory interpretation. Because the marriage statute did not contain gender-specific language, the petitioners alleged that the statutory language did not limit marriages to opposite-gender couples and same-gender couples could be issued a marriage license. The Vermont Supreme Court, similar to all the other

\(^{179}\) ALASKA CONST. art. I, § 25. The original proposed amendment had another sentence that stated “[n]o provision of this constitution may be interpreted to require the State to recognize or permit marriage between individuals of the same sex.” The Alaska Supreme Court determined that this sentence was surplusage and should be deleted from the ballot. Bess v. Ulmer, 985 P.2d 979 (Alaska 1999).

\(^{180}\) See Wetzstein, supra note 6.


courts in which this argument was made, rejected this interpretation of the marriage statute. Applying the plain-meaning rule, the court found that the common understanding of the word marriage was limited to opposite-gender couples. The court also rejected the petitioners' invitation to interpret the marriage code in a similar fashion to the court's interpretation of the adoption code—that the code should be read broadly to include same-gender relationships. The court distinguished the adoption case, holding that the overriding concern of the adoption code, the best interests of the child, allowed the court to interpret the adoption code's language to effect that concern and grant the adoption.

We are not dealing in this case with a narrow statutory exception requiring a broader reading than its literal words would permit in order to avoid a result plainly at odds with the legislative purpose. Unlike [the adoption case], it is far from clear that limiting marriage to opposite-sex couples violates the Legislature's "intent and spirit." Rather, the evidence demonstrates a clear legislative assumption that marriage under our statutory scheme consists of a union between a man and a woman. 183

Petitioners' next claim was that limiting marriage to opposite-gender couples violated the Common Benefits Clause of the Vermont Constitution. 184 The Vermont Supreme Court began its discussion of this claim by a detailed analysis distinguishing the Common Benefits Clause of the Vermont Constitution from the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Although some of the Vermont Supreme Court decisions in the past had appeared to follow the Fourteenth Amendment analysis of applying differing standards of review to determine if a statute violated the equal protection clause, 185 the Vermont Supreme Court used this case as an opportunity to create a specific and distinct analysis under

184. VT. CONST. ch. I, art.7.

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

VT. CONST. ch. I, art.7.
185. See supra, III.A.1. for an explanation of the different standards of review used in equal protection cases.
the Common Benefits Clause, separate and apart from a Fourteenth Amendment equal protection analysis.

First, the court noted that the Fourteenth Amendment was enacted to prohibit the denial of equal rights. The Common Benefits Clause, however, was enacted to prevent favoritism and the conferring of advantages to privileged groups. Consequently, the Fourteenth Amendment's language was premised on preventing exclusion, but the Common Benefits Clause was based on the principle of inclusion. "Thus, at its core the Common Benefit Clause expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage."186 In addition, although the Vermont Constitution of 1777 abolished slavery in another provision, the framers were principally concerned with equal access to public benefits and protections for the community as a whole, not granting specific civil rights to distinct minorities. "The concept of equality at the core of the Common Benefits Clause was not the eradication of racial or class distinctions, but rather the elimination of artificial governmental preferments and advantages."187

The Vermont Supreme Court then set out the standard that it would use under a Common Benefits Clause analysis. First, the court must define the group of Vermont citizens who were being excluded from the benefits and protections that the state provided to all other citizens. Next, the court must examine the government's purpose in making a classification that included some members of the community but excluded certain other citizens. Finally, the court must determine whether the exclusion of this group of citizens from the benefits of the challenged law "bears a reasonable and just relation to the governmental purpose."188 In making this determination, the court may take into consideration three factors: "(1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive."189

The court then proceeded to apply this new standard to the exclusion of same-gender couples from the marriage statute. It first identified the excluded group under the marriage statutes as persons who wish to marry someone of the same gender. Then the court set out several of the governmental purposes advanced by the state—to further the link between procreation and child-rearing, and to promote a permanent commitment between couples who have children, ensuring their children were considered legitimate and were receiving continued parental support.

187. Id. at 876.
188. Id. at 878-79.
189. Id.
As to the first governmental purpose, the state argued that the legislature could use the marriage statutes “to send a message that procreation and child-rearing are intertwined.” In other words, the state claimed that by recognizing marriages of same-gender couples who cannot conceive children on their own, the state would separate “the connection between procreation and parental responsibility for raising children” and would “advance the notion that fathers or mothers are mere surplusage to the functions of procreation and child-rearing.”

In analyzing this stated governmental purpose, the court found that many opposite-gender couples marry without intending to have children and for numerous reasons unrelated to procreation. Therefore, the Vermont Supreme Court found the statute to be under-inclusive. The court also cited studies that found between 1.5 to 5 million children were residing with their lesbian mothers and that a significant number of gay men and lesbians were raising children in same-gender couple households. In addition, the Vermont legislature had amended the state’s adoption statute to allow same-gender couples to adopt children together. Given these facts, the Vermont Supreme Court found that the marriage statute excluded same-gender couples who were no different from opposite-gender couples. In fact, “the exclusion of same-sex couples from the legal protections incident to marriage exposes their children to the precise risks that the State argues the marriage laws are designed to secure against. In short, the marital exclusion treats persons who are similarly situated for purposes of the law, differently.”

Finally, the court noted that the highest percentage of persons using assisted reproduction were married heterosexual couples who “cannot conceive children on their own,” yet the “State does not suggest that the use of these technologies undermined a married couple’s sense of parental responsibility, or fosters the perception that they are ‘mere surplusage’ to the conception and parenting of the child so conceived.”

The court then turned to the nature of the benefits that were being denied to same-gender couples because they cannot marry. The court noted that marriage was a state-created institution that had significant public benefits and protections, listing fifteen of these significant benefits. Consequently, because of these significant benefits, coupled with “the extreme logical disjunction” between limiting marriage to opposite-gender couples and the stated purposes of the statute, the Vermont Supreme Court held that limiting marriage to opposite-gender couples failed to meet the burden of being “grounded on public concerns of sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned.”

The state made several other arguments in opposition to opening civil marriage to same-gender couples. One argument was that the state had an interest in

190. Id. at 881.
192. Id.
193. Id. at 884.
maintaining heterosexual marriages so that child rearing was done in a setting that provided both male and female role modeling. Although the court conceded that it was conceivable that the legislature might “conclude that opposite-gender couples might offer some advantages in this area,” the state’s argument was fundamentally flawed. Because the Vermont legislature had recently enacted legislation to allow same-gender co-parent adoptions, it could be inferred that the Vermont legislature did not accept the argument that child rearing should take place in only opposite-gender households. As to the state’s argument that the legislature had an interest in maintaining uniformity with other jurisdictions, the court noted that Vermont was one of the few states that allowed first-cousin marriages and the fact that it was the only state that had specific legislation authorizing same-gender co-parent adoptions refuted the state’s argument that the legislature was acting with this interest in mind.

Finally, the state made the argument that “the long history of official intolerance of intimate same-sex relationships cannot be reconciled with an interpretation of Article 7 that would give state-sanctioned protection to individuals who commit to a permanent domestic relationship.” The court rejected this claim for two reasons. First, the court noted that “to the extent that state action historically has been motivated by an animus against a class, that history cannot provide a legitimate basis for unequal application of the law.” Second, the recent history of legislative action concerning homosexuals contradicted the state’s assertion. The Vermont legislature had enacted legislation decriminalizing same-gender sexual contact, providing anti-discrimination protections in employment, housing, and public services based on sexual orientation, establishing sexual orientation as a category protected against hate-motivated crimes, allowing same-gender co-parent adoptions and providing legal rights and protections for same-gender couples and their children if their domestic relationships broke down. Consequently, the court found that the state failed to provide reasonable and just bases for continuing to exclude same-gender couples and their children from the benefits that come from marriage.

194. Id. at 885.

195. Id.


197. “Accordingly, in the faith that a case beyond the imagining of the framers of our Constitution may, nevertheless, be safely anchored in the values that infused it, we find a constitutional obligation to extend to petitioners the common benefit, protection, and security that Vermont law provides opposite-sex married couples.” Baker, 744 A.2d 864, 886 (Vt. 1999), <http://www.state.vt.us/courts/98-032.txt>.
Having found that limiting the benefits of marriage to opposite-gender couples violated the Common Benefits Clause, the Vermont Supreme Court issued a ruling that the petitioners were entitled to obtain "the same benefits and protections afforded by Vermont law to married opposite-gender couples." As a result, the court instructed the Vermont legislature to enact legislation that achieved this goal, but the court left it to the legislators to determine how to accomplish this result—whether to open up civil marriage to same-gender couples or to create a parallel or equal institution, such as domestic partnerships or registered partnerships, which would provide the same benefits and protections as marriage. The court also retained jurisdiction over the case, to permit the legislature to consider and enact legislation consistent with the constitutional mandate issued in the case. If the legislature failed to provide the same benefits and protections to same-gender couples, however, the court stated that the petitioners could petition the court to order the remedy they had originally sought—a marriage license. The court concluded its decision with the following:

The extension of the Common Benefits Clause to acknowledge plaintiffs as Vermonters who seek nothing more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship is simply, when all is said and done, a recognition of our common humanity.198

One of the interesting features of the Vermont case was that the dissenting opinion199 had quite a different focus than the dissent in the Hawaii Supreme Court case of *Baehr v. Lewin* six years earlier. The dissenting justices in the Hawaii case disagreed that the marriage statutes were discriminatory. In the Vermont case, however, Justice Johnson, who concurred and dissented, agreed that the marriage statute was discriminatory, but she argued the marriage statute engaged in gender

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198. *Id.* at 889.

199. There were three opinions written in this case. In addition to the majority opinion, which accounted for three of the five Supreme Court justices, there was a concurring opinion by Justice Dooley and a third opinion by Justice Johnson, which both concurred in and dissented from the majority's judgment. Justice Dooley argued in his concurring opinion that the majority improperly restructured the legal analysis of the Common Benefits Clause by distancing that analysis from the analysis associated with the Fourteenth Amendment Equal Protection Clause of the U.S. Constitution. Justice Dooley intimated that, under the Fourteenth Amendment analysis, he might find homosexuality to be a suspect class, requiring the state to strictly scrutinize classifications based on sexual orientation. Justice Johnson concurred with the majority decision's finding of discrimination, but disagreed with the analysis used to reach that determination, preferring instead to classify the unequal treatment as gender discrimination. She also dissented from the remedy fashioned by the majority opinion, arguing that the appropriate remedy was the issuance of the marriage license.
discrimination. Consequently, she would have used the "heightened scrutiny" analysis, which the Vermont Supreme Court applied to gender classifications. Not only would Justice Johnson have found that the state failed to meet its burden under this intermediate standard of review, but she also contended that the state's asserted interests in maintaining heterosexual marriage failed under an analysis of the most lenient standard of review, the rational basis test. Most importantly, Justice Johnson became the first appellate judge in the United States who directly stated that the petitioners must be issued marriage licenses. She criticized the majority decision because it fell short of an appropriate remedy. According to Justice Johnson, the only acceptable remedy, once discrimination was present, was to order the issuance of the marriage license to the petitioners.

Based on the directive of the Vermont Supreme Court, in April of 2000, the Vermont legislature created the parallel institution of "civil unions" to provide same-gender couples equal benefits that are enjoyed by married heterosexual couples. Consequently, even though the Vermont Supreme Court found the marriage statute unconstitutional, the end result was not the opening of marriage to same-gender couples, but the creation of a parallel institution, similar to registered partnerships in the Netherlands. Questions remain, however, whether any legislation, other than opening civil marriage to same-gender couples, can create a truly equivalent institution to heterosexual marriage, and whether a "separate but equal" system can withstand future constitutional challenges. Arguments also have been made that because many rights and benefits are tied to the words "marriage," "married," or

200. According to Justice Johnson, when the state asserted that limiting marriage to opposite-gender couples was appropriate because it provided children with male and female role models, that assertion was "sex stereotyping of the most retrograde sort." Baker, 744 A.2d at 910 (Johnson J. concurring and dissenting). Justice Johnson stated that the state provided no legally valid rationale for the different treatment. "The justifications asserted by the state for the classification are tautological, wholly arbitrary, or based on impermissible assumptions about the roles of men and women." Id. at 911 (Johnson J. concurring and dissenting).

201. See <http://www.leg.state.vt.us/statutes/title15/CHAP023.HTM#01201>. For information on the implementation of civil unions in Vermont, see <http://www.leg.state.vt.us/baker/cureview.htm>.

202. The "separate but equal" position was found to be unconstitutional when applied to racial classifications in Brown v. Board of Education, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 108 (1955).
“spouse,” it is impossible to create a perfectly parallel institution that has a different name. 203

5. Challenging Prohibitions Against Marriages of Same-Gender Couples: An Analysis of the United States Case Law

There are several conclusions that can be drawn from an analysis of the United States cases in which petitioners challenge statutes that limit marriages to heterosexual couples. Initially, it appears that the outcome of the cases can be influenced by how the judges define the term marriage. If the judges define marriage as a legal institution into which only a man and a woman can enter, then the judges dismiss the petitioners’ challenge “because what they propose is not a marriage” 204 and “[a]ppellants were not denied a marriage license because of their sex; they were denied a marriage license because of the nature of marriage itself.” 205 However, other judges criticize this method of analysis, labeling the logic as tautological, circular, and unpersuasive. These judges argue that it is the very definition of marriage itself that is being challenged and define the marital relationship as a state-created and state-sanctioned status, contract, or legal institution, which confers benefits and rights to its parties. With this broad definition, it is more likely that the judges will find that denying marriage to same-gender couples is discriminatory.

This analysis can be repeated should the petitioners argue that they are being denied due process of the law, resulting from the violation of the right to privacy or a fundamental right. If the judges define that right narrowly by asking the question whether there is a fundamental right to a “same-gender marriage,” then the argument fails. However, if the judges define the right to marry broadly, such as the right to

203. For example, Section 1204(f) of the Vermont civil union legislation states that “The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.”<http://www.leg.state.vt.us/statutes/title15/CHAP023.HTM#O1201>. However, because proof of nonpaternity is sufficient to show that a woman’s husband is not the natural parent of the child, this parentage law can be used to overcome the presumption that the female partner of a woman who gives birth during a civil union is not the “natural parent” of that child. Consequently, attorneys are advising persons who have children during a civil union to go through the additional step of securing a co-parent adoption in order to protect the parental rights of the nonbiological parents, a step that spouses in a marriage are not required to take.


choose one's life partner or the right to receive the state-conferred benefits that flow from marriage, then it is more likely the judges will find a violation of this right.\footnote{206}

Another characteristic of these cases is that they are analyzed on differing theories of equal protection. Some of the judges view the claim as a gender discrimination claim, and, depending on the state constitution, determine whether gender is a suspect classification, requiring the highest level of review, strict scrutiny. Other judges view the claim as discrimination based on sexual orientation, which different judges have analyzed under each of the three levels of review—the lowest level of the rational basis test, the intermediate level of heightened scrutiny, or the highest level of strict scrutiny (by finding that homosexuality is an immutable characteristic). Even if some judges agree on the level of review, this does not mean there will be any agreement on whether the governments’ stated interests in maintaining marriage as a heterosexual institution will be analyzed in the same fashion. For example, some judges state that even if the marriage statute is subjected to strict scrutiny, the state nonetheless has met its burden of proving a compelling state interest, justifying the exclusion of same-gender couples from marriage, because of the link between marriage and procreation. On the other hand, other judges find that the state has failed to meet even the lowest standard of review because the state’s reasons for excluding same-gender couples bear no rational relation to the exclusion because the marriage statute is both under-inclusive and over-inclusive. These judges state that, even accepting the state’s rationalizations for excluding same-gender couples from marriage—i.e., that the marriage statutes promote procreation in the context of marriage, the reality is that same-gender couples and their children would, in fact, be benefitted if the couples could marry.\footnote{207}

Consequently, a review of the United States case law shows that same-gender petitioners seeking to marry have been successful in their arguments if the

\footnote{206. The justices on the United States Supreme Court seem to be in disagreement on whether a fundamental right should be narrowly or broadly defined. Compare, for example, the analysis between a narrowly defined due process right in Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986) (no fundamental right for homosexuals to engage in same-sex sodomy; a state could criminalize such conduct without violating the right to privacy under the Due Process Clause) to the more broadly defined notion of due process in Casey v. Planned Parenthood of Southeastern Pennsylvania, 505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992) (the Due Process Clause is not limited to protecting against government interference only those practices protected at the time the Fourteenth Amendment was ratified. “Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in Loving v. Virginia...” Id. at 847-48.)}

\footnote{207. Because of the diversity of these decisions, even when the judges are applying identical legal analyses yet reaching diametrically opposite results, one is left wondering if the only determining factor in these decisions is the individual judges’ level of comfort with, and understanding of, homosexuality.}
courts: 1) use an analysis based on the state constitutional provisions, rather than using federal constitutional analysis, 2) broadly define the right to marry, or view marriage as an institution that confers substantial benefits to individuals who enter this institution, and 3) recognize the existence of large numbers of children who are growing up in same-gender households, who would be benefitted if their parents could marry, thereby refuting the state’s argument that marriage must remain an exclusively heterosexual institution for purposes of procreation, and the protection and optimal development of children.

B. United States Legislation

1. Restricting the court decisions: The Legislative Backlash to Baehr v. Lewin

The United States legislation concerning marriages of same-gender couples began as a reactionary response to the Hawaii Supreme Court’s ruling in Baehr v. Lewin.209 With the ruling barely a year old, the Hawaii legislature passed a measure declaring that the state’s policy did not include marriages of same-gender couples.210 However, this statute was not binding since the Baehr decision was premised on constitutional issues.211 Consequently, the Hawaii Legislature passed a proposed constitutional amendment that delegated power to the legislature to restrict marriage only to members of the opposite gender.212 Hawaii citizens approved the amendment in the 1998 general election, with nearly seventy percent of the voters favoring the amendment.213 The same reaction occurred in Alaska, after the trial court’s ruling in Brause v. Bureau of Vital Statistics.214 Similar to the constitutional amendment in Hawaii, the Alaskan proposal passed by a two-to-one margin in the 1998 general election.215

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208. 852 P.2d 44 (Haw. 1993).
211. See id.
212. “The legislature shall have the power to reserve marriage to opposite-sex couples.” HAW. CONST. art. 1, § 23.
213. See Wetzstein, supra note 6.
215. See Lis Ruskin, Limit on Marriage Passes in Landslide, ANCHORAGE DAILY NEWS, Nov. 4, 1998, at 1A.
Many state legislatures passed bills amending the state marriage statutes, so that the statutes specifically limited marriages to opposite-gender couples. In addition, some states passed provisions that declared as void and unenforceable marriages of same-gender couples that were contracted outside of the state. Along with the state legislatures' passage of provisions against recognizing marriages of same-gender couples, the "Defense of Marriage Act" (hereinafter DOMA) was signed into law by President William Clinton, restricting the federal definition of marriage to members of the opposite gender and precluding married same-gender couples from federal economic funds. Even the more liberal state of California recently approved Proposition 22 on March 7, 2000. The measure, sponsored by Republican Senator Pete Knight, consists of a mere fourteen words: "Only marriage between a man and a woman is valid or recognized in California." Despite capturing the national spotlight and inciting a bitter state-wide fight in the weeks prior to the vote, Proposition 22 won by a margin of sixty-one to thirty-nine percent.

Consequently, the legislative activity in the United States has been aimed at restricting the application of the court decisions that have struck down, as unconstitutional, statutes limiting marriage to opposite-gender couples. This backlash has been so strong and emotionally-driven that, although no state has enacted legislation allowing same-gender marriages, thirty-five of the fifty state legislatures have passed "anticipatory" statutes, which refuse to recognize these marriages, should any state authorize them. Therefore, the success of same-gender

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216. See, e.g., Haw. Rev. Stat. § 572-1. "Requisites of valid marriage contract: In order to make valid the marriage contract, which shall be only between a man and a woman . . ." Id.


Same-sex marriages
(a) A marriage entered into by persons of the same sex, either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state.
(b) A same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage.

Id. See also Scott Fruehwald, Choice of Law and Same-Sex Marriage, 51 Fla. L. Rev. 799, 811 (1999).

218. 28 U.S.C. 1738(c).


220. See An Archive of the Moral Crusade and Religious Propaganda that was Proposition 22 in California, California Proposition 22; The Limit on Marriage Archive (visited Apr. 17, 2001) <http://www.prop22.org>.


couples in the U.S. courts has resulted in reactive legislation, preventing any of the court decisions from taking effect and limiting any favorable legislation in the future.

2. Providing limited rights: The enactment of domestic partnership legislation

While marriages of same-gender couples remain impermissible nationwide, "domestic partnership" ordinances have been adopted in recent years in many municipalities, counties and other governmental entities. Although "domestic partnership is not a legal substitute for marriage," the ordinances provide, for those who have registered as domestic partners, such incentives as group health insurance, family sick leave, bereavement leave, and hospital visitation rights. Today, over six hundred companies, educational institutions, municipalities, and states provide domestic partnership benefits. In addition, the State of Vermont enacted

Marriage between persons of the same sex is void and prohibited.

Ark. Code Ann. § 9-11-109 (1999) ("Validity of Same-Sex Marriages") (a) Marriage shall be only between a man and a woman. (b) A marriage between persons of the same sex is void.

Ga. Code Ann. § 19-3-3.1 (2000) ("Marriages between persons of same sex prohibited; marriages not recognized.") (a) It is declared to the public policy of this state to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state.

Ill. Comp. Stat. 5/213 (2000) ("Same-sex marriages: Public Policy") (A marriage between two individuals of the same sex is contrary to the public policy of this State.

Ind. Code § 31-11-1-1 (2000) ("Same sex marriages are prohibited.") (Sec. 1 (a) Only a female may marry a male. (b) A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it was solemnized.

Mich. Comp. Laws Ann. § 551.1 (2000) ("Marriage between same sex, invalidity") (Sec. 1 Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children. A marriage contracted between individuals of the same sex is invalid in this state.

Wash. Rev. Code Ann. § 19-3-3.1 (2000) ("Marriage contract - Void Marriages") (1) Marriage is a civil contract between a male and a female who have each attained the age of eighteen years, and who are otherwise capable.


225. Id. (citing L. Brill et al., Introductory Policy Analysis: Historical Background of the San Francisco Domestic Partnership Ordinance (1988)).

legislation in the spring of 2000 creating “civil unions,” an institution that grants exactly the same rights and benefits of marriage to same-gender couples who enter into them. However, even this legislation is suffering from a significant backlash. In November, 2000, some members of the Vermont legislature who voted in favor of the Civil Union Act found themselves voted out of office, being targeted by politically conservative citizens who disapproved of the legislature granting equivalent marital rights to same-gender couples. The fact that the Vermont Supreme Court mandated the legislation did not seem to matter to these Vermont voters.227 Current bills before the 2001 Vermont legislature include bills that would repeal the civil union legislation, would limit civil unions to Vermont residents only, would limit the definition of marriage to a man and a woman, and would allow persons who are legally authorized to perform marriages and civil unions to refuse to perform the ceremonies based on the principle of “freedom of conscience;” there is even a bill that would prohibit school employees from instructing counseling or advising a student that “homosexual or bisexual orientation is innate or unchangeable.”228

In addition, granting less than equivalent rights to same-gender couples through domestic partnership legislation has not had a significant impact. Although Hawaii Governor Ben Cayetano claimed the Hawaiian reciprocal benefits initiative as “a historic step forward,”229 the legislation has been criticized as ineffective and futile.230 In a state with a population of over 1.1 million, only 435 reciprocal beneficiary relationships were on file with the Hawaii Health Department as of October 1999.231 Moreover, the reciprocal beneficiaries plan in Hawaii includes other couples not permitted to marry, such as a son and a widow, and sisters.232 With state health insurance include: State of Delaware, State of Massachusetts, State of New York, State of Oregon, State of Vermont, Alameda County, Cal., Los Angeles County, Cal., Marin County, Cal., Santa Cruz County, Cal., San Mateo County, Cal., Hennepin County, Minn., Multnomah County, Ore., Travis County, Tex., King County, Wash., Tacoma County, Wash., Dane County, Wis., Laguna Beach, Cal., Oakland, Cal., Santa Cruz, Cal., San Diego, Cal., West Hollywood, Cal., Denver, Colo., West Palm Beach, Fla., Oak Park, Ill., Boston, Mass., Brookline, Mass., Santa Fe, N.Mex., Rochester, N.Y., Portland, Ore. Judy DeHaven, Domestic Partners Yeanr for More Political Rights, THE DETROIT NEWS, Nov. 13, 1995, at 1B. See also A. Mechele Dickerson, Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status, 67 FORDHAM L. REV. 69, 113 (1998).

231. Id.
232. Id.
and counties contributing only $56,000 to the fund for domestic partners benefits, which is based on the number of filings during the fiscal year of 1997-98, Hawaii Auditor Marion Higa admitted, "Privately run health-care organizations see little impact from the reciprocal beneficiaries law."\(^{233}\)

Despite the relative trivial import of domestic partnership packages,\(^{234}\) such measures have been created in some municipalities.\(^{235}\) But even in San Francisco, a city perceived as the most hospitable to homosexuals, it took a long, hard-fought, eight-year battle before domestic partnerships rights were granted to city employees.\(^{236}\) The conclusion that one draws from the legislative activity concerning opening marriage to same-gender couples is that it has been focused on overriding, or stopping, the court decisions that have determined that the marriage statutes are constitutionally discriminatory. Even when the legislators granted benefits to same-gender partners, it is either in reaction to a court decision, as in Hawaii and Vermont, or the enactments are the result of long-fought battles that take years before the domestic partnership benefits are enacted. It is not surprising then that, with the exception of the court-mandated rights granted in the civil union legislation in Vermont, domestic partnerships provide few benefits and are not parallel institutions to heterosexual marriages.

IV. COMPARISON AND ANALYSIS OF THE DUTCH AND UNITED STATES LEGAL HISTORIES ON OPENING CIVIL MARRIAGE TO SAME-GENDER COUPLES

\(^{233}\)Id.


\(^{236}\) In 1982, the Board of Supervisors of the City of San Francisco drafted a domestic partnership ordinance for city employees. The Board of Supervisors passed the legislation twice; however, then-Mayor Dianne Feinstein (now U.S. Senator for California) vetoed the measure, deeming the package "too costly to implement." Undaunted, the Board of Supervisors launched an initiative extending benefits to domestic partners in 1988. The 1988 proposal focused not only on same-gender partners, but included extended family members, such as siblings and blood relatives. The domestic partnership referendum was placed on the 1989 ballot and, despite receiving support from the Human Rights Commission, lost by a one-percent margin. In 1990, some eight years after the inception of the domestic partnership legislation, Proposition K, which was aimed at those involved in an "intimate committed relationship," passed by a 10 percent edge, 55 percent to 45 percent. See Hunter, *supra* note 223, at 566-568.
It is interesting that, in both the United States and the Dutch case law, the issues argued and decided are almost identical. The first issue in these cases generally involved statutory interpretation questions, because the term "marriage" was not defined as being limited to opposite-gender couples in the Netherlands Civil Code, similar to many of the U.S. state statutes that were challenged in the court. Consequently, the first issue in both countries' case law was whether same-gender couples can marry because no specific statutory language prohibited such a marriage.

The second issue involved a request to strike down any statutory interpretation that would limit marriage to opposite-gender couples, based on arguments that rely on higher legal authorities, such as violations of treaty provisions in the Dutch cases or, in the United States cases, arguments based on violations of principles of constitutional law. Although the case law in both countries has these similarities, the Dutch courts refused to find there was unlawful discrimination in limiting marriage to opposite-gender couples, whereas at least three United States courts issued rulings that found the marriage statutes were impermissibly discriminatory.

In contrast, though, not only has the Netherlands enacted comprehensive registered partnership legislation that is almost identical to heterosexual marriage, but recently the Dutch Parliament changed the legal definition of marriage to include same-gender couples, making Netherlands the first country in the world to allow same-gender couples to marry.

Conversely, in the U.S. two of the three states where the courts found the marriage statutes were discriminatory, the state legislatures and citizens overrode the decisions by enacting constitutional amendments, limiting marriage to a man and a woman. Legislation of the same nature is pending in the third jurisdiction, Vermont, which enacted a parallel institution, civil unions, pursuant to the state supreme court decision that denying comparable rights of marriage to same-gender couples violated the state constitution. A majority of other state legislatures also have amended their states' marriage statutes, specifically limiting marriage to heterosexual couples. In addition, the United States Congress and numerous states have enacted legislation that refuses legal recognition to marriages of same-gender couples.

Consequently, it appears there is a striking contrast in these two countries' legal histories concerning opening marriage to same-gender couples. The Dutch have been conservative in their courts, but liberal in their legislative process, whereas in the United States, several courts have found that limiting marriage to opposite-gender couples is impermissible discrimination, but Congress and state legislatures or citizens have reacted by passing legislation that limits marriage to opposite-gender couples and refuses to recognize marriages of same-gender couples that are validly contracted in other jurisdictions. There are, however, logical explanations for these contrasting developments.
A. Differences in Legal Systems

One of the more obvious explanations for the different outcomes in the United States and Dutch courts is the difference in their legal systems. Early in the history of the United States, the Supreme Court ruled that the judiciary had the power to review legislative enactments that litigants claimed were in violation of the country's written constitution. This power of the courts, known as the power of judicial review, resulted in the courts having the ability to invalidate legislation if the court found it violated constitutional provisions. Consequently, the courts that found the marriage statutes were discriminatory did so under the courts' power of judicial review, finding that restricting marriage to opposite-gender couples violated state constitutional provisions dealing with the right to privacy, equal protection of the laws, or the guarantee of common benefits to the citizenry.

The Dutch courts, however, do not have the authority to strike down legislation by finding that parliamentary enactments violate provisions in the Netherlands Constitution. The role of the courts is limited to applying the legislation as enacted by Parliament, not reviewing it and striking it down. And although Dutch courts have the authority to strike down national laws that violate provisions of international treaties, the Dutch courts are constrained to follow the precedent of the international courts, which are superior courts established under the treaty provisions. The Dutch courts cannot give a broader meaning to the treaty language if doing so contravenes the holdings of the international courts. Consequently, the decisions in the Dutch same-gender marriage cases are not surprising, when the courts defer to the Parliament on the issue of opening marriage to same-gender couples and state that any change in the law must come from the legislative branch of the government.

B. Differences in the Social Status of Homosexuals

The differences in the legislative responses in the Netherlands and the United States may also be easily explained by the social status of homosexuals within the two countries. The Netherlands has been far more liberal in recognizing and protecting the rights of lesbians and gay men. The Netherlands has had a sequence of events, which have been identified by Kees Waaldijk of Leiden University, that steadily moves a country toward full recognition and equalization of rights between heterosexual and homosexual persons. According to Waaldijk:

237. See Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803).
238. Art. 93, 94 Gw.
The law in most countries seems to be moving in a line starting at (0) total ban on homo-sex, then going through the process of (1) the decriminalisation of sex between adults, followed by (2) the equalisation of ages of consent, (3) the introduction of anti-discrimination legislation, and (4) the introduction of legal partnership. A fifth point on the line might be the legal recognition of homosexual parenthood. 239

The first step in this sequence started as early as 1810, when the Netherlands was occupied by France, resulting in the imposition of the French Criminal Code, which decriminalized same-gender sexual conduct. 240 The Dutch also have a tradition of tolerance and seeking pragmatic solutions to social problems. This tradition has resulted in legalized, though regulated prostitution, freely accessible means of birth control, and liberal abortion policies. This tradition was evident in 1971, e.g., when the Dutch Parliament proceeded to the second step in Waaldijk's sequence, adopting legislation making the legal age of consent for sexual contact the same for heterosexuals and homosexuals. 241 The third step in the sequence can be identified in 1983, when an amendment to the Netherlands Constitution included a general nondiscrimination clause, which has been interpreted to include a prohibition against discrimination based on sexual orientation. 242 Then, in 1992, discrimination based on sexual orientation became a criminal offense in the Netherlands. 243 In 1998, the Dutch Parliament established a system of registered partnerships, and, unlike other European countries that had opened limited registered partnerships only to same-gender couples, Dutch registered partnership became open to same-gender and opposite-gender couples equally. The final steps in the sequence occurred in 2000, when the Dutch Parliament enacted legislation opening civil marriage to same-gender couples and allowing same-gender couples to adopt children together.

In contrast, the public opinion in the United States continues to be divided over homosexuality. 244 Perhaps part of the conflict over granting rights to

240. Art. 245 Sr.
241. Art. 245 Sr juncto art. 1 e.v. AWGB.
242. Art. 1 Gw.
243. Art. 137c and 137e, Sr.
244. See Alan S. Yang, From Wrongs to Rights (New York: The Policy Institute of the National Gay and Lesbian Task Force in New York, 1999), at 21. (In 1996, a Gallup Poll showed that 50 percent of United States citizens in the poll agreed that homosexuality "should be considered an acceptable alternative lifestyle ..."; Ruth Padawer, 30 Years After Stonewall, Gays Still Seeking Key Rights, THE RECORD (Bergren County, N.J.), June 27, 1999, at 1).
245. ("Asked by Gallup whether marriage between gays should be recognized as legally equal to traditional marriage, 35 percent of United States citizens in the poll said yes ..."; Joan Biskupic, For Gays, Tolerance Translates to Rights: Legal Gains
homosexual individuals in the United States can be attributed to the fact that many states have yet to take the first step in the sequence of events that leads to the legal recognition of homosexuals discussed above. In several states, not only is consensual same-gender sexual contact between adults still a crime, but several states also outlaw heterosexual sodomy. Consequently, as long as homosexual sexual activity remains criminal, when there is any attempt to expand the rights of homosexual individuals, particularly an attempt in the form of proposed legislation, it is met with the argument by conservative legislators that homosexuals are criminals and, therefore, should not be granted any legal protections.

In addition, politically conservative and fundamental-religious lobbying groups have discovered that the average United States citizen's fear of homosexuality and the lack of education about homosexuality are useful tactics in advancing the

\[\text{Reflect Shift in Attitudes, THE WASHINGTON POST, Nov. 5, 1999, at A1 (A Washington Post/Kaiser Family Foundation/Harvard University survey found that 57 percent of its respondents said homosexuality was unacceptable.); Don Feder, GOP Candor in Closet as Gay Issues Arise, THE BOSTON HERALD, Jan. 17, 2000, at 21 ("Opinion surveys show two-thirds think we've gone too far on gay rights (NEWSWEEK), a two-to-one margin opposes gay adoption (Gallup) and 46 percent believe the Boy Scouts have a right to exclude homosexual leaders (Wirthlin)"); Dave Moniz, Military Adjusts to "Don't Ask, Don't Tell," THE CHRISTIAN SCIENCE MONITOR, July 13, 1999, at 2 (A poll conducted by Yankelovich Partners Inc. found that in 1998, 37 percent of United States citizens surveyed in the poll didn't want homosexuals as friends).} \]


conservative political agenda. For example, it is interesting to note that, in the 2000 presidential campaign, all of the initial Republican candidates not only opposed opening marriage to same-gender couples, but disapproved of homosexuals adopting children, serving as foster-care parents, and either agreed with the “don’t ask, don’t tell” ban against open gays serving in the U.S. military, or would have authorized a complete ban against gays serving in the military. During his presidential campaign, President George W. Bush made contradictory statements about whether he would hire or appoint homosexuals in his administration and he supported a Texas bill that would prohibit lesbians and gay men from adopting children. Consequently, in the state legislative arena, where legislators are likely to have uninformed opinions of homosexuals, one finds there can be a strong anti-gay backlash, based on fear and stereotypical beliefs about homosexuality.

On the other hand, the state courts that have found it impermissible discrimination to limit marriage to opposite-gender couples have done so after an extensive fact-finding hearing. These judges were presented with studies on


> [t]hese perverted homosexuals . . . absolutely hate everything that you and I and most decent, God-fearing citizens stand for . . . Make no mistake. These deviants seek no less than total control and influence in society, politics, and our schools and in our exercise of free speech and religious freedom . . . If we do not act now, homosexuals will own America. *Id.*

> “Shrill condemnations of gay people have been a standard Religious Right tactic for years . . . but lately the Religious Right’s attacks on gays and lesbians seem to have increased in both frequency and severity.” *Id.* “Leaders of the Christian Reconstructionists movement, which advocates imposing Old Testament’s legal code on the United States, argue that homosexual acts should merit the death penalty.” *Id.*

> “According to Religious Right dogma, homosexuality is a matter of personal choice, not biological destiny.” *Id.* Pat Robertson, founder and president of the Christian Coalition . . . called homosexuality “a pathology.” “It is a sickness, and it needs to be treated . . . Many of those people involved with Adolf Hitler were Satanists, many of them were homosexuals. The two things seem to go together.” *Id.*

248. “The Netherlands’ military has an education program to foster tolerance and understanding for gay and lesbian soldiers, whereas the United States is among four countries in the North Atlantic Treaty Alliance (Greece, Turkey, and Britain the others) which still bans homosexuals in the military.” Staff writer, *No title*, THE DES MOINES REGISTER, Jan. 28, 1993, at 4.


251. Another difference between the United States legislative process and the Dutch parliamentary process is that in the Netherlands, bills are drafted by the government, which employs professionals. In the United States, any member of the legislature can introduce a bill and these individuals are not professional politicians, but part-time legislators, who come from ordinary walks of life, some of them with very parochial views and who are elected on one or two narrow issues.
homosexuality in general, but more importantly, studies concerning children being raised by same-gender couples. This research not only refutes the stereotypical images of homosexuals, but the studies actually support the position that allowing same-gender couples to marry would protect and benefit these couples and their children. This explains why it is the courts that are finding in favor of the petitioners’ claims of discrimination, while state legislatures concurrently are passing anti-gay legislation based on stereotypes and fears of homosexuality. It also is significant to note that Vermont, the state in which its Supreme Court recently found that limiting marriage to opposite-gender couples violates the Vermont constitution, had, in fact, followed the sequence of events that leads toward full recognition and equalization of rights between heterosexual and homosexual persons, up to and including the right of homosexual parenthood by adopting legislation authorizing same-gender co-parent adoptions.

One other consideration is that the U.S. courts, through the power of judicial review, have a history of protecting the rights of unpopular minorities from discriminatory legislation enacted by democratically elected legislators, who harbor the majority’s animus toward that minority group. It was the courts in the United States that challenged discrimination against racial minorities by dismantling segregation, so it seems appropriate that the courts would be the first institutions in the United States to question laws that deny important social benefits to individuals

252. Recently, at the Society for Research and Development on Child Development, papers were presented on studies of children in lesbian and non-lesbian homes. The studies were done in the United States, Britain, and the Netherlands. The findings showed there were no significant differences except in one aspect: “... 90 percent of the lesbian coparents took an active role in raising the children, while only about 37 percent of the heterosexual fathers did the same.” Garry Cooper, Network Briefs, FAM. THERAPY NETWORKER, July/Aug. 1997, at 15. Another study in the state of Minnesota found that “[i]n general, gay/lesbian families tended to score most consistently as the healthiest and strongest of the family structures...” with married couples and their families scoring a strong second place for the healthiest and strongest family structure. The least strong family structures in the Minnesota study were cohabiting unmarried heterosexual couples, especially when there were children present in the home. The researchers hypothesized as follows:

The strength of the gay/lesbian families is striking, particularly in contrast to those heterosexual couples who are cohabiting. While neither group is legally married, their results in terms of family strength are at opposite ends of the spectrum. Perhaps same-sex couples, in their struggle to adapt in a relatively hostile culture, have developed certain strengths—better communication skills or support systems, for example.


253. See Waaldijk, Standard Sequences, supra note 196.

254. However, the Vermont legislature is currently considering legislation to rescind the civil union act. See supra text at note 227.
who have a history of being treated poorly, in a persistent and irrational manner, by the dominant culture.

In the Netherlands, however, public opinion polls about homosexuality show that the majority of Dutch citizens believe in recognizing and protecting the rights of sexual minorities. Specifically on the issue of opening civil marriage to same-gender couples, a poll conducted in 1996 found that fifty-two percent of those polled agreed that same-gender couples should be allowed to marry and have the same rights and obligations as married heterosexual couples. In contrast, the constitutional amendments in Hawaii and Alaska, which limited marriage to heterosexual couples, were passed by seventy percent of the voters and, in California, a fairly liberal state, fifty-eight percent of the voters approved a 1999 voter initiative that denies any legal recognition of marriages between same-gender couples that might be contracted elsewhere. In the Dutch poll cited above, by contrast, thirty-five percent of persons over fifty-five—the most conservative individuals interviewed—agreed that same-gender couples should be allowed to marry. This percentage is still larger than the percentage of voters in Hawaii and Alaska—approximately thirty percent—who voted against limiting marriage to heterosexual couples. Therefore, because of these radically different social positions on the rights of homosexuals, it is not surprising that legislation in the Netherlands has added same-gender couples to the legal definition of marriage, while many U.S. state legislatures are introducing bills restricting marriage to opposite-gender couples and preventing the recognition of any marriages of same-gender couples that might have been contracted in other jurisdictions.

C. Differences in the Legal Status of Non-marital cohabitation

Another difference between the Netherlands and the United States is that many of the social legislation benefits in the United States have been connected to marital status, whereas the Dutch social legislation is much more "individualized." Dutch social legislation also is more comprehensive as regards the benefits the government provides to its citizens, including health care provided on an

255. For example, as early as 1990, opinion polls of the Social and Cultural Planning Office suggested that 95 percent of the Dutch population believed that one should let homosexuals be as free as possible to live the way they choose. The same poll suggested that 89 percent believed that homosexuals should have the same housing rights as married couples, 93 percent believed that they should have the same inheritance rights, and 47 percent that they should have the same adoption rights; *Sociaal en Cultureel Rapport 1992* (Rijswijk: Sociaal en Cultureel Planbureau, 1992), p. 465.

individualized basis. In addition, many of the Dutch laws dealing with social security, rent protection, income tax, and obtaining residence permits no longer make a distinction between married or unmarried cohabitants.

In contrast, there is no widespread acceptance and protection of nonmarital heterosexual cohabitants in the United States. It appears that these more conservative views on non-marital sex have a significant impact on the benefits that social legislation confers on United States citizens, homosexual and heterosexual alike. Therefore, it is not surprising that the public opinion in the United States is predominantly opposed to granting marital benefits to same-gender couples, because these benefits are not granted to opposite-gender unmarried couples.

V. CONCLUSION

At first glance, the legal developments in the Netherlands and the United States concerning opening civil marriage to same-gender couples appear to have many striking contrasts. Within each country, the judicial and legislative branches have taken different, and sometimes opposing, positions on opening marriage to same-gender couples. There also are contrasts between the two countries. Although the judiciary in the Netherlands refused a request for a marriage license by a same-gender couple, the judiciary in some of the states in the United States has struck down, as unconstitutional, marriage statutes that limit marriage, and the considerable benefits that come with marriage, to opposite-gender couples only. On the other hand, Congress and state legislatures have made significant attempts to block the action by the judiciary, while the Dutch legislature recently enacted legislation allowing same-gender persons to marry one another. A closer examination of these two countries’ legal systems and social attitudes, however, provides a better understanding of why different routes have been taken toward the same destination—opening civil marriage to same-gender couples.

257. In the United States, there is no government program for nationalized health care; instead, many persons have health care insurance through their employers. This fact might account for numerous United States companies and government entities adopting "domestic partnership" policies for their employees, extending health insurance coverage and other employee benefits to nonmarital cohabitants, equal to the benefits provided to married employees and their spouses.

258. KEES WAALDUK, TOWARDS FULL EQUALITY IN DUTCH LAW FOR SAME-SEX PARTNERS AND THEIR CHILDREN, COC INFORMATION BROCHURE 6 (Amsterdam: Dutch Association for the Integration of Homosexuality - COC, 1998).