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Domestic Partnerships and Same-Sex Marriage

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Chapter 4

Domestic Partnerships and Same-Sex Marriage

Family law continues to evolve rapidly. Past orthodoxies become unsustainable, while new norms and values are ushered in.

John Murphy, *The Recognition of Same-Sex Families in Britain: The Role of Private International Law*,
16 Int'l J. L. Pol. & Fam. 181, 185 (2002)

Perhaps nowhere in family law is this evolution more dramatic than in the burgeoning recognition of rights of same-sex couples. Within the past twenty years courts, legislatures, and international bodies have addressed the extent to which rights and obligations formerly reserved to heterosexual married spouses should be conferred on other partners.

Most western democracies now recognize same-sex unions, assuring the partners in such unions a range of rights and benefits, similar to but distinct from the rights and benefits enjoyed by married couples. Part A of this Chapter describes the legal mechanisms which recognize and protect same-sex unions, some of which are also open to heterosexual couples. Part B focuses on the still-small minority of states that have opened civil marriage to same-sex couples. Part C considers the growing reliance on human rights instruments to expand the rights of same-sex couples, and the promulgation of new instruments, including the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

A. Domestic Partnerships

Kelly Kollman,
Same-Sex Unions: The Globalization of an Idea

51 Int'l Stud. Q. 329, 329 (2007)

With the adoption of its registered partnership law in 1989, Denmark became the first country to implement a national same-sex unions (SSU) law. In the decade and a half that have followed, 15 additional West European countries have adopted similar legislation, eight of them in the past 5 years. In 2003, Jean Chrétien's government in Canada became one of the first non-European governments to propose an SSU law at the national level and in 2005 Canada became one of only five countries to allow gay and lesbian couples to marry. By the beginning of 2006, the only major western democracies without such laws in place were the United States, Italy, Greece, and Ireland.

Most states which afford same-gender couples the opportunity to formalize their relationships legally have opted to create an alternative status that coexists with the institution of marriage. As noted above, Denmark became the first nation to follow this route when it enacted registered partnership legislation. It was soon joined by other Nordic countries—Norway (1993), Sweden (1994), Greenland (1994), and Iceland (1995)—whose legislation mirrored Denmark's.

Registered partnerships in these Nordic countries are open only to same-gender couples. The legislation explicitly guarantees that, with a few delineated exceptions, registered partners will have all of the same rights under law as married couples. Thus, the registered partnership creates mutual obligations of support, inheritance rights, insurance benefits, and the other economic and legal rights, between the partners themselves and in relation to third parties, that accompany marital status. The substantive exceptions in the original legislation all relate to parental rights. Denmark and Sweden, for example, restricted the ability of partners to have joint custody, and Iceland and Sweden restricted access to artificial insemination. Originally, all of these countries withheld the right to adopt, although subsequently Denmark, Sweden, and Iceland lifted or partially lifted those restrictions as described above in Note 3. See Martin DuPuis, *The Impact of Culture, Society, and History on the Legal Process: An Analysis of the Legal Status of Same-Sex Relationships in the United States and Denmark*, 9 Intl J. L. & Fam. 86, 104–05 (1995); Denmark's Registered Partnership Act, Iceland's Registered Partnership Act, Norway's Act on Registered Partnerships for Homosexual Couples, and Sweden's Registered Partnership Act, <http://users.cybercity.dk/~dco12530/s2.htm> (translated texts of all).

Many of the restrictions to marriage, such as age, consanguinity, and bigamy prohibitions, also apply to registered partnerships in these countries, and each of these nations requires that at least one partner be a citizen of the nation and domiciled therein. Solemnization requirements for registered partnerships, however, are not identical to marriage, and vary by country. In Denmark, for example, “[r]egistered partners do not have a right to a Danish church wedding,” nor do they have a right by law to mediation performed by clergy. DuPuis, *supra*, at 104–05, citing Act No. 821, 19 Dec. 1989. Registered partnerships in these countries are also dissolved under the same circumstances as marriages.

More recently, Germany and Finland have enacted registered partnership legislation, also limiting entry to same-gender couples. Germany's legislative scheme, the Registered Partnership Act of 2001, *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften Lebenspartnerschaften*, 2001 BGBI. I S. 266, is of particular interest, as it deviates from the Nordic model in several respects.

Rather than grant all of the rights of marriage, with specified parental exceptions, the German legislature instead enumerated the rights and obligations that registered partnership would entail. While extensive, they deviate from the rules governing marriage in some significant respects. Registered partners commit to provide each other with appropriate financial support during the relationship, and to joint entitlement and obligations arising from contracts entered by one partner, just as in marriage. Unlike marital spouses, however, partners must declare which system of property will be applicable to their partnership—a regime of accrued gains (which secures a share of property acquired for the homemaker partner), a contract that modifies the accrued gains regime, separation of property, or communal property—at the time they establish the partnership. Registered partners have the same rights of inheritance as marital spouses, and a right to become tenant of a joint residence after the death of a partner, but do not have equal tax status in

terms of inheritance tax or other tax benefits. Registered partners are accorded testimonial and immigration privileges similar to marital spouses, and one partner may acquire the right, with the consent of the other partner, to participate in day-to-day decisions regarding the partner's child. Joint adoption, or adoption of a partner's child, is not permitted, however, nor is artificial insemination of one of the partners. If one partner does live with the biological or adopted child of the other partner over an extended period of time, the former individual has a right of access following dissolution, but would not have a right to custody. Nina Dethloff, *The Registered Partnership Act of 2001*, in *The International Survey of Family Law 171*, 174–78 (Andrew Bainham ed., 2002); Steven Ross Levitt, *New Legislation in Germany Concerning Same-Sex Unions*, 7 *ILSA J. Int'l & Comp. L.* 469, 482–88 (2001).

As in marriage, dissolution of a German registered partnership requires a court decree. The grounds for dissolution of a registered partnership, however, differ in some respects from the grounds for dissolution of marriage. Dissolution of a registered partnership is permitted (1) by agreement, 12 months after the parties file a declaration of their desire for a dissolution; (2) at the request of one partner, 36 months after that partner's declaration has been filed; or (3) on the basis of unacceptable hardship to the partner who files, for reasons related to the other partner. Unlike dissolution of a marriage, there is no irrefutable presumption based upon breakdown and separation for a specific period. Thus, registered partners will frequently have to wait longer for the decree, because partners must declare their intent at the beginning of the statutory period, whereas marital spouses may choose to file toward the end of a separation period, and separation of spouses can be deemed to include periods in which both were physically living in the same home. Dethloff, *supra*, at 179.

German registered partnerships may, under some circumstances, create an obligation to provide post-dissolution maintenance to a former partner who cannot support himself or herself, due to age or disability. Unlike the situation following dissolution of a marriage, however, the court is directed by the legislation to look first to relatives of the financially vulnerable partner to provide support, and only if support cannot be obtained from such relatives would the obligation for post-dissolution maintenance be imposed upon an ex-partner. Levitt, *supra*, at 483.

On 12 October 2004, the Life Partnership Law (Revision) Act was passed by the Bundestag, increasing the rights of registered same-sex partners to include, among other things, the possibility of second parent adoption, pension rights for workers and employees (not for federal civil servants), and simpler alimony and divorce rules. This law, however, still excludes the same tax benefits that are available to married different-sex partners. Registered partners do not have full adoption rights.

German law allows registered partners to change their last names; joint custody over child for whom one partner already has custody and allows partners to adopt each other's children; grants recognition of next-of-kin rights; joint eligibility for some social security benefits; survivor's pension right; similar rights in the field of tenancy; and immigration concessions and working permission for a foreign partner.

Notes and Questions

1. *Constitutional and Political Constraints.* Several unique constitutional and political factors contributed to the different model for registered partnership ultimately fashioned by the German legislature. One important constraint was the risk that the new legislation would be determined unconstitutional by the Federal Constitutional Court.

Article 6 of the German Constitution explicitly provides special protection for the institutions of marriage and the family, both by protecting the institutions from state intervention and by imposing a positive duty upon the state to support them. Ilona Ostner, *Cohabitation in Germany—Rules, Reality and Public Discourses*, 15 Int'l J.L. Pol. & Fam. 88, 99 (2001). Review of legislation by the Federal Constitutional Court does not necessitate the same kind of standing requirements the U.S. Supreme Court would demand. Instead, an abstract review can be initiated by complaint of any of the sixteen state governments asserting that the challenged law violates constitutional principles. Sensing the likelihood that opponents of the legislation would challenge the legislation under Article 6, drafters steered away from the use of the word “marriage,” as well as from consideration of an alternative status for both opposite-sex and same-sex partners that might compete with marriage. Though the bill’s drafters desired to provide as many rights as possible, legislative history reveals their concern that the partnership be perceived as a new institution, without all of the rights and indicia of marriage, so that it would not be regarded as a rival or an affront to the legitimacy of traditional marriage that might be found to violate the government’s constitutional duty to protect marriage and family life. Levitt, *supra*, at 478–79, 488–89. *See also* Ostner, *supra*, at 99.

The drafters’ calculations proved to be successful. In an action challenging the constitutionality of the German domestic partnership legislation, brought by Bavaria and two other states, the Federal Constitutional Court voted 5–3 to uphold the law’s constitutionality. *German Court Oks Gay Marriage*, July 17, 2002, at <http://www.nytimes.com/aponline/international/AP-Germany-Gay-Couples.html>.

Another set of constraints was imposed by Germany’s federal system. A bill regarded as affecting the rights or interests of the states requires a simple majority of votes in both the Bundestag, the lower house, and the Bundesrat, the upper house in which legislators are chosen by the state governments and each state’s representatives must vote as a block. Legislation regarded as within the competency of the federal government can, under certain circumstances, become law without approval of the majority in the upper house. When it became apparent that the registered partnership legislation did not have sufficient votes in the Bundesrat, the legislation was split into two bills, separating out the matters within the competency of the federal government, which was the portion that ultimately was put into effect. Those matters regarded as impacting state governments, such as the tax benefits, were separated into a second bill, which was ultimately defeated. Levitt, *supra*, at 479–81, 488.

2. *Should Role Assumptions Impact Creditors’ Rights?* German law professor Nina Dethloff questions whether imposing contractual liability on both partners for purchases made by one partner during the relationship for food, clothing, furniture, or a vehicle is creating a windfall for the creditor. She argues that insufficient data is available regarding the role assumption of same-gender partners, but postulates that differentiated division of tasks is rarer because few children are raised in German same-gender relationships. If so, she suggests that this creditor protection is unnecessary, as the principal function of joint liability is to enable a homemaker partner to make purchases for the couple independently. Dethloff, *supra*, at 175.

Does it make more sense, when fashioning an alternative status, to scrutinize each legal effect of opposite-gender marriage to determine if it is reasonably applied to same-gender couples, or rather to take a broader approach, establishing rights and obligations equivalent to marriage across the board?

If you believe scrutinizing individual rights and obligations is more appropriate, do you think Dethloff's assumption that differentiated division of tasks is far less frequent among same-gender couples would be accurate in the United States? Absent valid socio-economic studies, which Dethloff recognizes are not available, should legislatures justify differences in rights and obligations based on their individual perceptions regarding differences in role differentiation?

France introduced a very different model for an alternative status when its Pacte Civil de Solidarité (PACS), Loi no. 99-994, entered into effect in November 1999.

First, the status is open to opposite-sex as well as same-sex cohabitants.

Second, the law requires that the couple enter a cohabitation contract, the PACS, in which they set forth the terms and conditions that they wish to regulate their common life. It is the PACS, rather than the relationship, which is technically registered. Property issues regulated by private law, such as ownership of property and financial commitments towards each other, during and after the relationship, can be stipulated by the parties, subject to any restrictions the general law imposes. Alternatively, the partners may choose not to address some or all specific issues and declare that general law will regulate the PACS. In such cases, property acquired after the PACS is registered will be presumed to be owned by the partners in equal shares, unless a purchase deed specifies otherwise. Anne Barlow & Rebecca Probert, *Le PACS est arrivé—France Embraces Its New Style Family*, 2000 Int'l Fam. L. 182, 182.

A third important difference is the fact that some of the public benefits bestowed upon the couple after registration of a PACS are phased in based on the length of the relationship or birth of a child. For example, after two years PACS partners may leave an increased portion of their estate to the other partner without tax, and after three years PACS couples will be taxed as married couples. On the other hand, PACS partners can immediately take advantage of their partner's health insurance and social security contributions. *Id.* Entry into a PACS permits certain employment and immigration benefits as well. Adoption and custody are not addressed in the French PACS legislation. Collectif PACS et Caetera, http://perso.club-internet.fr/ccucs/frames/e_une.html.

Like the German registered partnership, not every feature of the PACS is equivalent to marriage. For example, partners owe each other "mutual and material assistance," which is considered a lower standard than the "help and assistance" duty imposed on married partners. Also like the German statute, the PACS law specifically sets forth enumerated rights and obligations, including the joint and several liability of each for debts incurred by either partner for household expenses. Upon desertion or death of one partner, the other is entitled to the tenancy of the partners' home, *id.*, but apart from tenancies, there are no succession rights. Claude Martin & Irène Théry, *The PACS and Marriage and Cohabitation in France*, 15 Int'l J. L. Pol. & Fam. 135, 150–51 (2001).

Registration of the PACS requires the attendance of both partners at the local courthouse, where the declaration of their agreement is recorded. The court must be notified of any subsequent amendments to its terms. The parties may terminate a PACS immediately upon their mutual agreement, or upon marriage to each other or the marriage of one to another individual. It can also be terminated by one partner unilaterally three months after notice is given to the other party and the court. Unless the parties marry each other, dissolution of the relationship requires that property be divided according to the terms of the PACS, and the role of the court is to resolve any disputes that might arise concerning these terms or their implementation, or to determine the financial consequences

regarding those issues the PACS does not address. *Id.* at 182–83. See also website of Collectif PACS et Caetera, *supra*.

Notes and Questions

1. *Constitutionality.* France's PACS legislation was also the subject of constitutional challenge, and was upheld by the Conseil Constitutionnel, subject to certain *réserves d'interprétation*. The Court held that the legislation is constitutional only if the parties are required to “live as a couple” and not simply as persons sharing a household; and that PACS partners not be permitted to opt out of the obligation of mutual assistance, and may be held liable to a partner if one breaks the relationship. Eva Steiner, *The Spirit of the New French Registered Partnership Law—Promoting Autonomy and Pluralism or Weakening Marriage*, 12 Child & Fam. L.Q. 1, 4 (2000), citing Decision 99-419 DC of 9 November 1999.

2. *Demographic Changes.* The PACS legislation was a response not only to the need of same-gender couples for equality, but also to the changes that had occurred in French society over the last few decades. Between 1980 and 1997, the annual rate of marriages celebrated in France dropped from 334,000 in 1980 to 284,000 in 1997; the annual percentage of children born out of wedlock rose from 11.4% in 1980 to 40% in 1997, and by 1999 one in three couples between the ages of 25 and 39 were cohabiting. Steiner, *supra*, at 3, n.12 and accompanying text.

3. *Participation.* During the first four and one-half months in which the PACS legislation was in effect, almost 14,000 PACS were registered. During the first two years of the Dutch Registered Partnership Act, by comparison, only 2,822 Dutch couples registered. Barlow, *supra*, at 183. No confirmed statistics regarding the gender of PACS partners are available, as the registering tribunals are forbidden to release this information. Martin, *supra*, at 151. However, a media survey of court clerks indicates that the majority of couples registering PACS are heterosexual. Barlow, *supra*, at 183. Does your knowledge of French divorce law from Chapter 3 possibly shed some light on the popularity of PACS in France?

4. *Uncertainty.* French academics Claude Martin and Irène Théry describe the PACS legislation as transitory law, observing that its “intermediate status, neither a union nor a contract, neither private nor public, expresses the ambiguity of the *French way* of responding to increasing cohabitation.” Martin, *supra*, at 135. They suggest that no consensus exists among French academics regarding the appropriate approach to the needs of same-gender couples and other cohabitants. *Id.* at 135, 151. See also Steiner, *supra*, at 10 (observing that in contrast to U.S. and U.K. academics, the bulk of French academics have criticized same-gender marriages). Martin and Théry suggest that the diverse academic reactions reflect in part a broader public debate, noting that no consensus exists in France as yet about the changes in family and private life in general. Historically a dichotomy has existed in France between conservatives, influenced by Catholicism, promoting a traditional family model, and progressives and socialists who, from the time of the French revolution, emphasized individual liberty, secularism, and equality. These historical tensions influenced the dramatic swings in divorce reform over the past two and a half centuries in France, as we saw in Chapter 3, and are also reflected in the new effort to define family, but have become increasingly complex with the pluralization of family forms that has occurred during the past two decades.

5. *Alternative Status in Other Nations.* As in France, legislation in Belgium, the Netherlands, several provinces in Spain, and the Canadian province of Nova Scotia have cre-

ated domestic partnerships that are open to both opposite-gender and same-gender couples. Levitt, *supra*, at 478, n. 47; R.S.N.S. c. 494, § 54 (2002). In 2002 the Canadian province of Quebec created civil unions, which also appear to be open to both same-gender and opposite-gender partners. Civil Code of Quebec, c. 64, § 521.1 (2002). Hungary, too, has taken this route. See Orsolya Szeibert, “Same-Sex Partners in Hungary: Cohabitation and Registered Partnership”, 4 Utrecht L. Rev. 212–21 (2008). The Hungarian Act entered into force on January 1, 2009.

Following the enactment of the United Kingdom Civil Partnership Act, 2004, c.33., the question has been raised whether it is acceptable under the European human rights conventions to maintain marriage and civil partnership as mutually exclusive institutions for opposite-sex and same-sex couples. Nicholas Bamforth, “‘The Benefits of Marriage in All But Name’? Same-Sex Couples and the Civil Partnership Act 2004”, 19 Child & Fam. L.Q. 133, 133–60 (2007). See also Wade K. Wright, “The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales”, 20 Int’l J.L. Pol’y & Fam. 249 (2006).

On a local level, many cities and local governments around the globe currently permit same-gender couples to register domestic partnerships, with varying benefits associated with this status. See LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE (K. Boele-Woelki & A. Fuchs eds., 2003); Katharina Boele-Woelki, “The legal recognition of same-sex relationships within the European Union,” 82 Tul. L. Rev. 1949–1981 (2008).

In 1999 Vermont established civil unions, a status open only to same-gender couples. Parties to a civil union are explicitly granted “all of the same benefits, protections and responsibilities” that are granted to marital spouses under Vermont state law. Therefore, parties to a civil union are responsible for each other’s support to the same degree as spouses, and are subject to the same domestic relations law, including the law of divorce, annulment, separation, property division, and child custody and support. All areas of Vermont law, including *inter alia* adoption law, probate law, property law, entitlement to state benefits, health care law, employment benefits, and evidentiary law, apply equally to parties to a civil union. Vt. Stat. Ann. tit. 15, §§ 1201–1205 (2008). Benefits and obligations conferred upon marital spouses by U.S. federal law, however, cannot be conferred by Vermont’s civil union statutes, and to date the federal government has not accorded parties to a civil union recognition as spouses under federal law. *Cf.* 1 U.S.C. § 7 (2000) (defining marriage exclusively in terms of an opposite-gender union for purposes of federal law).

Parties entering a civil union must obtain a license from a town clerk. The civil union must then be certified by a judge, justice of the peace, or member of the clergy. Vt. Stat. Ann. tit. 18 §§ 5160, 5164 (2000). Age, competency, consanguinity, and affinity restrictions apply to entering a civil union just as they do to marriage, and parties are prohibited from entering a civil union if they are at the time married or a party to another civil union. Vt. Stat. Ann. tit. 15, § 1203; tit. 18, § 5163(2008).

In 1997 Hawaii created reciprocal beneficiary relationships, which can be entered by parties meeting the requisite age requirements who are not married or in another such relationship. Only parties who are legally prohibited from marrying, however, can become reciprocal beneficiaries. Though these relationships would therefore primarily be entered by same-gender couples, they would also be open to couples whose relationship by blood or marriage violates consanguinity or affinity restrictions that prevent them from entering a legal marriage. Haw. Rev. Stat. § 572C-4 (2001). These relationships need

not necessarily be conjugal. In fact, in its statement of purpose, the legislature illustrates its intent to make the rights and benefits of a reciprocal beneficiary relationship available to those in nonmarital relationships by using the example of a widowed mother and her unmarried son. Haw. Rev. Stat. § 572C-2 (2001). The relationship is entered when both parties sign and file a notarized declaration of reciprocal beneficiary relationship with the Hawaii Director of Health, and is terminated when either files a declaration of termination or enters into a legal marriage. Haw. Rev. Stat. §§ 572C-5, 572C-7 (2001).

Unlike parties to a civil union in Vermont, parties to a reciprocal beneficiary relationship in Hawaii do not have all of the rights conferred through marriage, but rather only those rights that are specifically enumerated by statute. Haw. Rev. Stat. § 572C-6 (2001). Among those rights are state income tax advantages, eligibility for public pension benefits and certain insurance benefits, the right to hold property in joint tenancy by the entirety, the ability to elect a statutory share of a deceased partner's estate, certain evidentiary privileges, a cause of action for wrongful death of a partner, and post-termination claims to maintenance and equitable property division. See Sanford N. Katz, *Emerging Models for Alternatives to Marriage*, 33 Fam. L.Q. 663, 674 (1999).

The District of Columbia has also created registered domestic partnerships, which are open to any competent adult cohabitants in a "mutual caring relationship" who are not married or already in a domestic partnership. D.C. Code Ann. § 32-701 (2001). The status provides visitation privileges in health facilities, as well as family leave benefits and eligibility for family insurance benefits for District governmental employees. D.C. Code Ann. §§ 32-704, 32-705, 32-706 (2001). Maine and Washington also offer gay couples some legal protections. New Hampshire and New Jersey permit same sex civil unions that grant rights similar to those of the Vermont civil union statute. See Jason Szep, "Reuters Factbox: U.S. laws on gay marriage, civil unions," <http://uk.reuters.com/articlePrint?articleId=UKTRE5364KG20090407> (last visited 4/12/2009).

Many other local and municipal governments in the United States, including New York, Chicago, Seattle, Ann Arbor, and San Francisco, have enacted some form of domestic partner registration, and provide partnership benefits for their public employees. David L. Chambers & Nancy Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 Fam. L.Q. 523, 530–31 (1999). In Florida, the constitutionality of the Broward County Domestic Partnership Act was challenged under a provision of the Florida Constitution that prohibits county ordinances inconsistent with state law. Rejecting plaintiff's contention that the Domestic Partnership Act (DPA) of Broward County legislates within the domestic relations zone reserved for the state, a Florida Appellate Court, in *Lowe v. Broward County*, 766 So. 2d 1199 (Fla. Dist. Ct. App. 2000), held that the DPA did not curtail any rights incident to marriage. One provision of the Act, which permitted a domestic partner to make health care decisions on the same basis as would a spouse, was invalidated, however, as it directly conflicted with the prioritization of decision-making authority established by state statute.

Problem 4-1

You are a staff member for an advocacy group for gay and lesbian partners, drafting legislation on behalf of your members to present to the legislature when it begins its next session. Assume that at present, the state or nation in which you reside does not permit same-gender marriage, nor has it created an alternative status for partners of any type. You are meeting today with the legislative lobbyist for a local feminist organization, which is preparing draft legislation to create an alternative status for cohabitants. Slightly over

90% of the members of this particular organization are heterosexual. The two organizations have good relations and have worked together in the past to support various legislative proposals. The purpose of today's meeting is to attempt to negotiate a proposal for formal recognition of relationships that both organizations would enthusiastically support, if possible.

Which objectives of each organization might be likely to be the same? Which might be different?

Do you think either group would be more likely to prefer a bill creating predominantly contract-based rights and obligations, rather than status based rights and obligations? What are the advantages and drawbacks of each model?

Do you think either group would be more likely to prefer legislation that creates a status in which rights and obligations attach upon entry, or in which they accrue based upon the length or some other characteristic of the relationship?

Would either group be likely to desire any particular preconditions to entry, such as the absence of other marriages or formalized relationships or consanguinity restrictions?

What arguments do you anticipate encountering from opponents to your legislation when you present your draft to the legislature? What counter-arguments will you make?

B. Same-Sex Marriage

This Part begins with 2001 legislation in the Netherlands recognizing same-sex marriage. It then sets out excerpts from two noteworthy cases in which the high courts of South Africa and California hold that same-sex marriage must be recognized under their respective constitutions. Recent laws recognizing such unions in Canada and South Africa follow.

This part concludes with a brief sampling of some of the responses to these laws by states which do not recognize same-sex marriage. These range from Australia's Marriage Amendment Act (2004) and the Defense of Marriage Act in the United States, both of which explicitly limit marriage to opposite-sex couples, to the directive by Governor David Paterson of New York to all state agencies to immediately recognize same-sex marriages solemnized in states where such marriages are legal.

The requirements for marriage and its legal consequences are discussed in Chapter 2. A comprehensive discussion of the recognition of foreign marriages is set out in Chapter 5. While both chapters technically apply to same-sex marriage as well as opposite-sex marriage, there are differences which justify its separate treatment here. First, legislation enacted in opposition to same-sex marriage, such as the Defense of Marriage Act in the United States, in fact denies same-sex married couples the benefits of marriage under federal law. Thus, same-sex and opposite-sex married couples do not enjoy precisely the same rights and benefits, at least in some jurisdictions. Second, other laws regarding the refusal to recognize same-sex marriage mean that same-sex couples cannot assume that they will be protected under the usual principles governing recognition of foreign marriages. Rather, their marriages have been singled out by some governments as offensive to public policy. Some of the unique issues raised by same-sex marriages, and the responses they have generated, are accordingly noted here.

On April 1, 2001, the Netherlands became the first nation to permit partners of the same gender to marry. Although the Netherlands had already had domestic partnership legislation in effect since 1998 for both heterosexual and homosexual couples, the Government decided to take the further step of equalizing access to marriage for opposite-gender and same-gender couples, in furtherance of the principles of gender-neutrality and equal treatment. See Explanatory Memorandum accompanying the Act on Opening up of Marriage, Acts of 21 December 2000, Stb. 2001, no. 9 (Kees Waaldijk, trans.), at www.ilga-europe.org/content/download/11003/65185/file/Netherlands. As amended by the Act, Articles 30, 77a, and 80f of Book 1 of the Civil Code now read as follows:

Article 30—A marriage can be contracted by two different persons of different sex or of the same sex. The law only considers marriage in its civil relations.

Article 77a—When two persons indicate to the registrar that they would like their marriage to be converted into a registered partnership, the registrar of the domicile of one of them can make a record of conversion to that effect. If the spouses are domiciled outside the Netherlands and want to convert their marriage into a registered partnership in the Netherlands, and at least one of them has Dutch nationality, conversion will take place with the registrar in The Hague.

* * *

A conversion terminates the marriage and starts the registered partnership on the moment the record of conversion is registered in the register of registered partnerships. The conversion does not affect the paternity over children born before the conversion.

Article 80f—When two persons indicate to the registrar that they would like their registered partnership to be converted into a marriage, the registrar of the domicile of one of them can make a record of conversion to that effect. If the registered partners are domiciled outside the Netherlands and want to convert their registered partnership into a marriage in the Netherlands, and at least one of them has Dutch nationality, conversion will take place with the registrar in The Hague.

* * *

A conversion terminates the registered partnership and starts the marriage on the moment the record of conversion is registered in the register of marriages. The conversion does not affect the paternity over children born before the conversion. (Kees Waaldijk, trans., *supra*).

The legal requirements for and consequences of a same-gender marriage are identical to those of a heterosexual marriage in virtually every way. The conditions for entry, in terms of restrictions on age, plural marriages, consanguinity restrictions, etc, are the same. Whether or not they are a same-gender couple, at least one of the partners must be either a Dutch national or habitually resident in the Netherlands for the Dutch marriage laws to apply. Marriage for both opposite-gender partners and same-gender partners permits one to use the other's surname, and unless a premarital agreement provides otherwise, triggers community property treatment of assets and debts of the marriage. Marriage also imposes spousal support obligations both during marriage and after divorce, joint liability for certain household debts, and restrictions upon management of joint property. Marriage impacts many other legal rights and obligations, such as inheritance, tax consequences, and entitlements to pensions and governmental benefits, all of which will apply equally to both same-gender and opposite-gender marriages. To terminate any mar-

riage, whether between couples of the same or different genders, a court's divorce pronouncement is required. The Ministry of Justice, *Same-sex Marriages*, at <http://english.justitie.nl/themes/family-law/index.aspx>; Wendy Schrama, *Reforms in Dutch Family Law During the Course of 2001: Increased Pluriformity and Complexity*, in *The International Survey of Family Law* 277, 278 (2002).

Only a few differences remain. Because the Netherlands is a hereditary monarchy and in this context genetic progeny are deemed important, the Government pronounced in deliberations on the bill that it would not apply to the king or queen or a potential successor to the throne. This objective is to be legally accomplished, in the Government's view, by interpreting Article 28 of the Constitution, which addresses the marriage of the king or queen, as referring exclusively to an opposite-gender marriage, while interpreting the Civil Code's provision opening marriage to same-gender couples to apply to everyone else. Schrama, *supra*, at 278–79. Though interesting, this restriction directly affects only certain members of the royal family.

Of broader interest is the different effect of same-gender marriage on the recognition of legal parenthood. A marriage of spouses of opposite gender creates a presumption that the husband and wife are parents of any child born of the marriage. A woman who bears a child is the mother, and her husband is presumed to be the father of a child she bears. The legislature was unwilling to extend this presumption to the same-gender partner of another man, as the biological link that created the presumption for heterosexual spouses would be absent. Therefore, the Act Opening Marriages did not amend the relevant language in the Dutch statute creating marital presumptions of parenthood. If one of the spouses is a biological parent, that parent's same-gender partner is regarded as a legal parent of the child only if he or she adopts the child.

Legal parenthood must be distinguished in the Dutch system, however, from shared parenting responsibilities. In January, 2002, the law was updated to provide that a spouse in a lesbian marriage, as a matter of law, will acquire automatic shared custody of a child born to her partner during the marriage, if the child has no other legal parent. This would be the case if the child was conceived by anonymous artificial insemination. This rule does not apply to male couples, as the birth mother of the child would normally be recognized as a legal parent. A male partner of a biological father, however, or both, if neither is the legal parent, can still apply for shared custody if the other statutory requirements for shared custody are satisfied. Scharma, *supra*, at 295–96; Ministry of Justice, *supra*.

Notes and Questions

1. *Retention of the Domestic Partnership Alternative.* The Netherlands originally created domestic partnerships in 1998 in order to afford same-gender couples a status that would provide almost all of the benefits of marriage. Nevertheless, in order to provide equal access to the symbolic nature of marriage, the Government went further to enact the Act Opening Marriage three years later. Yet the Act retains the option of registered partnerships, and in fact permits a couple to convert their marriage to a registered partnership, or their registered partnership to a marriage, simply by making a record of conversion. If the goal of equality for same-gender couples has now been achieved by opening marriage, what purpose does retention of the registered partnership as an institution serve? Are there any drawbacks to retaining it?

In the Netherlands, the rights and obligations that the parties have towards each other are the same in both marriages and registered partnerships. There are some minor dif-

ferences regarding the form of the ceremony for entering a registered partnership, as opposed to a marriage, but the major difference affects dissolution, in that a marriage can only be dissolved through a divorce in court, but a registered partnership can be terminated by the parties themselves. The Ministry of Justice, *supra*. In addition, a registered partnership does not establish legal parenthood of the male partner over a child born during the partnership, even when the partnership is heterosexual, and requires formal recognition of the child by the male partner who wishes to become the legal father. Schrama, *supra*, at 262–63. This last distinction would not affect the choice of a male same-gender couple regarding which institution to enter, however, as for them the legal status of father is not derived from either marriage or registered partnership. Similarly, the parental status of female same-gender partners is not altered by the fact that the relationship is a marriage rather than a registered partnership. *Id.* at 295–99.

2. *Utilization of the Marital Option.* Government statistics indicate that during the first six months in which the Act Opening Marriage was in effect, 1900 same-gender couples married in the Netherlands, which constituted 3.6% of the total marriages performed during this period. Of these couples, 55% were male couples and 45% were female couples. Schrama, *supra*, at 279.

A similar gender disparity was observed in the early years of registered partner legislation in Denmark, Norway, and Sweden. Male couples registering far outnumbered female couples initially, although as each year goes by this disparity diminishes markedly. William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 *McGeorge L. Rev.* 641, 661 (2000).

3. *A Standard Progression of Rights?* Dutch law professor Kees Waaldijk and Professor William Eskridge of Yale have both observed a pattern in the legal progression towards equality in many European countries. They suggest that decriminalization of same-gender sexual behavior is typically the beginning step, followed by equalizing the age of consent for sexual conduct, prohibition of discrimination based upon sexual orientation, limited recognition characterized by bestowing certain rights and obligations on cohabiting same-gender couples, recognition of same-gender partnerships, and finally legalization of joint adoption of children by gay and lesbian couples. Eskridge, *supra*, at 647–49; Kees Waaldijk, *Towards the Recognition of Same-Sex Partners in European Union Law: Expectations Based on Trends in National Law*, in *Legal Recognition of Same-Sex Partnerships* 635 (Robert Wintemute & Mads Andenaes, eds. 2001).

This sequential and incremental process, Professor Eskridge observes, has played an important role in the relative sea change that has occurred in many countries in the treatment afforded gay people by the legal system over the past fifty years:

The recurrence of the same pattern in country after country suggests this paradox: law cannot move unless public opinion moves, but public attitudes can be influenced by changes in the law. For gay rights, the impasse suggested by this paradox can be ameliorated or broken if the proponents of reform move step-by-step along a continuum of little reforms. . . . Step-by-step change permits gradual adjustment of anti-gay mindsets, slowly empowers gay rights advocates, and can discredit anti-gay arguments. Eskridge, *supra*, at 648.

The Netherlands serves as a prototype for this progression theory and, completing the model, it in fact passed a law permitting same-gender couples to adopt at the same time that the Act Opening Marriage was passed. See *Wijziging van Boek 1 van het Burgerlijk Wetboek (Adoptie Door Personen van Hetzelfde Geslacht (Amendment of Book 1 of the Civil Code, Adoption by Persons of the Same Sex)*, Stb. 2001 no.10. Prior to April 2001,

gay couples could not adopt, even if they were registered partners, although one member of the couple could become an adoptive parent. Scott Seufert, Note, *Going Dutch?: A Comparison of the Vermont Civil Union Law to the Same-Sex Marriage Law of the Netherlands*, 19 Dick. J. Int'l L. 449, 456 (2001). Other European nations that have recognized domestic partnerships between same-gender couples have also often been slower to extend adoption rights to gay and lesbian couples. Sweden, for example, which enacted its Registered Partnership Act in 1994, did not permit registered partners to adopt until 2002. See Katherine McGill, *Sweden Passes Bill Allowing Homosexual Couples to Adopt*, The Independent (London), June 7, 2002, at 11. Denmark legalized adoption of a partner's child (though not other children) in 1999, ten years after it enacted its Registered Partnership Act, and Iceland approved joint adoption four or five years after its partnership legislation was enacted. See Nancy D. Polikoff, *Recognizing Partners but Not Parents/Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. Sch. J. Hum. Rts. 711, 729 (2000).

Professor Eskridge observes that to some extent U.S. jurisdictions that recognize domestic partnerships have followed the steps of this progression as well. Eskridge, *supra*, at 652–53. Professor Polikoff suggests that in at least one respect, however, U.S. law has followed a different sequence. Though recognition of same-gender marriage and domestic partnerships has occurred at a much slower pace in the United States than in Europe, American courts have already approved joint adoptions by gay or lesbian couples in more than half of the U.S. states. Polikoff, *supra*, at 712–13. What factors do you think contributed to the differences in the relative willingness of European nations and U.S. states to accept joint adoption and to create a legally sanctioned partnership status for gay and lesbian couples?

4. *Is Marriage the Appropriate Trigger?* One argument for opening the institution of marriage to same-gender couples is that marriage is the qualifying event for numerous legal benefits, as well as obligations, under the legal systems of most nations. Yet some scholars have questioned the extent to which marriage is the appropriate trigger for legal intervention, and whether it is a worthy institution for same-gender couples to pursue. See Kenneth Norrie, *Marriage is for Heterosexuals: May the Rest of Us Be Saved From It*, 12 Child & Fam. L.Q. 363 (2000); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 Va. L. Rev. 1535 (1993); Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation*, Nat'l Gay & Lesbian Q., Fall 1989, at 9.

Would all couples be better served if other life events or incidents played the central role in the allocation of legal rights and obligations? For example, the length and stability of the relationship might be the factor that triggers entitlement to legal rights, or the birth of a child, rather than the entry into marriage. Under such a system marriage could remain a choice for personal or religious reasons, but would lose its legal significance. Although no nation has adopted such a system, Sweden, for example, has reduced the number of rights attached to marriage, emphasizing individual responsibility and equality in its allocation of governmental rights and duties. Rebecca Probert & Anne Barlow, *Displacing Marriage—Diversification and Harmonisation within Europe*, 12 Child & Fam. L.Q. 156, 162–63 (2000). What arguments might be made for substituting factors related to the substance of a relationship rather than entry into the marital status itself, as the criteria for legal rights and obligations? As you read the subsequent sections regarding alternative status options and rights afforded cohabitants, consider the extent to which some nations are partially moving in the direction of linking rights to the substantive characteristics of a relationship.

Another approach would be to abolish civil marriage completely and to tie legal consequences to civil registration of a relationship rather than to marriage or to the characteristics of the relationship. While some nations have created registration systems as alternatives to marriage, as discussed above, no nation has to date chosen to totally replace the institution of marriage with registration as a method of affording equality to same-gender couples. For a provocative exploration, see Elizabeth S. Scott, *A World Without Marriage*, 41 Fam. L. Q. 537 (2007).

5. *Legislative or Judicial Initiatives.* What are the advantages and disadvantages of legislative reform as opposed to judicial reform? In the following two cases, the courts, rather than the legislature, take the initiative. Note carefully the authority they rely upon for doing so.

**Minister of Home Affairs and Another v.
Fourie and Another, with Doctors
For Life International (first amicus curiae),
John Jackson Smyth (second amicus curiae) and
Marriage Alliance of South Africa (third amicus curiae)**
Constitutional Court—CCT 60/04 Judgment date: 1 December 2005
Summary of Judgment

(The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.)

Ms Mari Adriaana Fourie and Ms Cecelia Johanna Bonthuys, of Pretoria, are the applicants in the first of two cases (the Fourie case) that were set down for hearing on the same day in this Court. Their complaint has been that the law excludes them from publicly celebrating their love and commitment to each other in marriage. They contend that the exclusion comes from the common law definition which states that marriage in South Africa is a union of one man with one woman, to the exclusion, while it lasts, of all others. In the second case, (the Equality Project case) the Gay and Lesbian Equality Project challenge section 30(1) of the Marriage Act, which provides that marriage officers must put to each of the parties the following question: “Do you AB . . . call all here present to witness that you take CD as your lawful wife (or husband)?” The reference to wife (or husband), they contend, unconstitutionally excludes same-sex couples.

The two cases raised the question whether the fact that no provision is made for the applicants, and all those in like situation, to marry each other, amounts to denial of equal protection of the law and unfair discrimination by the state against them because of their sexual orientation, contrary to the provision of the Constitution guaranteeing the right to equality and dignity. And if it does, what is the appropriate remedy that this Court should order?

* * *

Writing for a Court that was unanimous on all matters except in relation to the remedy, Sachs J held that it was clearly in the interests of justice that the Fourie and the Equality Project matters be heard together.

* * *

JUDGMENTS:

BY Sachs J

Introduction

Finding themselves strongly attracted to each other, two people went out regularly and eventually decided to set up home together. After being acknowledged by their friends as a couple for more than a decade, they decided that the time had come to get public recognition and registration of their relationship, and formally to embrace the rights and responsibilities they felt should flow from and attach to it. Like many persons in their situation, they wanted to get married. There was one impediment. They are both women.

Ms Mari Adriaana Fourie and Ms Cecelia Johanna Bonthuys are the applicants in the first of two cases that were set down for hearing on the same day in this Court. Their complaint has been that the law excludes them from publicly celebrating their love and commitment to each other in marriage. Far from enabling them to regularize their union, it shuts them out, unfairly and unconstitutionally, they claim.

They contend that the exclusion comes from the common-law definition which states that marriage in South Africa is “a union of one man with one woman, to the exclusion, while it lasts, of all others”. The common law is not self-enforcing, and in order for such a union to be formalized and have legal effect, the provisions of the Marriage Act have to be invoked. This, as contended for in the second case, is where the further level of exclusion operates. The Marriage Act provides that a minister of religion who is designated as a marriage officer may follow the marriage formula usually observed by the religion concerned. In terms of section 30(1) other marriage officers must put to each of the parties the following question:

“Do you, AB, declare that as far as you know there is no lawful impediment to your proposed marriage with CD here present, and that you call all here present to witness that you take CD as your lawful *wife (or husband)*?; and thereupon the parties shall give each other the right hand and the marriage officer concerned shall declare the marriage solemnized in the following words: ‘I declare that AB and CD here present have been lawfully married.’” (My emphasis.)

The reference to wife (or husband) is said to exclude same-sex couples. It was not disputed by any of the parties that neither the common law nor statute provide for any legal mechanism in terms of which Ms Fourie and Ms Bonthuys and other same-sex couples could marry.

In the pre-democratic era same-sex unions were not only denied any form of legal protection, they were regarded as immoral and their consummation by men could attract imprisonment. Since the interim Constitution came into force in 1994, however, the Bill of Rights has dramatically altered the situation. Section 9(1) of the Constitution now reads:

“Everyone is equal before the law and has the right to equal protection and benefit of the law.”

Section 9(3) of the Constitution expressly prohibits unfair discrimination on the grounds of sexual orientation. It reads:

“The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language and birth.” (My emphasis.)

The matter before us accordingly raises the question: does the fact that no provision is made for the applicants, and all those in like situation, to marry each other, amount to denial of equal protection of the law and unfair discrimination by the state against them because of their sexual orientation? And if it does, what is the appropriate remedy that this Court should order?

* * *

II. The issues

At the hearing two broad and interrelated questions were raised: The first was whether or not the failure by the common law and the Marriage Act to provide the means whereby same-sex couples can marry, constitutes unfair discrimination against them. If the answer was that it does, the second question arose, namely, what the appropriate remedy for the unconstitutionality should be. These are the central issues in this matter, and I will start with the first.

Does the law deny equal protection to and discriminate unfairly against same-sex couples by not including them in the provisions of the Marriage Act?

* * *

This Court has ... in five consecutive decisions highlighted at least four unambiguous features of the context in which the prohibition against unfair discrimination on grounds of sexual orientation must be analysed. The first is that South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one. The second is the existence of an imperative constitutional need to acknowledge the long history in our country and abroad of marginalization and persecution of gays and lesbians, that is, of persons who had the same general characteristics as the rest of the population, save for the fact that their sexual orientation was such that they expressed erotic desire and affinity for individuals of their own sex, and were socially defined as homosexual. The third is that although a number of breakthroughs have been made in particular areas, there is no comprehensive legal regulation of the family law rights of gays and lesbians. Finally, our Constitution represents a radical rupture with a past based on intolerance and exclusion, and the movement forward to the acceptance of the need to develop a society based on equality and respect by all for all. Small gestures in favour of equality, however meaningful, are not enough.

* * *

A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalize people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference... At the very least, it affirms that difference should not be the basis for exclusion, marginalization and stigma. At best, it celebrates the vitality that difference brings to any society. The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage... The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not

how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.

* * *

It is true that marriage, as presently constructed under common law, constitutes a highly personal and private contract between a man and a woman in which the parties undertake to live together, and to support one another. Yet the words “I do” bring the most intense private and voluntary commitment into the most public, law-governed and state-regulated domain.

* * *

(Sachs notes the legal consequences of marriage, including the reciprocal duties of support, management of property, relationships with and duties toward children, public documentation, and socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights.)

The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

It should be noted that the intangible damage to same-sex couples is as severe as the material deprivation. To begin with, they are not entitled to celebrate their commitment to each other in a joyous public event recognized by the law. They are obliged to live in a state of legal blankness in which their unions remain unmarked by the showering of presents and the commemoration of anniversaries so celebrated in our culture. It may be that, as the literature suggests, many same-sex couples would abjure mimicking or subordinating themselves to heterosexual norms. . . . Yet what is in issue is not the decision to be taken, but the choice that is available. If heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as to whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples. It follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.

* * *

Equally important as far as family law is concerned, is the right of same-sex couples to fall back upon state regulation when things go wrong in their relationship. Bipolar by its very nature, the law of marriage is invoked both at moments of blissful creation and at times of sad cessation.

* * *

Respect for religious arguments

The two amici submitted a number of arguments from an avowedly religious point of view in support of the view that by its origins and nature, the institution of marriage simply cannot sustain the intrusion of same-sex unions.

* * *

It is one thing for the Court to acknowledge the important role that religion plays in our public life. It is quite another to use religious doctrine as a source for interpreting the Constitution. It would be out of order to employ the religious sentiments of some as a guide to the constitutional rights of others. . . . Judges would be placed in an intolerable situation if they were called upon to construe religious texts and take sides on issues which have caused deep schisms within religious bodies.

* * *

[A]cknowledgment by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages.

* * *

III. Remedy

A notable and significant development in our statute law in recent years has been the extent of express and implied recognition that the Legislature has accorded to same-sex partnerships. Yet . . . there is still no appropriate recognition in our law of same-sex life partnership, as a relationship, to meet the legal and other needs of its partners.

* * *

[A] legislative intervention which had the effect of enabling same-sex couples to enjoy the status, entitlements and responsibilities that heterosexual couples achieve through marriage, would without more override any discriminatory impact flowing from the common-law definition standing on its own. . . . The effect would be that formal registration of same-sex unions would automatically extend the common law and statutory legal consequences to same-sex couples that flow to heterosexual couples from marriage.

* * *

This is a matter involving status that requires a remedy that is secure. To achieve security it needs to be firmly located within the broad context of an extended search for emancipation of a section of society that has known protracted and bitter oppression. The circumstances of the present matter call out for enduring and stable legislative appreciation. A temporary remedial measure would be far less likely to achieve the enjoyment of equality as promised by the Constitution than would lasting legislative action compliant with the Constitution.

The claim by the applicants in *Fourie* (supra) of the right to get married should, in my view, be seen as part of a comprehensive wish to be able to live openly and freely as lesbian women emancipated from all the legal taboos that historically have kept them from enjoying life in the mainstream of society. The right to celebrate their union accordingly signifies far more than a right to enter into a legal arrangement with many attendant and significant consequences, important though they may be. It represents a major symbolical milestone in their long walk to equality and dignity. The greater and more secure the institutional imprimatur for their union, the more solidly will it and other such unions be rescued from legal oblivion, and the more tranquil and enduring will such unions ultimately turn out to be.

This is a matter that touches on deep public and private sensibilities. I believe that Parliament is well-suited to finding the best ways of ensuring that same-sex couples are brought in from the legal cold. The law may not automatically and of itself elimi-

nate stereotyping and prejudice. Yet it serves as a great teacher, establishes public norms that become assimilated into daily life and protects vulnerable people from unjust marginalisation and abuse. It needs to be remembered that not only the courts are responsible for vindicating the rights enshrined in the Bill of Rights. The Legislature is in the frontline in this respect. One of its principal functions is to ensure that the values of the Constitution as set out in the Preamble and section 1 permeate every area of the law.

* * *

[T]he orders of this Court, read together, make it clear that if Parliament fails to cure the defect within twelve months, the words “or spouse” will automatically be read into section 30(1) of the Marriage Act. In this event the Marriage Act will, without more, become the legal vehicle to enable same-sex couples to achieve the status and benefits coupled with responsibilities which it presently makes available to heterosexual couples.

* * *

The order

* * *

(i) The common-law definition of marriage is declared to be inconsistent with the Constitution and invalid to the extent that it does not permit same-sex couples to enjoy the status and the benefits coupled with responsibilities it accords to heterosexual couples.

(ii) The declaration of invalidity is suspended for twelve months from the date of this judgment to allow Parliament to correct the defect.

* * *

c) The omission from section 30(1) of the Marriage Act 25 of 1961 after the words “or husband” of the words “or spouse” is declared to be inconsistent with the Constitution, and the Marriage Act is declared to be invalid to the extent of this inconsistency.

d) The declarations of invalidity in paragraphs (b) and (c) are suspended for 12 months from the date of this judgment to allow Parliament to correct the defects.

e) Should Parliament not correct the defects within this period, Section 30(1) of the Marriage Act 25 of 1961 will forthwith be read as including the words “or spouse” after the words “or husband” as they appear in the marriage formula.

* * *

BY O’Regan J

There is very little in the comprehensive and careful judgment of Sachs J with which I disagree.... The difference between his judgment and this, therefore, lies solely in one significant area, namely, that of remedy.... Sachs J ... proposes an order suspending the declaration of invalidity for twelve months. The effect of this order is that gay and lesbian couples will not be permitted to marry during this period.

His main reasons for this order are firstly, that there are at least two ways in which the unconstitutionality can be remedied, as recommended by the South African Law Reform Commission; and that given these alternatives, and the important democratic and legitimating role of the Legislature in our society, it is appropriate to leave it to Parliament to choose between these courses of action, or any other which might be constitutional. A second and equally important reason that he gives is that, as marriage involves a question of personal status, it would lead to greater stability if such matters were to be regulated by an Act of Parliament rather than the courts.

* * *

In my view, this Court should develop the common-law rule as suggested by the majority in the Supreme Court of Appeal, and at the same time read in words to section 30 of the act that would with immediate effect permit gays and lesbians to be married by civil marriage officers (and such religious marriage officers as consider such marriages not to fall outside the tenets of their religion).

In re Marriage Cases

43 Cal. 4th 757, 183 P.3d 384 (2008)

[W]e note at the outset that the constitutional issue before us differs in a significant respect from the constitutional issue that has been addressed by a number of other state supreme courts and intermediate appellate courts that recently have had occasion, in interpreting the applicable provisions of their respective state constitutions, to determine the validity of statutory provisions or common law rules limiting marriage to a union of a man and a woman. . . . These courts, often by a one-vote margin (see, *post*, pp. 114–115, fn. 70), have ruled upon the validity of statutory schemes that contrast with that of California, which in recent years has enacted comprehensive domestic partnership legislation under which a same-sex couple may enter into a legal relationship that affords the couple virtually all of the same substantive legal benefits and privileges, and imposes upon the couple virtually all of the same legal obligations and duties, that California law affords to and imposes upon a married couple. . . . Accordingly, the legal issue we must resolve is not whether it would be constitutionally permissible under the California Constitution for the state to limit marriage only to opposite-sex couples while denying same-sex couples any opportunity to enter into an official relationship with all or virtually all of the same substantive attributes, but rather whether our state Constitution prohibits the state from establishing a statutory scheme in which both opposite-sex and same-sex couples are granted the right to enter into an officially recognized family relationship that affords all of the significant legal rights and obligations traditionally associated under state law with the institution of marriage, but under which the union of an opposite-sex couple is officially designated a “marriage” whereas the union of a same-sex couple is officially designated a “domestic partnership.” The question we must address is whether, under these circumstances, the failure to designate the official relationship of same-sex couples as marriage violates the California Constitution.

* * *

As discussed below, upon review of the numerous California decisions that have examined the underlying bases and significance of the constitutional right to marry (and that illuminate *why* this right has been recognized as one of the basic, inalienable civil rights guaranteed to an individual by the California Constitution), we conclude that, under this state’s Constitution, the constitutionally based right to marry properly must be understood to encompass the core set of basic *substantive* legal rights and attributes traditionally associated with marriage that are so integral to an individual’s liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process. These core substantive rights include, most fundamentally, the opportunity of an individual to establish—with the person with whom the individual has chosen to share his or her life—an *officially recognized and protected family* possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union traditionally designated as marriage. . . .

Furthermore, in contrast to earlier times, our state now recognizes that an individual's capacity to establish a loving and long-term committed relationship with another person and responsibly to care for and raise children does not depend upon the individual's sexual orientation, and, more generally, that an individual's sexual orientation—like a person's race or gender—does not constitute a legitimate basis upon which to deny or withhold legal rights.

* * *

Furthermore, the circumstance that the current California statutes assign a different name for the official family relationship of same-sex couples as contrasted with the name for the official family relationship of opposite-sex couples raises constitutional concerns not only under the state constitutional right to marry, but also under the state constitutional equal protection clause. In analyzing the validity of this differential treatment under the latter clause, we first must determine which standard of review should be applied to the statutory classification here at issue. Although in most instances the deferential “rational basis” standard of review is applicable in determining whether different treatment accorded by a statutory provision violates the state equal protection clause, a more exacting and rigorous standard of review—“strict scrutiny”—is applied when the distinction drawn by a statute rests upon a so-called “suspect classification” or impinges upon a fundamental right. As we shall explain, although we do not agree with the claim advanced by the parties challenging the validity of the current statutory scheme that the applicable statutes properly should be viewed as an instance of discrimination on the basis of the suspect characteristic of sex or gender and should be subjected to strict scrutiny on that ground, we conclude that strict scrutiny nonetheless is applicable here because (1) the statutes in question properly must be understood as classifying or discriminating on the basis of sexual orientation, a characteristic that we conclude represents—like gender, race, and religion—a constitutionally suspect basis upon which to impose differential treatment, and (2) the differential treatment at issue impinges upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple.

Under the strict scrutiny standard, unlike the rational basis standard, in order to demonstrate the constitutional validity of a challenged statutory classification the state must establish (1) that the state interest intended to be served by the differential treatment not only is a constitutionally legitimate interest, but is a *compelling* state interest, and (2) that the differential treatment not only is reasonably related to but is *necessary* to serve that compelling state interest. Applying this standard to the statutory classification here at issue, we conclude that the purpose underlying differential treatment of opposite-sex and same-sex couples embodied in California's current marriage statutes—the interest in retaining the traditional and well-established definition of marriage—cannot properly be viewed as a *compelling* state interest for purposes of the equal protection clause, or as *necessary* to serve such an interest.

* * *

Accordingly, we conclude that to the extent the current California statutory provisions limit marriage to opposite-sex couples, these statutes are unconstitutional.

* * *

Having concluded that sections 300 and 308.5 are unconstitutional to the extent each statute reserves the designation of marriage exclusively to opposite-sex couples and denies same-sex couples access to that designation, we must determine the proper remedy.

When a statute's differential treatment of separate categories of individuals is found to violate equal protection principles, a court must determine whether the constitutional violation should be eliminated or cured by extending to the previously excluded class the

treatment or benefit that the statute affords to the included class, or alternatively should be remedied by withholding the benefit equally from both the previously included class and the excluded class. A court generally makes that determination by considering whether extending the benefit equally to both classes, or instead withholding it equally, would be most consistent with the likely intent of the Legislature, had that body recognized that unequal treatment was constitutionally impermissible....

In the present case, it is readily apparent that extending the designation of marriage to same-sex couples clearly is more consistent with the probable legislative intent than withholding that designation from both opposite-sex couples and same-sex couples in favor of some other, uniform designation. In view of the lengthy history of the use of the term “marriage” to describe the family relationship here at issue, and the importance that both the supporters of the 1977 amendment to the marriage statutes and the electors who voted in favor of Proposition 22 unquestionably attached to the designation of marriage, there can be no doubt that extending the designation of marriage to same-sex couples, rather than denying it to all couples, is the equal protection remedy that is most consistent with our state’s general legislative policy and preference.

CONCURRING AND DISSENTING OPINION BY CORRIGAN, J.

In my view, Californians should allow our gay and lesbian neighbors to call their unions marriages. But I, and this court, must acknowledge that a majority of Californians hold a different view, and have explicitly said so by their vote. This court can overrule a vote of the people only if the Constitution compels us to do so. Here, the Constitution does not. Therefore, I must dissent.

It is important to be clear. Under California law, domestic partners have “virtually all of the same substantive legal benefits and privileges” available to traditional spouses. (Maj. opn., *ante*, at p. 45.) I believe the Constitution requires this as a matter of equal protection. However, the single question in this case is whether domestic partners have a constitutional right to the name of “marriage.”

Proposition 22 was enacted only eight years ago. By a substantial majority the people voted to recognize, as “marriage,” only those unions between a man and a woman. (Fam. Code § 308.5.) The majority concludes that the voters’ decision to retain the traditional definition of marriage is unconstitutional. I disagree.

* * *

We are in the midst of a major social change. Societies seldom make such changes smoothly. For some the process is frustratingly slow. For others it is jarringly fast. In a democracy, the people should be given a fair chance to set the pace of change without judicial interference. That is the way democracies work. Ideas are proposed, debated, tested. Often new ideas are initially resisted, only to be ultimately embraced. But when ideas are imposed, opposition hardens and progress may be hampered.

We should allow the significant achievements embodied in the domestic partnership statutes to continue to take root. If there is to be a new understanding of the meaning of marriage in California, it should develop among the people of our state and find its expression at the ballot box.

Notes and Questions

1. *Proposition 8*. After the decision came into effect in mid-June, about eighteen thousand lesbian and gay male couples were legally married. On November 4, 2008 a major-

ity of California voters gave their support to Proposition 8, which amends the state constitution to read: “Only marriage between a man and a woman is valid or recognized in California.” Same-sex marriages were suspended on November 5, 2008. Jesse McKinley, “With Same-sex Marriage, a Court Takes on the People’s Voice.” N.Y. TIMES, November 21, 2008. Proposition 8 was challenged in a motion for judicial notice filed the same day. Granting the motion, the Court ordered the parties in *Strauss v. Horton* to brief the following issues:

- (1) Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution? (See Cal. Const., art. XVIII, §§ 1–4.)
- (2) Does Proposition 8 violate the separation of powers doctrine under the California Constitution?
- (3) If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples preformed before the adoption of Proposition 8?

On May 26, 2009, the California Supreme Court rejected the constitutional challenge to Proposition 8. The court unanimously held that Proposition 8 only restricts the use of the term “marriage,” rather than the constitutional rights set out in *In Re Marriage Cases*, and that it does not affect the validity of the estimated 18,000 same-sex marriages entered into before it took effect.

2. *Constitutionality.* Compare the analysis of constitutional rights in *Fourie* and *In re Marriage Cases*. How are they similar? How are they different? Why does the South African Court seek legislative action? Why does the California court take a different route? The first U.S. court to recognize same-sex marriage under its state constitution was the Massachusetts Supreme Court in *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003). The decision was cited in *Fourie*. For a thoughtful comparison of *Goodridge* and *Fourie*, see Lisa Newstrom, “The Horizon of Rights: Lessons from South Africa for the Post-*Goodridge* Analysis of Same-Sex Marriage,” 40 *Cornell Int’l L.J.* 781 (2007). For an account of the historical, ideological, and political forces that led to the inclusion of explicit protection for the gay and lesbian community in South Africa, see Eric C. Christiansen, “Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process,” 32 *Int’l L. & Pol.* 997 (2000).

3. *Trends?* On October 10, 2008, Connecticut became the third state to allow same-sex marriage. *Kerrigan v. Comm’r of Public Health* SC 17716. In the majority opinion, Justice Richard N. Palmer of the Connecticut Supreme Court wrote: “Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice.” On April 3, 2009, the Iowa Supreme Court held, in a unanimous decision, that the Iowa statute limiting civil marriage to a union between a man and a woman violated the equal protection clause of the Iowa Constitution. The decision strikes the language from Iowa Code section 595.2 limiting civil marriage to a man and a woman and directs that the remaining statutory language be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage. The decision becomes effective upon issuance of procedendo, which normally occurs twenty-one days after the opinion is filed, unless a petition for rehearing is filed. The opinion is available at www.iowacourts.gov/supreme_court.

On April 7, 2009, Vermont lawmakers overrode a veto from the governor of a bill that allows same-sex marriage, making Vermont the first state in the country to legalize gay marriage with a Legislature’s vote. Under the new law, marriage “is the legally recognized

union of two people. When used in this chapter or in any other statute, the word ‘marriage’ shall mean a civil marriage.” Journal of the Senate (Vermont), April 6, 2009 S. 115 § 8.

On May 6, 2009, the legislatures in New Hampshire and Maine voted in favor of same-sex marriage.

It should be kept in mind that forty-three U.S. states have laws explicitly prohibiting such marriages, including 29 with constitutional amendments restricting marriage to one man and one woman. Szep, *supra*. See Jeremy W. Peters, “Advocates on Both Sides Seek Momentum on Same Sex-Marriage”, N.Y. TIMES, April 9, 2009 at A22. See also Anjuli Willis McReynolds, Comment, “What International Experience Can Tell U.S. Courts About Same-Sex Marriage,” 53 UCLA L. Rev. 1073 (2006).

4. *Advantages and Disadvantages of Rights-based Claims.* What are the advantages and disadvantages of framing same-sex marriage in terms of constitutional rights or human rights? What is the view of Justice Corrigan (concurring and dissenting in *In re Marriage Cases*)?

5. *Changing Attitudes?* On December 18, 2006, the European Commission published the Eurobarometer results, including attitudes towards same-sex marriage and same-sex adoption. The survey shows that openness towards homosexuality tends to be quite limited. On average, only 32% of Europeans feel that homosexual couples should be allowed to adopt children throughout Europe. In fact, in 14 of the 25 Member States less than a quarter of the public accepts adoption by homosexual couples. Public opinions tends to be somewhat more tolerant as regards homosexual marriages: 44% of EU citizens agree that such marriages should be allowed throughout Europe. It should be noted that some Member States distinguish themselves from the average result by very high acceptance levels: the Netherlands tops the list with 82% of respondents in favour of homosexual marriages and 69% supporting the idea of adoption by homosexual couples. Opposition is strongest in Greece, Latvia (both 84% and 89% respectively) and Poland (76% and 89%). <http://www.ilga-europe.org>. As of May, 2009, the following European states recognized same-sex marriage: Belgium, Netherlands, Norway, Spain, Sweden (effective May 1, 2009). *Marriage and partnership rights for same-sex partners: country by country*, at *id*.

Civil Marriage Act

2005, c. 33

C-31.5 (Canada)

[Assented to July 20th, 2005]

An Act respecting certain aspects of legal capacity for marriage for civil purposes

Preamble

WHEREAS the Parliament of Canada is committed to upholding the Constitution of Canada, and section 15 of the *Canadian Charter of Rights and Freedoms* guarantees that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination;

WHEREAS the courts in a majority of the provinces and in one territory have recognized that the right to equality without discrimination requires that couples of the same sex and couples of the opposite sex have equal access to marriage for civil purposes;

WHEREAS the Supreme Court of Canada has recognized that many Canadian couples of the same sex have married in reliance on those court decisions;

WHEREAS only equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination, and civil union, as an institution other than marriage, would not offer them that equal access and would violate their human dignity, in breach of the *Canadian Charter of Rights and Freedoms*;

WHEREAS the Supreme Court of Canada has determined that the Parliament of Canada has legislative jurisdiction over marriage but does not have the jurisdiction to establish an institution other than marriage for couples of the same sex;

WHEREAS everyone has the freedom of conscience and religion under section 2 of the *Canadian Charter of Rights and Freedoms*;

WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;

WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage;

WHEREAS, in light of those considerations, the Parliament of Canada's commitment to uphold the right to equality without discrimination precludes the use of section 33 of the *Canadian Charter of Rights and Freedoms* to deny the right of couples of the same sex to equal access to marriage for civil purposes;

WHEREAS marriage is a fundamental institution in Canadian society and the Parliament of Canada has a responsibility to support that institution because it strengthens commitment in relationships and represents the foundation of family life for many Canadians;

AND WHEREAS, in order to reflect values of tolerance, respect and equality consistent with the *Canadian Charter of Rights and Freedoms*, access to marriage for civil purposes should be extended by legislation to couples of the same sex;

NOW, THEREFORE, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Short title

1. This Act may be cited as the *Civil Marriage Act*.

Marriage — certain aspects of capacity

2. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

Religious officials

3. It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs.

Freedom of conscience and religion and expression of beliefs

- 3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of mar-

riage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

Marriage not void or voidable

4. For greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.

**Government Gazette,
Republic of South Africa**
No. 17 of 2006: Civil Union Act, 2006

ACT

To provide for the solemnisation of civil unions, by way of either a marriage or civil partnership; the legal consequences of civil unions; and to provide for matters incidental thereto.

* * *

Objectives of Act

2. The objectives of this Act are—

(a) to regulate the solemnisation and registration of civil unions, by way of either a marriage or a civil partnership; and

(b) to provide for the legal consequences of the solemnisation and registration of civil unions.

Relationships to which Act applies

3. This Act applies to civil union partners joined in a civil union.

Solemnisation of civil union

4. (1) A marriage officer may solemnise a civil union in accordance with the provisions of this Act.

(2) Subject to this Act a marriage officer has all the powers, responsibilities and duties, as conferred upon him or her under the Marriage Act to solemnise a civil union.

* * *

Marriage officer not compelled to solemnise civil union

6. A marriage officer, other than a marriage officer referred to in section 5 may in writing inform the Minister that he or she objects on the ground of conscience, religion and belief to solemnising a civil union between persons of the same sex, whereupon that marriage officer shall not be compelled to solemnise such civil union

* * *

Requirements for solemnisation and registration of civil union

8. (1) A person may only be a spouse or partner in one marriage or civil partnership, as the case may be, at any given time.

(2) A person in a civil union may not conclude a marriage under the Marriage Act or the Customary Marriages Act

(3) A person who is married under the Marriage Act or the Customary Marriages Act may not register a civil union.

(4) A prospective civil union partner who has previously been married under the Marriage Act or Customary Marriages Act or registered as a spouse in a marriage or a partner in a civil partnership under this Act, must present a certified copy of the divorce order or death certificate of the former spouse or partner, as the case may be, to the marriage officer as proof that the previous marriage or civil union has been terminated.

(5) The marriage officer may not proceed with the solemnisation and registration of the civil union unless in possession of the relevant documentation referred to in subsection (4).

(6) A civil union may only be registered by prospective civil union partners who would, apart from the fact that they are of the same sex, not be prohibited by law from concluding a marriage under the Marriage Act or Customary Marriages Act.

* * *

Formula for solemnisation of marriage or civil partnership

11. (1) A marriage officer must inquire from the parties appearing before him or her whether their civil union should be known as a marriage or a civil partnership and must thereupon proceed by solemnising the civil union in accordance with the provisions of this section.

(2) In solemnising any civil union, the marriage officer must put the following questions to each of the parties separately, and each of the parties must reply thereto in the affirmative:

“Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage/civil partnership with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful spouse/civil partner?”, and thereupon the parties must give each other the right hand and the marriage officer concerned must declare the marriage or civil partnership, as the case may be, solemnised in the following words:

“I declare that A.B. and C.D. here present have been lawfully joined in a marriage/civil partnership.”

* * *

Legal consequences of civil union

13. (1) The legal consequences of a marriage contemplated in the Marriage Act apply, with such changes as may be required by the context, to a civil union.

(2) With the exception of the Marriage Act and the Customary Marriages Act, any reference to—

(a) marriage in any other law, including the common law, includes, with such changes as may be required by the context, a civil union; and

(b) husband, wife or spouse in any other law, including the common law, includes a civil union partner.

Notes and Questions

1. *Differences.* What is the major difference between the Canadian and South African laws? Does this create a substantive difference between the rights and status of same-sex couples in Canada and South Africa? If so, which confers greater benefits on such couples? If there is no substantive difference between the rights and statuses of Canadian and South African couples, what is the point? In answering these questions, it may be useful

to review the history of the South African Constitution set out in Chapter 2. *See generally* Peter Bowal & Carlee Campbell, “The Legalization of Same-Sex Marriage in Canada,” 21 Am. J. Fam. L. 37 (2007).

2. *Responses in Other States.* In 1996, the United States enacted the Defense of Marriage Act and in 2004 Australia passed the Marriage Amendment Act. Both define marriage as a union between a man and a woman. The U.S. Act, unlike the Australian law, does not preclude states from recognizing same-sex marriage under their own laws. The Australian law, if upheld by the High Court, could bind states. *See generally* Geoffrey Lindell, *Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey—North America and Australia*, 30 Sydney L. Rev. 27 (2008).

Amendments to the U.S. constitution limiting marriage to “a man and a woman” have been proposed three times, most recently in 2008. In 2006, the U.S. Senate rejected the Federal Marriage Amendment, which provided in pertinent part:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman. S.J. Res. 1, 109th Cong. (2006).

What difference would it have made? Could it have been challenged? Where? Anita Bernstein urges a “stealth response” to concerted attacks against same-sex marriage. She endorses policy reform as an incremental but effective strategy and suggests a range of sources for “policy-innovation ideas.” *See* Anita Bernstein, *Subverting the Marriage Amendment Crusade with Law and Policy Reform*, 24 Wash. U. J.L. & Pol’y 79 (2007). For a survey, see Note, *Developments—The Law of Marriage and Family*, 116 Harv. L. Rev. 1996 (2003).

3. *Recognition.* If some states are signaling their animosity toward same-sex couples, others are opening their doors. In 2006, the Israeli Supreme Court allowed a same-sex couple married in Toronto to register in Israel. Aeyal Gross, *Israeli Supreme Court Orders Registration: Canada’s Marriage Equality Available to Israelis*, Nov. 23, 2006, <http://www.same-sexmarriage.ca/advocacy/news2006.htm>. Governor David Patterson of New York directed all state agencies to recognize same-sex marriages performed elsewhere, even though such marriages cannot be entered into in New York. Jeremy W. Peters, *New York to Back Same-Sex Unions from Elsewhere*, N.Y. Times, May 17, 2008. Massachusetts recently rescinded a 1913 law precluding marriages in Massachusetts that were prohibited in the would-be couples’ native state. One study predicted that this would add \$111 million to the state’s economy over a three-year period. Pam Belluck and Katie Zezima, *A 1913 Law Dies to Better Serve Gay Marriages*, N.Y. Times, July 16, 2008, at A1. In addition to New York, Rhode Island and New Mexico also recognize same-sex marriages performed in Massachusetts. Tina Kelley, *New York Gay Couples Head to Massachusetts with Marriage in Mind*, N.Y. Times, Aug. 2, 2008 at B3. For rigorous analyses, see Linda Silberman, “Same-Sex Marriages: Refining the Conflict of Laws Analysis,” 153 U. Pa. L. Rev. 2195 (2005); J. Thomas Oldham, *Developments in the US—“The Struggle over the Creation of a Status for Same-Sex Partners”*, in *The International Survey of Family Law* 481 (Andrew Bainham ed., 2006).

Problem 4-2

While studying in a graduate program in the Hague in the Netherlands, you met your partner, a Dutch computer programmer. You have been living together in Denmark,

where your partner has been transferred, for several years. You are an American citizen currently teaching at the International School in Copenhagen. You and your partner have made a commitment for life, and would like to formalize your relationship. You are both the same gender, and your jobs give you flexibility to move back to New York, remain in Denmark, where you are now habitual residents, or relocate in the Netherlands. From a legal perspective, in which country would you and your partner prefer to formalize your relationship and take up residence, and why?

C. International Human Rights and Same-Sex Couples

International and regional human rights instruments are increasingly becoming a focus of attention as members of the gay and lesbian community turn to international organizations and tribunals to challenge discriminatory practices. Though international tribunals have been slow to recognize the relationships of same-gender partners, support from international instruments for equality of treatment is developing.

1. The European Court of Human Rights

The European Court of Human Rights has interpreted the European Convention on Human Rights to require contracting nations to recognize family rights of same-sex couples. As set out below, the Court relied on Article 14, which provides that the rights set forth in the Convention are to be secured without discrimination on any ground such as sex, race, colour, and a number of other enumerated grounds, and Article 8, which guarantees each individual “the right to respect for his private and family life.”

(Press release issued by the Registrar)

Application No. 40016/98 Karner v. Austria

24.7.2003

The European Court of Human Rights has today notified in writing a judgment in the case of *Karner v. Austria* (application no. 40016/98). The Court held by six votes to one that there had been a violation of Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for home) of the European Convention on Human Rights. Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicant’s estate, by six votes to one, 5,000 euros for costs and expenses.

1. Principal facts

The applicant, Siegmund Karner, was an Austrian national born in 1955. He used to live in Vienna. He died on 26 September 2000. His lawyer informed the Court that Mr Karner’s mother had waived her right to succeed to the estate. He later informed the Court that the public notary dealing with Mr Karner’s estate had started trying to trace possible heirs.

From 1989 Mr Karner shared a flat with his homosexual partner, who had started renting it a year earlier. They shared the outgoings on the flat. In 1991 his partner discovered

that he was infected with the Aids virus. When he developed Aids in 1993, Mr Karner nursed him. In 1994 he died after designating Mr Karner as his heir.

In 1995 the landlord brought proceedings against Mr Karner to terminate the tenancy. The District Court dismissed the action, considering that the statutory right of family members to succeed to a tenancy also applied to persons in a homosexual relationship. That decision was upheld by the Regional Court, but subsequently quashed on 5 December 1996 by the Supreme Court, which found that the notion of “life companion” had to be interpreted as at the time the statute had been enacted and that the legislature’s intention in 1974 had not been to include persons of the same sex.

* * *

3. Summary of the judgment

Complaint

The applicant complained under Article 14, taken together with Article 8, of the Convention that he had been the victim of discrimination on the ground of his sexual orientation.

Decision of the Court

* * *

Article 14 taken together with Article 8 of the Convention

The Court found that, as the applicant’s complaint related to the adverse effect of the alleged difference in treatment on the enjoyment of his right to respect for his home, Article 14 was applicable.

The Court reiterated that differences based on sexual orientation required particularly serious reasons by way of justification. The Government had submitted that the aim of the statutory provision in issue was the protection of the traditional family unit. The Court could accept that this was, in principle, a weighty and legitimate reason which could justify a difference in treatment. However, it was a rather abstract aim and a broad variety of concrete measures could be used to implement it. Where the Contracting States’ margin of appreciation was narrow, as in the present case, the principle of proportionality between the means employed and the aim sought to be realised did not merely require the measure chosen to be suitable for realising the aim; it also had to be shown that it was necessary to exclude homosexual couples from the scope of the legislation in order to achieve that aim. The Government had not advanced any arguments that would support such a conclusion and had therefore not advanced convincing and weighty reasons justifying the narrow interpretation of the provision in question.

2. European Union

When the Treaty on European Union and the Treaty Establishing the European Community were amended in the Treaty of Amsterdam in 1997 (*see* Chapter One, Section B.2.e for a detailed discussion of the treaties of the European Union and its structure), Article 13 of the Treaty Establishing the European Community was amended to provide:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Article 13 is not itself a “current prohibition on discrimination based on sexual orientation,” but instead provides a framework for passing future laws. Heather Hunt, *Diversity and the European Union: Grant v. SWT, The Treaty of Amsterdam, and the Free Movement of Persons*, 27 *Denv. J. Int’l L. & Pol’y* 633, 651 (1999).

In 2000, for example, the Council passed Council Directive 2000/78/EC, which establishes a general framework for equal treatment in employment and occupation. Directives establish European Union policy, and require member nations to implement that policy through whatever means—statute, administrative regulation, constitutional amendment—would be appropriate in the context of their own legal systems. Directive 2000/78 provides in part: “(12 . . . [A]ny direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the Community.”

In 2008, the ECJ relied on this Directive to hold that the surviving partner of a German same-sex partnership might be able to claim a pension, as set out below.

**Arthur S. Leonard,
European Court Victory for Same-Sex Partners**

April 1, 2008

[http://newyorklawschool.typepad.com/leonardlink/
2008/04/european-court.html](http://newyorklawschool.typepad.com/leonardlink/2008/04/european-court.html)

The European Court of Justice, which sits in The Hague, the Netherlands, and rules on questions arising under European Union Law, held on April 1 that the surviving partner of a German registered same-sex partnership may be able to claim a pension under the pension plan maintained by the union of the theatrical industry in Germany. *Maruko v. Versorgungsanstalt der deutschen Bühnen*, Case C-267/06 (ECJ, Grand Chamber, April 1, 2008).

The theatrical pension plan was established during the Nazi period, when the Reich commanded that all theatrical professionals join an official union which entered into a collective agreement with the theater owners in 1937 establishing the pension plan. The plan provides that if a member of the union dies, their surviving widow or widower is entitled to a pension, calculated according to how long they have been a member. All members are required to contribute a portion of their pay into the fund maintained and administered by the plan.

In 2001, Germany passed a law creating registered life partnerships for same-sex couples. Although the German law did not purport to give registered partners all the rights and responsibilities of marriage, it does provide that “life partners must support and care for one another and commit themselves mutually to a lifetime union. They shall each accept responsibilities with regard to the other. The life partners are each required to contribute adequately to the common needs of the partnership by their work and from their property.” The law also provided that a life partner “shall be regarded as a member of the family of the other life partner.”

A few years later, Germany amended its social security code to provide that surviving life partners should be treated the same as surviving spouses for purposes of entitlement to state pensions administered by the government under the social security system.

Shortly after the registered partnership law went into effect, Tadao Maruko and his same-sex partner registered their partnership. Maruko’s partner, a theatrical costume designer

who is not named in the court's opinion, had been a member of the theatrical workers union since 1959, and had maintained his membership voluntarily through occasional periods when he was not employed in the industry. Maruko's partner died on January 12, 2005, and Maruko applied to the union for a survivor's pension.

The union turned him down, pointing out that under the 1937 collective bargaining agreement language, which was still in effect, only a surviving legal spouse was entitled to a pension. Maruko's lawsuit relies on European Council Directive 2000/78, which established within Europe the principal of non-discrimination on grounds of sexual orientation in employment, including compensation. The Directive does not, by its terms, apply to state social security systems, and also specifically states that it "is without prejudice to national laws on marital status and the benefits dependent thereon."

* * *

The critical substantive question ultimately is whether same-sex registered partnerships in German law are sufficiently similar in their legal status to marriages so as to invoke the non-discrimination requirements.

The thirteen unanimous judges of the Grand Chamber of the court, agreeing with the position articulated to them last year by the Advocate General in most respects, agreed with the Bavarian Court that this pension plan is subject to the non-discrimination requirements, and that if the refusal to provide a pension to Mr. Maruko has the effect of discriminating on the basis of sexual orientation, then the plan must pay out the pension.

Perhaps the most significant point of the ECJ's decision was to go beyond the recommendation of the Advocate General and to find discrimination if registered partnerships are "similarly situated" with respect to pension entitlements to marital relationships. The Advocate General had suggested that the non-discrimination requirements would only be breached if the registered partnerships were "substantially identical" to marital partnerships. The similarly situated concept may bring into play for comparison purposes the more recent German legislation that treats registered partners like spouses for purposes of entitled to social security survivor's benefits.

* * *

According to Dr. Helmut Graupner, a Viennese lawyer who was part of Maruko's legal team, the decision is particularly important because so far this court had never ruled directly on a discrimination claim in favor of gay people, having previously decided several cases involving transsexuals. Previous gay rights victories in Europe had come from the Court of Human Rights, located in Strassbourg, which is narrowly charged with interpreting the European Convention on Human Rights.

3. Organization of American States

Partners in same-gender relationships have also begun to seek assistance from the Inter-American Commission on Human Rights in their efforts to secure equivalent benefits. *In the Case of Marta Lucia Alvarez Giraldo*, Case 11.656, Report No. 71/99 (1999), the Commission reviewed a complaint brought by the applicant against Colombia, alleging that the director of the prison in which the applicant was incarcerated had refused her request for intimate visits from her female life partner on the basis of her sexual orientation. Finding that Colombian law afforded prisoners a right to intimate visits, the

Commission determined that the applicant had stated a colorable claim of arbitrary and abusive interference with her private life, in violation of Article 11(2) of the American Convention on Human Rights. Following unsuccessful attempts to resolve the matter by friendly settlement, the Commission declared the case admissible, and agreed to publish the decision, to continue analyzing the merits of the case, and to renew its efforts to conclude a friendly settlement. (See Chapter One, Section B.2.f for a detailed discussion of the Convention and the procedures and remedies available to the Commission.). A subsequent action brought by *José Alberto Pérez Meza*, Report No. 96/01 (2001), seeking inheritance rights on the basis of a de facto same-gender partnership equivalent to those Paraguayan law would permit opposite-gender de facto partners, was dismissed because the petitioner had not exhausted domestic remedies.

On June 3, 2008, the OAS General Assembly adopted a “Resolution on Human Rights, Sexual Orientation, and Gender Identity,” with support from 34 countries. The resolution takes note of the importance of the adoption of the Yogyakarta Principles (see subsection d, *infra*) and affirms the core principles of non-discrimination and universality in international law. States also agreed to hold a special meeting “to discuss the application of the principles and norms” of the Inter-American system on abuses based on sexual orientation and gender identity, <http://www.hrw.org/english/docs/2008/06/06/colomb19049.htm> (last visited Oct. 10, 2008).

4. United Nations Human Rights System

Within the United Nations human rights system, the convention most frequently invoked in support of same-gender partners is the International Covenant on Civil and Political Rights (ICCPR). The Human Rights Committee monitors implementation of the ICCPR through its review of periodic reports from the member states. Victims of violations of the ICCPR may submit communications to the Human Rights Committee against a contracting nation only if that nation has also ratified the first Optional Protocol to the ICCPR. Complaints from a member state about another member state’s violation of the ICCPR may also be heard through a communication to the Human Rights Committee, but only if both states have specifically agreed to this authority. (See Chapter One, Section B.2.a. for further information regarding the operation of the enforcement system under U.N. human rights conventions.) Although the limited nature of this enforcement scheme has not facilitated extensive consideration of matters involving sexual orientation issues, two cases arising out of this system have received significant attention.

The first case involved a challenge to New Zealand’s refusal to permit same-gender couples to marry. Three lesbian couples who unsuccessfully sought a declaratory judgment appealed the High Court’s decision to the New Zealand Court of Appeal, arguing both that the gender neutral marriage law did not preclude them from obtaining a license and that barring their entry to marriage constituted discrimination under the New Zealand Human Rights Act. In *Quilter v. Attorney General* [1998], 1 N.Z.L.R. 523, the Court unanimously determined that the statute permitted marriage between a man and woman only, and the majority further held that this restriction did not constitute discrimination under the Act. The couples subsequently filed a communication with the United Nations Human Rights Committee under the first Optional Protocol to the ICCPR, asserting that New Zealand’s failure to permit same-gender marriage violated their rights under Articles 16, 17, 23, and 26 of the ICCPR. In *Joslin v. New Zealand*, Communication No. 902/1999, CCPR/C/75/D/902/1999 (July 30, 2002), the Human Rights Committee issued its determination:

* * *

... The Committee notes that article 23, paragraph 2 of the Covenant expressly addresses the issue of the right to marry.

Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term “men and women”, rather than “every human being”, “everyone” and “all persons”. Use of the term “men and women”, rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.

In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.

Just as in the European Court of Human Rights, a communication submitted to the Human Rights Committee challenging the criminalization of private same-gender sexual conduct between consenting adults was more successful. In *Toonen v. Australia*, Communication No. 488/1992, CCPR/C/50/D/488/1992 (April 4, 1994) the Committee determined that the provisions of the Tasmanian Criminal Code constituted an arbitrary interference with the author’s privacy, in violation of Article 17 of the ICCPR, that could not be justified by the intent to prevent the spread of AIDS. The Committee suggested that as a remedy, the State of Tasmania should repeal the relevant sections of the Criminal Code within 90 days. The Committee also observed that the prohibition against sex discrimination in Article 26 of the ICCPR “is to be taken as including sexual orientation,” but found it unnecessary, in light of its decision under Article 17, to determine whether there was also a violation of Article 26.

For a provocative discussion, see Vincent J. Samar, *Throwing Down the International Gauntlet: Same-Sex Marriage as a Human Right*, 6 *Cardozo Pub. L. Pol’y & Ethics J.* 1 (2007).

In 2006, the International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, convened a meeting in Indonesia to develop a set of international principles, as described below.

Introduction to the Yogyakarta Principles

Many advances have been made toward ensuring that people of all sexual orientations and gender identities can live with the equal dignity and respect to which all persons are entitled. Many States now have laws and constitutions that guarantee the rights of equality and non-discrimination without distinction on the basis of sex, sexual orientation or gender identity.

Nevertheless, human rights violations targeted toward persons because of their actual or perceived sexual orientation or gender identity constitute a global and entrenched pattern of serious concern. They include extra-judicial killings, torture and ill-treatment, sexual assault and rape, invasions of privacy, arbitrary detention, denial of employment and education opportunities, and serious discrimination in relation to the enjoyment of other

human rights. These violations are often compounded by experiences of other forms of violence, hatred, discrimination and exclusion, such as those based on race, age, religion, disability, or economic, social or other status.

Many States and societies impose gender and sexual orientation norms on individuals through custom, law and violence and seek to control how they experience personal relationships and how they identify themselves. The policing of sexuality remains a major force behind continuing gender-based violence and gender inequality. . . . However, the international response to human rights violations based on sexual orientation and gender identity has been fragmented and inconsistent. To address these deficiencies a consistent understanding of the comprehensive regime of international human rights law and its application to issues of sexual orientation and gender identity is necessary. . . . Following an experts' meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November 2006, 29 distinguished experts from 25 countries with diverse backgrounds and expertise relevant to issues of human rights law unanimously adopted the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

* * *

The experts agree that the Yogyakarta Principles reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity. They also recognise that States may incur additional obligations as human rights law continues to evolve.

The Yogyakarta Principles affirm a broad range of rights, including the universal enjoyment of human rights, equality and non-discrimination, protection from all forms of exploitation, and effective remedies and redress, to which all human beings are entitled without distinction as to sexual orientation or gender identity. The Principles also set out specific measures to be taken by states so as to assure these rights.

Principle 24, set out below, is particularly pertinent for the purposes of this chapter.

The Right to Found a Family

Everyone has the right to found a family, regardless of sexual orientation or gender identity. Families exist in diverse forms. No family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members. States shall:

- A. Take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption or assisted procreation (including donor insemination), without discrimination on the basis of sexual orientation or gender identity;
- B. Ensure that laws and policies recognize the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration;
- C. Take all necessary legislative, administrative and other measures to ensure that in all actions or decisions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consider-

ation, and that the sexual orientation or gender identity of the child or of any family member or other person may not be considered incompatible with such interests;

- D. In all actions or decisions concerning children, ensure that a child who is capable of forming personal views can exercise the right to express those views freely, and that such views are given due weight in accordance with the age and maturity of the child;
- E. Take all necessary legislative, administrative and other measures to ensure that in States that recognize same-sex marriages or registered partnerships, any entitlement, privilege, obligation, or benefit available to different-sex married or registered partners is equally available to same-sex married or registered partners;
- F. Take all necessary legislative, administrative and other measure to ensure that any obligation, entitlement, privilege, obligation or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners;
- G. Ensure that marriages and other legally-recognized partnerships may be entered into only with free and full consent of the intending spouses or partners.

The complete text of the Principles can be found at http://www.yogyakartaprinciples.org/principles_en_principles.htm.

On December 12, 2008, 66 nations at the UN General Assembly supported a groundbreaking statement confirming that international human rights protections include sexual orientation and gender identity. It is the first time that a statement condemning rights abuses against lesbian, gay, bisexual, and transgender people has been presented in the General Assembly.

The statement was read by Argentina and a counterstatement was read by the Syrian Arab Republic. See www.un.org, “18 December 08 General Assembly: 70th and 71st plenary meeting—Morning session.”

Problem 4-3

Elena and Sofia have resided together in a conjugal relationship in Luxembourg, their native country, for the past twelve years. They have committed to a life-long relationship, and are raising a daughter conceived by artificial insemination. As of 2004, Luxembourg has had a domestic partnership law, but Elena and Sophia would prefer to marry. Having unsuccessfully sought a marriage license in proceedings in the Luxembourg courts and exhausted all domestic remedies, they file an application with the European Court of Human Rights alleging violations of Articles 8, 12, and 14. Article 12 guarantees men and women of marriageable age a right to marry in accordance with national laws.

As an advocate for the applicants appearing before the Court, what arguments would you make to persuade the Court to rule that denial of the ability to marry violates the applicants’ rights under the Convention? As you frame your arguments, consider drawing upon analogous constitutional decisions as well as precedent under international law.

As counsel for the Grand Duchy of Luxembourg appearing before the Court, what arguments, drawing from both international sources cited in this section as well as constitutional precedents from Section B, would you submit to the Court?