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Toward A 'European Model' of Same-Sex Marriage Rights: A Viable Pathway for the U.S.?

By

Christy M. Glass, Nancy Kubasek and Elizabeth Kiester*

INTRODUCTION

The much-publicized passage of Proposition 8 in California, effectively banning same-sex marriage through an amendment to the state constitution,¹ is but the most recent of several successful efforts by well-organized opponents of same-sex marriage.² Indeed, since President Clinton signed the federal Defense

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1. Proposition 8, otherwise known as the California Marriage Protection Act, was a ballot proposition and state-level constitutional amendment that effectively overturned the California Supreme Court's ruling that denying same-sex couples the right to marry was unconstitutional. In other words, what made this proposition's passage so notable was that, rather than preempting a court's potential decision to allow same-sex marriage, this constitutional ban overturned an existing court-granted right to marry for same-sex couples. This measure, which was passed in November 2008, amended Article II, Section 8 of the California Constitution with the following clause: "Only marriage between a man and a woman is valid or recognized in California." Institute of Governmental Studies, UC Berkeley, Proposition 8: The Latest Effort to Ban Same-Sex Marriage in California, http://igs.berkeley.edu/library/hot_topics/2008/Nov2008Election/Prop8main.html (last visited Oct. 11, 2010).

2. On August 4, 2010, a federal judge, Vaughn R. Walker, ordered that enforcement of Proposition 8 be stopped, declaring the marriage ban unconstitutional. Specifically, Judge Walker ruled, "In the absence of a rational basis, what remains of proponents' case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate." *Perry v. Schwarzenegger*, 704 F.

of Marriage Act (DOMA) in 1996,³ nearly forty states have passed Defense of Marriage Acts, which prohibit same-sex marriage at the state level.⁴ As American advocates of same-sex marriage rights mobilize to counter these efforts, several countries throughout the world are moving toward full marriage equality for same-sex couples.⁵ This paper attempts to assess the viability of achieving same-sex marriage rights in the United States through pathways pursued by five European countries: Belgium, the Netherlands, Norway, Spain and Sweden. Though these countries vary a great deal in terms of political culture and gay rights histories, they are alike in that each has granted full

Supp. 2d 921, 1002 (N.D. Cal. 2010) (citing *Palmore v. Sidoti*, 466 U.S. 429, 433, (“[T]he Constitution cannot control [private biases] but neither can it tolerate them.”)). Shortly thereafter the United States Court of Appeals for the Ninth Circuit issued a stay on the performance of same-sex marriages until it determines the constitutionality of the marriage ban. *Perry v. Schwarzenegger*, No. 10-16696 2010 WL 3212786 (9th Cir. Aug. 16, 2010).

3. The Defense of Marriage Act, signed in 1996 by President Clinton, has two provisions. The first defines marriage, for federal purposes, as only heterosexual: “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” The Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 1 U.S.C. § 7 (2000). The second provision states that, “No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect of any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same-sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.” Pub. L. No. 104-199, 110 Stat. 2419, 28 U.S.C. § 1738C (2000).

4. As of December 2009, only five states grant full marriage equality to same-sex couples. They include: Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont. Thirty-eight states recognize laws that ban same-sex marriage. They include: Alabama (2006), Alaska (1998), Arizona (2008), Arkansas (2004), California (2008), Colorado (2006), Delaware (1996), Florida (2008), Georgia (2004), Hawaii (1998), Idaho (2006), Illinois (1996), Indiana (1997), Kansas (2005), Kentucky (2004), Louisiana (2004), Maine (1997), Michigan (2004), Minnesota (1997), Missouri (2004), Mississippi (2004), Montana (2004), Nebraska (2000), North Carolina (1996), North Dakota (2004), Ohio (2004), Oklahoma (2004), Pennsylvania (1996), South Carolina (2006), South Dakota (2006), Tennessee (2006), Texas (2005), Utah (2004), Virginia (2006), Washington (1998), West Virginia (2000), Wisconsin (2006), and Wyoming (2003). See *Freedom to Marry*, State Anti-Gay Constitutional Amendments and Laws (Nov. 9, 2009), <http://www.freedomtomarry.org/page/-/files/pdfs/091109%20RR%20Anti-Gay%20Amendments%20&%20Laws.pdf>.

5. The Netherlands became the first country to grant full marriage rights to same-sex couples in 2001 under the Act Opening the Institute of Marriage, *Burgerlijk Wetboek [BW] [Civil Code]* art. 30:1 (Neth.). Same-sex marital relationships have also been recognized in Belgium since 2003, see *Burgerlijk Wetboek [BW] [Civil Code]* art. 143 (Belg.); in Canada since July of 2005, see *The Civil Marriage Act*, 2005 S.C., ch. 33 (Can.); in Spain since 2005, see *Law 13/2005 (Código Civil [C.C.] [Civil Code] 2005*, 157 (Spain) (amending the Civil Code on the right to contract marriage); in South Africa since 2006, see *Civil Union Act 17 of 2006* (S. Afr.); and in Sweden since 2009, see *International Lesbian and Gay Association of Europe, Country-By-Country Guide: Sweden*, http://www.ilga-europe.org/home/guide/country_by_country/sweden (last visited Oct. 11, 2010). Civil unions or registered partnerships are available to same-sex couples in Andorra, Columbia, Czech Republic, Denmark, Ecuador, Finland, France, Germany, Greenland, Hungary, Iceland, Luxembourg, New Caledonia, New Zealand, Slovenia, the United Kingdom, and Uruguay. *International Lesbian and Gay Association, Marriage/Substitutes to Marriage*, <http://ilga.org/ilga/en/Articles?select=tag:marriage/substitutes%20for%20marriage> (last visited Oct. 11, 2010).

marriage rights to same-sex couples in the past decade.⁶

We begin by briefly reviewing the recent history of the battle to achieve same-sex marriage rights in the U.S. in Section I. In Sections II through VI, we provide in-depth comparative case studies of the ways in which equal rights advocates successfully won same-sex civil marriage rights at the federal level in Belgium, the Netherlands, Norway, Spain and Sweden. Next we critically evaluate these comparative cases to identify the central pathways by which these countries successfully achieved same-sex marriage rights. We conclude in Section VIII that the most important lesson for the U.S. lies in developing a long-term strategy that begins with federal recognition of civil unions or domestic partnerships. As these case studies suggest, the successful transition to full marriage equality depends above all else upon the ascension to power of a strong, politically left ruling party or coalition willing to advance marriage equality even in the face of opposition.

I.

RECENT HISTORY OF SAME-SEX MARRIAGE RIGHTS

A. From Hawaii to DOMA: The History of Marriage Rights in the U.S. since 1990

Despite its prominence in political debates in recent years, same-sex marriage rights have a relatively short history in the United States.⁷ In

6. This paper does not include important European cases where registered domestic partnerships and/or civil unions between same-sex couples have been recognized, including the Czech Republic, Denmark, Finland, France, Germany, Hungary, Luxembourg, Slovenia, Switzerland and the United Kingdom. ILGA Europe, Marriage and Partnership Rights for Same-Sex Partners: Country-By-Country, http://www.ilga-europe.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country (last visited Oct. 11, 2010). We limit our analysis to European countries where same-sex marriage rights have been achieved because we believe that these cases have the most relevance for the U.S. In the United States, over one thousand federal benefits are granted to married couples, including social security benefits and federal income tax premiums. Because of the financial, social, and political returns of marriage in the U.S., we limit our analysis to those countries in which the full range of benefits and recognition associated with federal marriage rights have been granted to same-sex couples. For an analysis of the limitations of domestic partnership recognition in the U.S. context, see Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 93 COLUM. L. REV. 1164 (1992). In arguing that civil unions and domestic partnerships are not equivalent to marriage culturally or economically, we depart from Eskridge, who refers to these non-marriage alternatives as “different but equal.” WILLIAM N. ESKRIDGE, EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 128-39 (2002).

7. This is not to suggest that same-sex marriage was an entirely new political concept in the early 1990s, only that same-sex marriage did not achieve national political salience until the decision of the Hawaiian Supreme Court. As early as 1971, a gay couple argued unsuccessfully that the lack of language prohibiting marriage between a man and a woman effectively authorized marriage between individuals of any sex. *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971). In 1973 Maryland enforced a law that defined marriage as a union between a man and a woman, and in the

December 1990, three same-sex couples requested civil marriage licenses in Hawaii and were denied four months later. The couples' case was eventually heard by the Hawaii Supreme Court, which ruled that the denial of marriage licenses to same-sex couples violated the state's constitutional guarantee of equal protection.⁸ This landmark ruling ignited a political firestorm. Same-sex marriage opponents mobilized a strong, well-organized political backlash, which resulted in constitutional and statutory legal restrictions at the federal and state level.⁹

In recent years, opponents have been wildly successful in mobilizing anti-marriage constituencies at the state level. Today, groups including conservative political actors, voters, and scholars form what some have billed a "marriage movement," aimed at protecting traditional marriage by, among other things,

same year a Kentucky court denied a lesbian couple the right to a marriage license. *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973). See WILLIAM N. ESKRIDGE, *THE CASE FOR SAME SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 54-57 (1996) for further detail on the fight for same-sex union recognition in the 1970s. Despite this smattering of cases centering on marriage rights, most early activism around same-sex partnerships focused on domestic partnership ordinances and civil union statutes. Major early successes in these arenas were achieved in California in the 1980s. The first domestic partnership ordinance was adopted in Berkeley in December 1984. City of Berkeley Domestic Partnership Information, <http://www.ci.berkeley.ca.us/contentdisplay.aspx?id=4206> (last visited Oct. 30, 2010). The following year, West Hollywood mayor Valerie Terrigno created the first domestic partnership registry in the U.S., which allowed all municipal employees to register and receive benefits for same-sex partners. Stephen Braun, *West Hollywood Law Would Expand Rights of Unmarried Couples*, L.A. TIMES, Jan. 31, 1985, at WS1; Robert Lindsey, *West Hollywood Acting on Pledges*, N.Y. TIMES, Mar. 19, 1985, at A16. Marriage did not become central to the political agenda of the gay rights movement until the 1990s, but by this time the movement had already fought against a broad range of discriminatory laws and practices against same-sex individuals and couples. These struggles included, but were not limited to, the decriminalization of homosexuality through the repeal of state-level sodomy laws and employment and housing-related discrimination. For an excellent history of the American gay rights movement prior to the infamous Stonewall riots, see VERN L. BULLOUGH, *BEFORE STONEWALL: ACTIVISTS FOR GAY AND LESBIAN RIGHTS IN HISTORICAL CONTEXT* (2002). For insight into the contemporary gay rights movements from 1950 to 2001, see ERIC MARCUS, *MAKING GAY HISTORY: THE HALF CENTURY FIGHT FOR LESBIAN AND GAY EQUAL RIGHTS* (2002).

8. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

9. States that have passed anti-marriage statutes, legislation or constitutional amendments banning same-sex marriage since 1993 include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin. As of December 2009, only five states, Massachusetts, New Jersey, New Mexico, New York, and Rhode Island, have no statutes or constitutional amendments prohibiting same-sex marriage and only five states, Iowa, Vermont, Massachusetts, New Hampshire, and Connecticut, allow same-sex marriage. For state-by-state histories and specific state-level DOMA language, see Danielle O'Connell, *Federal and State DOMA Language*, <http://www.cga.ct.gov/2002/olrdata/jud/rpt/2002-R-0957.htm>. For a compilation of more detailed information on state-level prohibitions, see Paul Axel-Lute, *Same-Sex Marriage: A Selective Bibliography of the Legal Literature*, RUTGERS UNIV. LAW LIB., <http://law-library.rutgers.edu/SSM.html#jurisus> (last updated Sept. 25, 2010).

preventing the extension of marriage rights to same-sex couples.¹⁰ However, arguably the most severe blow to marriage-rights proponents came with Clinton's signing into law the Defense of Marriage Act in 1996.¹¹ This act, with which the federal government limited marriage to heterosexual couples for the first time,¹² validated anti-marriage-rights activists' efforts and paved the way for electoral victories at the state level.

DOMA has two provisions. The first defines marriage as "a legal union between one man and one woman as husband and wife" and limits the term "spouse" to "a person of the opposite-sex who is a husband and wife."¹³ The second provision states:

No State, territory, or possession of the United States or Indian tribe, shall be required to give effect to any public act, record or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same-sex that is treated as marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.¹⁴

Thus while the first provision codifies marriage at the federal level as exclusively heterosexual unions, the second relieves states from recognizing same-sex marriages recognized in other states.

10. According to Bernstein for example, the premise of this movement is that marriage is socially desirable, under threat, and in need of protection. Anita Bernstein, *For And Against Marriage: A Revision*, 102 MICH. L. REV. 129, 13 (2003); see also Judith Stacey, *Family Values Forever: In the Marriage Movement, Conservatives and Centrists Find a Home Together*, THE NATION, Jul. 9, 2001. This movement has found support among social conservative political actors, as well as scholars. For an example of a scholarly report that supports the premise of the marriage movement, see *The Council on Families in America, Marriage in America: A Report to the Nation*, in PROMISES TO KEEP 293-318 (David Popenoe et al. eds., 1996). Sociologist David Popenoe, the son of the eugenicist and early founder of marriage counseling, Paul Popenoe, and colleagues have formed the National Marriage Project, now housed at the University of Virginia, and directed by sociologist W. Bradford Wilcox. The center documents the factors leading to the so-called decline of marriage and traditional family life. The stated mission of the center is "to provide research and analysis on the health of marriage in America," and each year it produces an annual report titled "The State of Our Unions." The Center's web site can be viewed at: <http://www.virginia.edu/marriageproject/history.html> (last visited Mar. 25, 2010).

11. The timing of this law restricting marriage rights is somewhat ironic. 1996 was the same year that Clinton signed into law The Personal Responsibility and Work Opportunity Act (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996), more commonly known as welfare reform or welfare-to-work. In addition to moving welfare recipients into paying jobs, the stated objective of the welfare reform bill was to "encourage the formation and maintenance of two-parent families," section 401a(4), based on the premise that "marriage is the foundation of a successful society," section 101(1).

12. When the Act was introduced in May 1996, its sponsors wrote that the purpose of the bill was, in part, to "make explicit what has been understood under federal law for over 200 years; that marriage is the legal union of a man and a woman as husband and wife, and a spouse is a husband or wife of the opposite sex." Summary and Analysis, Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 1 U.S.C. § 7 (May 7, 1996). While previous court rulings had used the language of man and wife, no previous federal act had made this requirement explicit.

13. 1 U.S.C. § 7.

14. 28 U.S.C. § 1738C.

Marriage-rights opponents have adopted the language of the first provision and have successfully mobilized for state-level DOMAs. Since the passage of the DOMA at the federal level in 1996, thirty-eight states have introduced either DOMA legislation or constitutional amendments banning marriage between individuals of the same-sex.¹⁵

Despite these major political setbacks at the state level, a handful of important victories for same-sex marriages have been achieved through the judiciary. Since 1996, state supreme court decisions in Vermont,¹⁶ Massachusetts,¹⁷ Connecticut,¹⁸ and Iowa¹⁹ have extended marriage rights to same-sex couples. In New Hampshire, same-sex marriage rights have been granted to couples since 2010, following the signing into law of a marriage equality bill in 2009.²⁰

These victories, however anomalous and limited in their impact,²¹ have served to further fortify the efforts of same-sex marriage opponents. The political backlash against same-sex marriage rights has focused on framing the same-sex marriage debate in ever-stronger moral and cultural terms, thereby cultivating a sense of moral panic among constituents.²² These framing efforts

15. O'Connell, *supra* note 9.

16. Baker v. State, 744 A.2d 864 (Vt. 1999).

17. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). This victory remains a tenuous one. Opponents of same-sex marriage in Massachusetts nearly forced a 2008 statewide vote on a constitutional ban on same-sex marriage. But in June 2007, after over three years of debate, the Massachusetts legislature narrowly upheld the court decision granting same-sex marriage rights, thereby protecting this decision for at least five years.

18. Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135, 957 A.2d 407 (Conn. 2008).

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

20. 2009 H.B. 436, Gen. Court, Reg. Sess. (N.H. 2009) (codified as amended at RSA 457:1-a (2010)).

21. Though significant in their own right, state level marriage rights are limited in the protections and benefits they grant to same-sex couples. While state-level recognition allows same-sex couples to file joint state tax returns, they must continue to file federal taxes independently, thus denying same-sex couples the benefits and premiums offered to married couples able to jointly file incomes taxes. State-level benefits can include inheritance rights, workers compensation, health insurance and pension benefits for partners of state employees, paid family leave, hospital visitation rights, and healthcare decision-making. However, these statutes cannot provide the federal protections and benefits granted to legally married couples as outlined in a 1997 report by the General Accounting Office, which identified 1,049 federal laws in which "benefits, rights and privileges are contingent on marital status," including Social Security benefits, veterans' benefits, employment benefits and taxation. U.S. GEN. ACCOUNTING OFFICE, OFFICE OF THE GEN. COUNSEL, B-275860, CATEGORIES OF LAWS INVOLVING MARITAL STATUS (1997).

22. Sociologist Barry Adam compares the tone and substance to this panic campaign to other historical moral panics, which Stanley Cohen defines as "threats to societal values and interests . . . presented in a stylized and stereotypical fashion by the mass media . . . [when] moral barricades are manned by editors, bishops, politicians . . . [and where] experts pronounce their diagnoses." STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* 1 (1980) (quoted in Barry D. Adam, *The Defense of Marriage Act and American Exceptionalism: The "Gay Marriage" Panic in the United States*, 12 J. HIST. SEXUALITY 259, 260 (2003)). According to Adam, the moral panic around same-sex marriage emerged out of the close relationship forged between the Republican Party and the

have aided in state-level victories across the country, for example in California, where prior to the passage of marriage bans, the majority of voters expressed support for same-sex civil rights.²³ To date, the success of challenges to state constitutional amendments banning same-sex marriage have been limited.²⁴ However, even the narrow handful of successes achieved through judicial challenges has strengthened opponents' efforts at achieving a federal amendment to the U.S. Constitution banning marriage between individuals of the same-sex.

The Federal Marriage Protection Act,²⁵ a proposed constitutional

Christian Right that aims to increase the conservative religious influence within American politics by, in part, constructing homosexuality generally and same-sex marriage specifically as evidence of America's cultural and moral decline. Evidence for this is provided by the immense financial and institutional resources provided to state-level anti-marriage campaigns by conservative Christian organizations as well as by the rhetoric of these campaigns, which seek to mobilize non-urban, Christian and less-educated voters against so-called special rights of elite and immoral gays and lesbians.

23. In a poll of likely voters conducted several months before the November election in which Proposition 8 was passed, a majority of California voters indicated that they did not believe same-sex relationships were morally wrong. Cathleen Decker, *Californians Slimly Reject Gay Marriage*, L.A. TIMES, May 23, 2008. Another poll, conducted by the Public Policy Institute of California less than two months prior to the election, found that 55% of likely voters were opposed to banning same-sex marriage rights in the state. John Wildermuth, *Poll: Same-sex Marriage Ban Not Wooing Voters*, S.F. CHRON., Sept. 25, 2008.

24. See, e.g., *Andersen v. King County*, 138 P.3d 963, 969 (Wash. 2006) (upholding Washington's Defense of Marriage Act). The trial court in *Andersen* had found the state Defense of Marriage Act passed in 1998 to be unconstitutional on its face because it violated the privileges and immunities and due process clauses of the Washington state constitution by prohibiting same-sex marriage. *Id.* at 970. The state supreme court, however, determined that same-sex couples were not members of a suspect class and, therefore, that the trial court should have applied the rational basis test, rather than strict scrutiny. *Id.* at 969. The court found that the DOMA met the rational basis test and that the legislature had the power to limit marriage to opposite-sex couples. *Id.* Neither was the picture hopeful in Michigan for same-sex marriage advocates. A Michigan appeals court found that the constitutional ban on same-sex marriage barred state and local governments, as well as public universities, from exercising their right to provide benefits to same-sex domestic partners. *Nat'l Pride at Work, Inc. v. Governor of Michigan*, 732 N.W.2d 139, 156 (Mich. Ct. App. 2007), *aff'd*, 748 N.W.2d 524 (Mich. 2008). A county court judge in Iowa, however, struck down the Iowa DOMA in August 2007, writing, "Couples . . . who are otherwise qualified to marry one another may not be denied licenses to marry or certificates of marriage or in any other way prevented from entering into a civil marriage . . . by reason of the fact that both persons comprising such a couple are of the same-sex." *Varnum v. Brien*, No. CV5965, 2007 WL 2468667 (D. Iowa Aug. 30, 2007). Because the ruling was appealed to the Iowa Supreme Court, the judge issued a stay of his ruling. One same-sex couple, however, was able to marry during the four hours when the ruling was in effect. Monica Davey, *Iowa Permits Same-Sex Marriage, For 4 Hours, Anyway*, N.Y. TIMES, Sept. 1, 2007, at A9. On April 3, 2009, the Iowa Supreme Court heard the case and unanimously rejected the ban and extended the right to marry to all same-sex couples in the state. Jeff Eckhoff and Grant Schulte, *Unanimous Ruling: Iowa Marriage No Longer Limited to One Man, One Woman*, DES MOINES REG., Apr. 3, 2009.

25. The first version of this amendment was originally introduced in the House in 2002 as the Federal Marriage Amendment, sponsored by Rep. Ronnie Shows (D-MS). H.R.J. Res. 93, 107th Cong. (2002). The proposed amendment made little progress in 2002 and 2003 before being defeated in the House and the Senate in 2004. The Senate did not defeat the amendment on a direct vote, but rather on a cloture vote, which would end debate and move to an up or down vote. The bi-partisan

amendment banning same-sex marriage, was rejected by the U.S. Senate in June 2006 by a vote of 49 opposed and 48 in favor.²⁶ The goal of the amendment was not simply to limit marriage between a man and a woman, but also to prevent states and the judiciary from extending marriage rights—and therefore federal marriage benefits—to same-sex couples.²⁷ Had it passed, this amendment would have effectively ended state legislative and judicial challenges to DOMA. Supporters of the Amendment have vowed that they will continue their efforts at its passage.

The presence of a potent and well-organized backlash against same-sex marriage rights is not unique to the U.S.²⁸ However, what is exceptional about

vote of 48 to 50 fell short of the 60 votes needed for cloture, which blocked the amendment from continuing. The House was forty-six votes away from the required two-thirds majority in their 227 to 186 bipartisan vote. For the official status of the resolution, see H.R. 106, 108th Cong. (2003).

26. The Amendment required a two-thirds vote to pass. The narrow margin of the vote was a great disappointment to those in favor of extending marriage rights to same-sex couples. Laurie Kellman, *Senate Rejects Gay Marriage Ban*, S.F. CHRONICLE, June 7, 2006.

27. S.J. Res. 1, 109th Cong. (2005). The language of the proposed amendment reads in 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." *Id.* at § 2. In his speech calling for a federal amendment, President Bush said a federal law was needed to reign in "activist judges and local officials" who have made an "aggressive attempt to redefine marriage." Press Release, Office of the White House Press Sec'y, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004) (on file with author). Indeed, a federal amendment would apply marriage standards to all state constitutions, and the impact of a federal amendment would be to allow states to ignore court mandates, and revoke any laws that provided such benefits to same-sex couples. S.J. Res. 1.

28. Most organized opposition groups have been religious-based, as in the United States. According to religion scholar Jeffrey Stout, "The major obstacle to the full legal recognition of same-sex marriage in the U.S. is Christian opposition to it." Jeffrey Stout, *How Charity Transcends the Culture Wars: Eugene Rogers and Others on Same-Sex Marriage*, 31 J. OF RELIGIOUS ETHICS 2 (2003). However, though opposition to same-sex marriage in the U.S. is dominated by conservative fundamentalist Christian organizations, this is not necessarily true around the world. The Vatican's opposition to same-sex marriage rights is well documented. To read the Vatican's official statement regarding same-sex marriage, see "Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons", The Vatican, available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html (last visited Dec. 16, 2009). In the statement, the Vatican quotes scripture identifying homosexuality as "a serious depravity" and further argues "there are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God's plan for marriage and family." In response to the Spanish parliament's passage of a bill granting same-sex marriage and adoption rights, Cardinal Alfonso Lopez Trujillo, the head of the Vatican's Pontifical Council on the Family, decried the legislation as "iniquitous." *Vatican Condemns Spain Gay Bill*, BBC NEWS, Apr. 22, 2005, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4473001.stm>. For detailed insight into the organization of conservative religious opposition groups in Canada, see SYLVAIN LAROCQUE, GAY MARRIAGE: THE STORY OF A CANADIAN SOCIAL REVOLUTION (Lortimer 2006). Gevisser's excellent analysis of opposition to homosexuality and same-sex marriage in Sub-Saharan Africa details the ways in which opposition to gay rights, articulated in a religious and highly politicized context, symbolizes African leaders' appeal to traditional values and a rejection of the importation of Western cultural values. Mark Gevisser, *Homosexuality in Africa: An interpretation and overview of homosexuality in both traditional and modern African societies* in AFRICANA: THE ENCYCLOPEDIA

the U.S. case is the direction of change to date, namely, the regressive nature of American politics and policies vis-à-vis same-sex marriage rights.²⁹ While only a handful of countries have granted full marriage rights to date, many industrialized countries have implemented some form of recognized partnership status, either legally recognized civil unions or domestic partnerships.³⁰

Rather than attempt to explain the factors driving U.S. exceptionalism on this issue,³¹ this paper compares the trajectories of the five European countries that have granted full marriage rights to same-sex couples. By identifying the range of pathways by which these diverse countries achieved full marriage rights, we hope to offer critical comparative guidance for the U.S. Before turning to our case studies, we briefly review the status of same-sex marriage rights around the globe.

B. Same-Sex Marriage Rights Around the Globe

To date, seven countries have successfully passed laws granting full legal marriage rights to same-sex couples: Belgium, Canada, the Netherlands,

OF THE AFRICAN AND AFRICAN AMERICAN EXPERIENCE, (Kwame A. Appiah and Henry L. Gates, Jr. eds., 1999). For a detailed exploration of the moral opposition to same-sex marriage rights in France, see Claudina Richards, *The Legal Recognition of Same Sex Couples: the French Perspective*, 51 INT'L & COMP. L.Q. 2 (2002). For a broad review of various religious groups' official positions on same-sex marriage, see THE PEW FORUM ON RELIGION & PUBLIC LIFE, RELIGIOUS GROUPS' OFFICIAL POSITIONS ON SAME-SEX MARRIAGE (2010), <http://pewforum.org/Gay-Marriage-and-Homosexuality/Religious-Groups-Official-Positions-on-Same-Sex-Marriage.aspx>. Very few religious organizations have not made official statements condemning homosexuality generally and same-sex marriage specifically. Religious organizations that support gay and lesbian rights, including the right to marry, include the United Church of Christ, Unitarian Universalist Association of Congregations, Reform, and Reconstructionist movements within Judaism, and some Hindu sects. *Id.*

29. Sociologist Barry Adam emphasizes this point when he writes, "What is especially noteworthy about this American trend is the degree to which it is exceptional on the world scene. At a time when the legal recognition of gay and lesbian relationships has been proceeding apace in advanced industrial nations around the world (most notably, in Scandinavia, the Netherlands, Belgium, France, Canada, Germany, and Hungary and partially or locally in Australia, Austria, Brazil, Columbia, Czech Republic, New Zealand, Portugal, South Africa, Spain, Switzerland, and the United Kingdom), the efforts of U.S. legislators to prohibit legal recognition demand explanation." Adam, *supra* note 22, at 259.

30. The first countries to extend domestic partnership protections to same-sex couples were Denmark (1989), Norway (1993), Sweden (1995), and Iceland (1996). Israel, France, and Japan recognize same-sex marriages performed in other countries. These examples do not include regions, provinces or municipalities that grant some rights to same-sex couples through civil union ordinances or domestic partnership registries. THE PEW FORUM ON RELIGION & PUBLIC LIFE, GAY MARRIAGE AROUND THE WORLD (2009), <http://pewforum.org/Gay-Marriage-and-Homosexuality/Gay-Marriage-Around-the-World.aspx>.

31. The literature on U.S. exceptionalism in the areas of cultural politics is exemplified by Seymour Martin Lipset's classic work. SEYMOUR M. LIPSET, *AMERICAN EXCEPTIONALISM: A DOUBLE EDGED SWORD* (1996). Barry Adam, *supra* note 22, specifically identifies three factors that promote U.S. exceptionalism in the arena of same-sex marriage rights: American Protestantism, labor movement politics, and gender and national identity.

Norway, South Africa, Spain, and Sweden.³² However, the major innovation in granting partnership rights to same-sex couples occurred in Denmark in 1989. Indeed, Denmark's registered partnership law was the first such law to be introduced at the national level in any country around the globe.³³ Danish partnership recognition granted property and inheritance rights to same-sex couples, the first time that a national government guaranteed same-sex couples any rights enjoyed by heterosexual couples.³⁴ Since 1989, several other countries have followed Denmark in successfully introducing civil union and/or registered domestic partnership laws.³⁵ Same-sex civil union or domestic partnership status is also recognized in a number of regions and jurisdictions of other countries, though not at the federal or national level.³⁶ These laws are important symbolically because they represent a political commitment to legal recognition of same-sex partnerships and are an important step towards full equality.³⁷ These laws also allow same-sex partners to access a variety of economic benefits, as well as social and political rights.³⁸ However, civil union

32. While these are the only countries that grant full marriage rights at the national and federal level, same-sex marriages are performed in specified regions in Argentina, Australia, Mexico, the United States, and Venezuela. Same-sex marriages are recognized though not performed in Aruba, Israel, Antilles, and the Isle of Man. International Lesbian and Gay Association, *supra* note 5.

33. Ingrid Lund-Andersen, *The Danish Registered Partnership Act, 1989: Has the Act Meant a Change in Attitudes?* in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW 437, 417 (Robert Wintemute & Mads Andenaes eds., 2001).

34. THE PEW FORUM, *supra* note 30.

35. These include Andorra, Austria, Columbia, the Czech Republic, Ecuador, Finland, France, Germany, Greenland, Hungary, Iceland, Luxembourg, New Calendonia, New Zealand, Slovenia, Switzerland, Wallis and Futuna, the United Kingdom, and Uruguay. *Id.*

36. For example, same-sex civil union and/or domestic partnership status is recognized in at least one jurisdiction in Albania, Bolivia, Bulgaria, Burundi, Cambodia, Chile, China, Costa Rica, Cuba, Democratic Republic of Congo, Dominican Republic, El Salvador, Estonia, the European Union, Faroe Islands, Greece, Honduras, India, Ireland, Italy, Jamaica, Japan, Kosovo, Latvia, Liechtenstein, Lithuania, Moldova, Montenegro, Nepal, Nigeria, Panama, Paraguay, the Philippines, Poland, Romania, Russia, Serbia, Slovakia, Singapore, South Korea, Taiwan, Uganda, United States, Ukraine, Venezuela, and Vietnam. INTERNATIONAL LESBIAN AND GAY ASSOCIATION, *LGTBI RIGHTS IN THE WORLD*, http://ilga.org/map/LGBTI_rights.

37. Barry Adam, *supra* note 22, at 261, 273, identifies an ideal typical pathway toward full recognition of same-sex partnerships as beginning with decriminalization of anti-sodomy laws, followed by the passage of human rights legislation that includes anti-discrimination provisions related specifically to sexual orientation. These two legal advances create a framework whereby full citizenship rights, including partnership rights, are eventually granted. Some kind of partnership recognition either at the national, regional or provincial level, preceded the extension of full marriage rights in nearly every country. *See also* Patrick Festy & Godfrey Rogers, *Legal Recognition of Same-Sex Couples in Europe*, 61 POPULATION 4 (2006) for a history and breakdown of the range of policy advancements related to same-sex couple recognition in Europe.

38. The range of benefits available to partnerships recognized as civil unions or domestic partnerships vary a great deal. For instance, Denmark's domestic partnership statute provides legal benefits equal to marriage, though with exceptions to the Legal Incapacity and Guardianship Act, The Inheritance Tax Act, church ceremonies and adoption. Lov om registreret partnerskab [Registered Partnership Act], Act No. 372 (1989) (Den.). However, as of July 2010, the Danish

and domestic partnership laws typically do not grant the same socio-cultural recognition and economic benefits as legal marriage.³⁹

Below we systematically review the histories of the successful political battles to achieve same-sex marriage rights in five European countries that have granted marriage rights to date.⁴⁰ Specifically, we identify the political mechanisms used by proponents of same-sex marriage rights in each case to identify viable pathways for the U.S. We present our case study analyses in the chronological order in which the countries implemented full marriage rights for same-sex couples.

II. HISTORY OF SAME-SEX MARRIAGE RIGHTS IN THE NETHERLANDS

On April 1, 2001, just moments after the landmark Dutch legislation recognizing same-sex marriages took effect, two lesbian brides and six gay grooms became the world's first homosexuals to legally marry in a colorful, pre-dawn wedding in Amsterdam City Hall.⁴¹ All of the couples were already registered domestic partners, so the mayor asked each one in turn, "Will you convert your partnership into a marriage and do you swear to fulfill all the duties with which the law endows marriage?"⁴²

Final approval for the law legalizing same-sex marriage came on December

Parliament had amended the rights of couples in registered partnerships to include joint adoption of children. *Gays Given Equal Adoption Rights*, COPENHAGEN POST, May 5, 2010, <http://www.cphpost.dk/news/national/88-national/48896-gays-given-equal-adoption-rights.html>. However, other domestic partnership and civil union statutes do not go as far. For instance, state or provincial-level domestic partnerships or civil unions do not and cannot offer the full range of federal benefits available to married couples. Most state-level civil unions in the United States offer couples similar state-level benefits as married couples. However, state-level union recognition cannot provide joint parental rights, immigration and residency for married partners, automatic inheritance, spousal veterans benefits, society security or social security survivor benefits, Medicare, joint tax filing, wrongful death benefits, and over one thousand additional benefits granted to married couples at the federal level. U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004).

39. For stirring arguments in favor of marriage as opposed to civil unions or domestic partnerships, see EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICAN, EQUALITY AND GAY PEOPLE'S RIGHT TO MARRY (2005); and JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2004), particularly Chapter 2, "Accept No Substitutes", at 29-54.

40. We compared the U.S. to Canada in an early work, which identified several lessons the U.S. could learn from our northern neighbor. Christy Glass and Nancy Kubasek, *The Evolution of Same-Sex Marriage in Canada: Lessons the U.S. Can Learn from their Northern Neighbor Regarding Same-Sex Marriage Rights*, 15 MICH. J. GENDER & JUST. 143, 154 (2008). Due to its unique political history and broad variability from Europe, we do not include an analysis of South Africa in this paper.

41. *World's First Legal Gay Weddings*, ONE NEWS, Apr. 1 2001, http://tvnz.co.nz/view/news_world_story_skin/34978; Same-Sex Marriage Legalized in Amsterdam (CNN television broadcast Apr. 1, 2001), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0104/01/sm.10.html>.

42. *Id.*

19, 2000, when it was passed by the upper house of Parliament by a vote of 49 to 26,⁴³ along with a bill granting adoption rights to same-sex couples.⁴⁴ Just as in the United States, where one party tends to be more opposed to granting marriage rights to same-sex couples, in the Netherlands, all of the Christian Democratic Senators voted against the law.⁴⁵ Earlier in the year, the lower house had passed gay marriage legislation by a vote of 109 to 33.⁴⁶

The Senate, aware of the uniqueness of the country's recognition of same-sex marriage, warned that other countries might not recognize the Dutch marriages, although it noted such recognition was most probable in countries that recognized same-sex registered partnerships.⁴⁷ Consistent with this admonition, the new law did not allow "marriage tourism"; the country would not wed couples from other countries that wanted to come to the Netherlands to take advantage of its same-sex marriage law.⁴⁸

Two weeks before the bill was enacted, a poll conducted by the reformist Daily newspaper revealed that 62% of Dutch people did not object to gay marriages.⁴⁹ Thus, one of the factors favorable to same-sex marriage advocates was that a majority of the population accepted the concept of gay marriage.

At the time of passage of this historic legislation, Dutch same-sex couples had the same opportunity to register domestic partnerships as opposite-sex couples and enjoyed the same legal benefits. For instance, since 1994, it had been illegal for employers and providers of services to discriminate between married and unmarried couples, including domestic partners.⁵⁰ Between 1998 and July of 2000, nearly 9,500 couples registered their domestic partnerships.⁵¹

Surprisingly, in spite of the fact that the Netherlands was the first country to extend marital rights to same-sex couples, the Dutch were not the first to

43. *Same Sex Dutch Couples Gain Marriage and Adoption Rights*, N.Y. TIMES, Dec. 20, 2000, <http://www.nytimes.com/2000/12/20/world/same-sex-dutch-couples-gain-marriage-and-adoption-rights.html> [hereinafter *Adoption Rights*].

44. The adoption bill passed by a slightly slimmer margin, 47 to 28. *Id.* The adoption law made adoption rights of same-sex couples comparable to those of heterosexual couples; a same-sex couple wanting to adopt need not be married nor in a domestic partnership, but must have lived together for at least three years. Prior to the passage of this legislation, only one partner in a domestic partnership could have full parental rights. *Id.*

45. *Id.*

46. Stanley Kurtz, *Going Dutch? (Lessons of the same-sex marriage debate in the Netherlands)*, WKLY. STANDARD, May 23, 2004, at 26.

47. At the time of the passage of this historic legislation, Sweden, Norway, Denmark, and Iceland had domestic partnership registration systems similar to the one that had been in place in the Netherlands. *Adoption Rights*, *supra* note 43.

48. *Id.*

49. *Netherlands Legalizes Gay Marriage*, BBC NEWS, Sept. 12, 2000, <http://news.bbc.co.uk/2/hi/europe/921505.stm>.

50. Equal Treatment Act, Stb. 1994, p. 230.

51. *Dutch Approve Gay Marriage, Adoption*, TVNZ, Dec. 20, 2000, <http://tvnz.co.nz/content/23025>.

recognize same-sex domestic partnerships. Denmark was first in 1989, followed by Norway in 1993 and Sweden in 1994.⁵² The history of how the Netherlands became the first country to finally recognize same-sex marriage, as detailed below, illustrates that the path to same-sex marriage may be filled with minor setbacks, and that the goal may only be attained when a number of conditions fall into place.

During the 1980's, Dutch same-sex couples seeking equal marriage rights began entering into "cohabitation contracts," which gave gay couples the same rights as heterosexual couples. These cohabitation contracts did not discriminate against same-sex couples, but neither did they provide the same panoply of benefits as marriage.⁵³ However, at that time, many in the gay community were not interested in same-sex marriage; many felt that marriage was an "old fashioned" institution that belonged to the heterosexual community.⁵⁴ Some members of the gay community in the Netherlands did not understand exactly why the Dutch gay movement, the COC, did not initially become more involved in trying to obtain greater rights for same-sex partners, while others attributed the COC's lack of involvement to its leadership's emphasis on individual rights.⁵⁵ Still others may have felt content with the rights they had under the cohabitation contracts.⁵⁶

Instead, much of the early advocacy for gay marriage rights came from Henk Krol, the editor of *Gay Krant*, and from the Friends of *Gay Krant* Foundation, which the former Vice Prime Minister and Commissioner of the Queen Molly Geertsma established to advance gay rights.⁵⁷ The initial push for same-sex marriage recognition occurred in the courts. A specialist "think tank"⁵⁸ within the Friends of *Gay Krant* Foundation started constructing the case that Dutch civil marriage, by its very terms, did not prohibit same-sex couples from marrying. After much preparation, a gay couple represented by a

52. *Id.*

53. Tom Hundley, *Homosexual Unions Slowly Gain Momentum in Europe*, CHICAGO TRIBUNE, June 30, 2004, at 4, available at: <http://www.chicagotribune.com/news/nationworld/chi-0406300271jun30,1,6181033.story>.

54. *Id.*

55. Henk Krol, *The Long Road to Civil Marriage: From Trial Process to Reality*, *Gay Krant* [Gay News], <http://gaykrant.nl/index.php?id=222>.

56. Kees Waaldijk, *How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 33, at 441. Starting in 1979, same and opposite sex cohabitating couples were given many of the same rights and duties as married couples. *Id.* Gradually changes were made in areas of the law such as rent law, social securing, income tax, pensions, and immigration. By 1994, it was illegal for any employer or any provider of goods or services to discriminate between married and cohabitating couples. Equal Treatment Act, *supra* note 50.

57. Krol, *supra* note 55, at 2.

58. This group included two legal experts, Loes Gijbels and Kees Waaldijk of the University of Leiden. *Id.* at 3. Rb. Amsterdam, 13 februari 1990, NJ 1990, 456 (Neth.) in Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZONA J. INT. AND COMP. LAW 141, 145 (2001).

foundation lawyer applied to the head of the Amsterdam civil-affairs department for a marriage license. The official turned down their request, but said, "it is up to you to request a review of this decision,"⁵⁹ which they immediately did. On December 12, 1989, before a full three-judge panel in Amsterdam, the plaintiff's attorney set out the inequities between gay and heterosexual couples' treatment.⁶⁰ In February of 1990, the Amsterdam court made its ruling, essentially refusing to decide whether the parties' human rights were violated because they believed the Parliament should decide the question.⁶¹ However, the court did recognize that the Civil Code did not explicitly require that partners be of the opposite-sex.⁶²

At the same time, a parallel case involving two female partners was also making its way through the courts. On October 19, 1990, after they lost twice in the lower courts, the Netherlands' Supreme Court ruled that the exclusion of same-sex couples from marriage was justified, and thus not discriminatory under Article 26 of the International Covenant on Civil and Political Rights.⁶³ The Court relied on the fact that one of the legal consequences of marriage was that the spouse of a woman giving birth was legally considered to be the father of her child.⁶⁴ In dicta, however, the Supreme Court stated that there was a "possibility" that there was insufficient justification for specific other benefits of marriage that are unavailable for same-sex couples in a lasting relationship. Thus while the court denied equal marriage rights in this case, the ruling suggested that denial of other marriage rights to same-sex couples might be discriminatory and thus unconstitutional.⁶⁵

Amidst the publicity surrounding these two cases, several major parties moved toward support for extending benefits and legal recognition to same-sex couples, while a handful of minority parties remained strongly against extending rights to same-sex couples. In 1990, in the Second Chamber of the Dutch Parliament, a representative of the Christian Democrats (DCA) said that his party did not wish to give gay relationships marital status but that the party would consider other legislation extending rights and benefits to same-sex couples. A representative of the Labour Party said his party was waiting for the right moment to present a workable proposal to the Chamber.⁶⁶ The spokesman for the Liberal Party thought that perhaps there might be a reconsideration of marriage, with the possibility of recognizing some similar form of relationship

59. *Id.* at 4.

60. *Id.*

61. *Id.*

62. Krol, *supra* note 55, at 5

63. Rb. Amsterdam, *supra* note 58.

64. BW Book 1, Article 199 (a), (b).

65. Waaldijk, *supra* note 56, at 443.

66. Krol, *supra* note 55, at 5.

for same-sex couples.⁶⁷ Minority radical right parties were opposed to any recognition of marital rights for same-sex couples.⁶⁸ The Democrat (D-66) member, Louise Groenman, and Green member, Peter Lankhorst, argued that marital rights should not be reserved for opposite-sex couples. Other prominent government officials, such as the Minister of Justice, a Christian Democrat, were vocally opposed to making it possible for same-sex couples to marry.⁶⁹

A 1990 survey conducted by Gay Krant and Veronica Television revealed that 52.8% of the Dutch population supported equal relationship rights for same-sex and opposite-sex couples, while only 35.6% were opposed.⁷⁰ With the national politicians still opposed, however, the Friends of Gay Krant Foundation proposed an alternative marriage register that would guarantee the same rights and duties as the official marriage Registry.⁷¹ Another survey taken in 1992 showed that 63.5% of the Dutch were now supportive of equal relationship rights – an increase of over ten percent.⁷²

In 1993, the Cabinet Dutch Parliament decided that same-sex couples who could not marry should have the right to enter their relationship into the Registry and receive the same rights as heterosexual couples, with the exception of adoption rights.⁷³ The Second Chamber insisted that gay couples should also be given adoption rights. Conflict over this issue prevented the approval of any official legislation during the 1993 term.⁷⁴

In 1994, a partnership bill was introduced that would have allowed same-sex partnerships to be registered, and would have given same-sex couples many of the benefits of marriage. The proposed bill would have also opened up registration to other couples formerly prohibited from marrying, such as brother and sister.⁷⁵ The bill was revised in 1995 and again in 1996, evolving to provide many more of the benefits associated with marriage, and to allow the registration of both same and opposite-sex couples; however, the provision allowing registration of closely related partners was dropped.⁷⁶

Partnership legislation finally passed in both houses in 1997, and became operational on January 1, 1998.⁷⁷ With the additional passage of the Registered

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 6.

71. *Id.*

72. *Id.* at 7.

73. *Id.* at 8.

74. *Id.*

75. Parliamentary Papers II 1993/1994, 23761 nr.2 in Waaldijk, *supra* note 56, at 444.

76. Parliamentary Papers II 1994/1995, 23761 nr.5 and *idem* 1995/1996, nr.8. in Waaldijk, *supra* note 56, at 444.

77. Stb. 1997, p. 32 in Waaldijk, *supra* note 56, at 444.

Partnership Adjustment Act of 1997,⁷⁸ changes were made to over one hundred statutory provisions, giving significant additional rights to same-sex couples who chose to register their partnerships.⁷⁹ Under the new law, registered partners were awarded almost all of the rights afforded to married couples. Nine months after the law passed, 5,000 couples had registered their relationships. More of the couples were heterosexual than homosexual.⁸⁰ Yet, even though the legislature had adopted registered partnership legislation and confirmed that it planned to extend adoption rights to same-sex couples, it was still debating extending full rights to civil marriage.⁸¹

Some give significant credit for the ultimate passage of the Netherlands' landmark legislation to the ascension to power of Boris Dittrich, a gay Dutch legislator who represented the liberal D-66 party. Dittrich's first act in Parliament was to introduce a measure granting same-sex marriage rights.⁸² Not only did the liberal D-66 party gain more power after these elections, but also for the first time since 1913, the government contained no representatives of the socially conservative Christian Democratic Party.⁸³ A more liberal government began a series of parliamentary debates and public appeals.⁸⁴

In 1996, the lower house of Parliament passed a non-binding motion calling for gay marriage,⁸⁵ this led to a serious public debate about gay marriage. Christian Democratic party chairman Hans Helgers made the argument that procreation and parenthood were the essence of marriage.⁸⁶ Advocates of gay marriage, on the other hand, denied this link. For example, in *De Gay Krant* [The Gay News], a major gay publication, columnist Cees Van der Pluijm rejected the idea that procreation should be linked with marriage, and argued that, based on the principle of equality, if heterosexual couples were allowed to marry, then homosexual couples should be allowed to as well.⁸⁷

As a consequence of this public debate, the government established the Kortman Commission, made up of eight legal experts, to investigate the potential consequences of opening up marriage and adoption to same-sex

78. Stb. 1997, p. 660 in Waaldijk, *supra* note 56, at 444.

79. See Wendy M. Schrama, *Registered Partnership in the Netherlands*, 13 INT. J. OF LAW, POLICY & THE FAMILY 315 (1999).

80. Krol, *supra* note 55, at 15.

81. *Id.*

82. Matthew S. Bajko, *Profile of Human Rights Watch's Boris Dittrich*, LGBT ASYLUM NEWS, <http://madikazemi.blogspot.com/2010/03/profile-of-human-rights-watches-boris.html> (last visited Oct. 11, 2010).

83. Kurtz, *supra* note 46.

84. *Id.*

85. *Id.* The motion passed by a vote of 81 for to 60 against. Parliamentary Papers II 1995/1996, 22700 nrs. 18 and 14; Parliamentary Debates II 1995/1996, 4883-4884.

86. Kurtz, *supra* note 46.

87. *Id.* Van der Pluijm actually opposed marriage for anyone, saying that permanent monogamy was a fairy tale that everyone should repudiate. *Id.*

couples. The Commission made its official report in October of 1997, recommending unanimously that same-sex couples be able to adopt jointly or as stepparents, and that other parental duties be extended to them.⁸⁸ The Commission also voted five to three in favor of allowing same-sex couples to marry.⁸⁹ Interestingly, one of the commissioners unsuccessfully proposed maintaining registered partnerships, but abolishing civil marriage, leaving marriage as a religious institution regulated by the church, but with no legal consequences.⁹⁰

D-66's strength grew after the 1998 elections, which put Dittrich in a position to withhold his party's support from the governing coalition until they agreed to support same-sex marriage legislation.⁹¹ But the debate continued as the religious parties persistently argued that the definition of marriage should not be separated from its procreative purpose. In 2000, Kars Veling, speaking for three of the smaller religious parties, repeatedly stressed "the unique and universal procreative structure of marriage."⁹² One of the strongest advocates of the procreation position was Cees van der Staaij, a member of parliament from one of the small religious parties, the SGP. He argued that the equality principle was inapplicable to the same-sex marriage debate because that principle requires only equal treatment of those who are similarly situated. If procreation is essential to marriage and same-sex couples cannot procreate, he reasoned, then same-sex couples and opposite-sex couples are not similarly situated; thus, the equality principle is not relevant to the marriage debate.⁹³

While not able to prevent the passage of same-sex marriage, the opponents were able to modify the benefits attached to same-sex marriage in a way that has not generated much discussion. Van der Staaij raised what he saw as a very significant problem related to the link between marriage and procreation: whether the proposed law would recognize the existing ties of descent between children and their married parents. In other words, what happens when two women are married and one has conceived a child with a man outside of the marriage? Does the child now have three legal parents—his two biological parents and his mother's wife?⁹⁴ Van der Staaij saw this question as clearly illustrating that same-sex and opposite-sex partners are not similarly situated.⁹⁵ While this argument did not kill the same-sex marriage proposal, it did lead the

88. Waaldijk, *supra* note 56, at 447.

89. *Id.* at 448.

90. In rejecting this idea, the Commission noted that such an idea would be difficult in light of the protection of marriage by Article 2 of the ECHR. Caroline Forder, *An Undutchable Family Law Partnership: Parenthood, Social Parenthood, Names, and Some Article 8 ECHR Case Law*, in *INTERNATIONAL SURVEY OF FAMILY LAW: 1997*, 265 (Andrew Bainham, ed.).

91. Hundley, *supra* note 53, at 4.

92. Kurtz, *supra* note 46.

93. *Id.*

94. *Id.*

95. *Id.*

Parliament to decouple parental rights from the right to marry; in the legislation that ultimately passed the non-biological partner does not have parental rights until the child is legally adopted.⁹⁶

In less than a year after its passage, thousands of same-sex and opposite-sex couples had entered into registered partnerships.⁹⁷ In a survey commissioned by the Ministry of Justice, members of opposite-sex partnerships were asked why they opted for partnership registration over marriage. Some of their responses included that "registered partnership is less binding than marriage," while others professed "an aversion to marriage as a traditional institution."⁹⁸ Thus the survey demonstrates that allowing same-sex couples partnership registration was not equal to the marriage rights of opposite-sex couples.

With political momentum solidly behind same-sex marriage rights and with concerns regarding parental rights addressed, Parliament moved toward passage of marriage rights in 2000.⁹⁹ In the final Parliamentary debate on gay marriage legislation, Otto Vos, who represented the centrist-liberal VVD party, argued that the real basis for marriage is love between two partners.¹⁰⁰ It is impossible, of course, to know exactly what argument led to that final, historic vote. But, with 109 members of Parliament voting in favor of gay marriage legislation and only 33 against, the vote was a decisive victory for same-sex rights advocates.¹⁰¹

The final step was passing a law to adjust the language of other legislation that was affected by opening up marriage to same-sex couples. The Adjustment Act substituted gender-neutral language into sections of the country's laws that formerly specified gender specific spouses or parents.¹⁰²

Henk Krol, a Dutch publisher, journalist, and gay activist, advocates a gradual approach to pushing a same-sex marriage agenda. He believes that the campaign for gay marriage in the Netherlands was helped by first legalizing registered partnerships, as that helped the public adjust to the idea of same-sex unions.¹⁰³

There are several different factors that could have led to the successful legalization of gay marriage in the Netherlands. For example, much of the

96. Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 4 ELECTRONIC J. OF COMP. LAW (2000), <http://www.ejcl.org/43/art43-1.html#par43>.

97. Kees Waaldijk, *How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 33, at 450.

98. Waaldijk, *supra* note 56, at 450.

99. Maxwell, *supra* note 96.

100. Kurtz, *supra* note 46.

101. Waaldijk, *supra*, note 56, at 453.

102. *Id.*

103. Hundley, *supra* note 53.

worldwide opposition to gay marriage comes from organized religion. Thus, one of the factors that might have made the Netherlands more receptive to gay marriage is its lack of a strong religious community.¹⁰⁴ Also, the fact that the Netherlands has a long history of protecting minority rights may have been influential.¹⁰⁵ Finally, many of the benefits of marriage had already been gradually given to same-sex couples, and same-sex relationships were already recognized through registered partnerships. This meant that recognizing same-sex marriage was a relatively small step when it was finally taken in the Netherlands.

III. HISTORY OF SAME-SEX MARRIAGE RIGHTS IN BELGIUM

Belgium extended full marriage rights to same-sex couples on January 30, 2003, making it only the second country in the world, after the Netherlands, to do so.¹⁰⁶ Couples were legally able to marry beginning on June 1, 2003. On that day, Marion Huibrechts and Christel Verswyvelen became the first same-sex couple to legally marry in the country.¹⁰⁷ Within the two years of the passage of Belgium's same-sex marriage law, approximately 2,500 same-sex couples had legally married.¹⁰⁸ As in the Netherlands, however, the fight to gain full marriage rights for same-sex couples evolved over time.

The first major legislative victory occurred in November 1998, when Belgium introduced "statutory cohabitation" to the country's Civil Code. This provision granted limited rights to registered and cohabitating couples, regardless of gender or sexual orientation.¹⁰⁹ In addition to extending some rights and protections to same-sex couples, this victory was also significant because its proponents included members from three major political parties in Belgium's Chamber of Representatives: Social Christian, Socialist, and

104. Kurtz, *supra* note 46.

105. Virginie Guiraudon, *Citizenship Rights for Non-Citizens: France, Germany and the Netherlands*, CHALLENGE TO THE NATION-STATE: IMMIGRATION IN WESTERN EUROPE AND THE UNITED STATES 272 (Christian Joppke ed., 1998).

106. B.A. Robinson, *Same Sex Marriage (SSM) in Belgium*, ONTARIO CONSULTANTS ON RELIGIOUS TOLERANCE, June 10, 2003, http://www.religioustolerance.org/hom_mar10.htm.

107. Sandro Contenta, *June Weddings A First For Gay Belgians*, TORONTO STAR, June 23, 2003, at A1, A19.

108. Festy and Rogers, *supra* note 37, at 430-32. According to Festy and Rogers, compared to most of its western neighbors Belgian law goes the furthest in terms of the legal benefits attached to marriage for same-sex couples and the country has the highest partnership registration rate.

109. *Id.* This amendment to the Code granted some tax and property rights to registered same-sex partners as well as to cohabitating close relatives (e.g., parents and children, siblings). Under this law, same-sex couples were still barred from full marriage rights and were not recognized as legal couples under Belgium's family law statutes. Olivier de Schutter & Anne Weyembergh, *Statutory Cohabitation Under Belgian Law: A Step Towards Same-Sex Marriage?* in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 33, at 465.

Liberal.¹¹⁰ Shortly after this victory, in 1999, Belgium introduced prohibitions against employment discrimination based on sexual orientation. This prohibition was made into law in 2003.¹¹¹

Organized pressure to expand benefits and privileges available to same-sex couples was strongest in the Dutch-speaking northern areas of the country along the border with the Netherlands.¹¹² Holebifederatie, the largest gay and lesbian civil rights organization in the country, led the political mobilization.¹¹³ The fight for full same-sex marriage rights was invigorated by the historic electoral losses in 1999 of the ruling Christian Social party, the conservative party closely affiliated with the Roman Catholic Church.¹¹⁴ The fall of the Christian Social-led government after forty years in power and the rise of a ruling coalition comprised of Liberals, Socialists, and Greens created a window of opportunity for the passage of progressive laws in the areas of same-sex rights.¹¹⁵

In April 2001, shortly after same-sex marriage legalization passed in the Netherlands, government officials began to reconsider Belgian law and the remaining inequalities related to marriage rights for same-sex couples. Compared to registered partnerships in the Netherlands, Belgian's statutory cohabitation law was extremely limited in the rights and responsibilities granted to those recognized as legal co-habitators.¹¹⁶ One option available to the government was to introduce civil union legislation for same-sex couples, like several of Belgium's European neighbors.¹¹⁷ However, after deliberation, officials decided that passing civil union legislation would require drafting a parallel system of rights and responsibilities for civil unions, while opening up marriage to same-sex couples would be less complicated. According to one government official, introducing civil union legislation "would have meant a whole new type of legislation," whereas simply redrafting the language in existing marriage law was a "really simple operation."¹¹⁸

110. See de Schutter & Weyembergh, *supra* note 109.

111. See *id.*

112. Robinson, *supra* note 106.

113. *Id.*

114. THE PEW FORUM, *supra* note 30

115. *Same-Sex Marriage in Belgium*, RELIGIOUS TOLERANCE, http://www.religious-tolerance.org/hom_mar10.htm (last visited Nov. 14, 2010).

116. Waaldijk, *supra* note 56

117. By 2001, civil unions or registered partnerships had been introduced in several European countries including Denmark (since 1989), Finland (since 2002), France (since 1999), Germany (since 2001), and Iceland (since 1996). EUROPEAN LABORATORY ON MARRIAGE AND REGISTERED PARTNERSHIP (L.E.M.U.R.), http://www.disced.unisa.it/lemur/ENGLISH/LEMUR_3_ENG.htm (last visited Oct. 11, 2010).

118. This quote is from Annemie Mercelis, legal advisor to Jef Tavernier, who has served as Belgium's Federal Minister of Consumer Interests, Health and Environment since August 2002. Tavernier oversaw the drafting of the bill that eventually granted full marriage rights to same-sex couples. He replaced Magda Aelvoet, who was one of the first high-ranking politicians to urge the Belgian government to legalize same-sex relationships. Robinson, *supra* note 106.

On June 22, 2001, the Minister of Justice and the Cabinet approved a draft bill that would amend Book 1 of the Civil Code, thereby eliminating language denoting marriage as a contract restricted to opposite-sex couples.¹¹⁹ The bill was introduced to the Senate in May 2002 by representatives from several political parties, including the Reformist Movement, the Liberal and Democratic Party, the Socialist Party, the Ecology Party, and the Green party.¹²⁰ Thus, as with the passage of “statutory cohabitation” legislation, this legislation was introduced and supported by a multi-party coalition.

The bill passed by a significant margin, 46 in favor and 15 opposed, in the Senate, and went on to passage in the Chamber of Representatives in January 2003 with a vote of 91 in favor and 22 opposed.¹²¹ Notably, the only opposing votes were cast by members of the Christian Democrat party and the neo-fascist Vlaams Blok party, both of which had long opposed same-sex marriage rights.¹²² King Albert II granted royal assent to the bill on Feb 13, 2003. The Act was published in the Belgian Official Journal two weeks later, and then, in accordance with article 23, it came into force on June 1, 2003.¹²³

Significantly, support for extending marriage rights to same-sex couples among members of Belgium’s parliament in 2003 was not mirrored in Belgian society at large. That year, only 37% of Belgians approved of allowing marriage between same-sex couples, and only 19% of Belgians approved of extending adoption rights to same-sex couples.¹²⁴

Despite this victory, same-sex couples were still denied equal parental rights to opposite-sex couples,¹²⁵ namely the presumption of paternity,¹²⁶

119. De Schutter and Weyembergh, *supra* note 109. Waaldijk notes that while this law only amended Book 1 of the Civil Code, the effect of the legislation was to amend numerous provisions in the areas of family law, as well as several areas in other books within the Civil Code. Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage and Semi-Marriage for Same Sex Couples in European Countries*, 5 JUD. STUD. INST. J. 104 (2005).

120. Robinson, *supra* note 106.

121. Loi Ouvrant le Mariage a des Personnes de Meme Sexe et Modifiant Certaines Dispositions du Code Civil [Law Opening Marriage to Persons of the Same Sex and Amending Certain Provisions of the Civil Code] of Feb. 28, 2003, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Feb. 28, 2003, 3d. ed., 9880, available at <http://www.just.fgov.be>.

122. Waaldijk, *supra* note 119.

123. As a result of the passage of this bill, the first paragraph of article 143 of the Belgian Civil Code (Book I, Title V, Chapter 1) reads, “Two persons of different sexes or the same-sex may contract marriage.” Robinson, *supra* note 106.

124. The low approval rating of marriage and adoption rights in Belgium contrasts with much higher levels of approval in Denmark, Sweden, and the Netherlands at the time same-sex. Finland, Norway, Germany, and France, however, reported approval of marriage and adoption rights comparable to levels in Belgium. Festy and Rogers, *supra* note 37.

125. Waaldijk, *supra* note 119, at 116-17. According to Socialist party deputy Karine Lalieux, “In spite of the very symbolic value of [the marriage law] and the positive signal it sends to the gay community . . . it remains blatantly hypocritical in one respect: a single person can adopt a child, but not a homosexual couple.” Gareth Harding, *Belgium Legalizes Gay Marriage*, UPI, Jan. 31, 2003, available at http://www.upi.com/Business_News/Security-Industry/2003/01/31/Belgium-legalizes-gay-marriage/UPI-46741044012415/.

second-parent adoption,¹²⁷ and joint adoption.¹²⁸ For instance, until 2005, Belgian law identified the biological parent in families with same-sex partners as the sole parent of the child. Furthermore, amendments to the marriage law provided no provision for joint custody by married same-sex partners.¹²⁹

Advocates of full marriage and parental rights for same-sex couples introduced amendments in 2003 that would eliminate the words “of different sex” from those articles of the Civil Code that restrict second parent adoption and joint adoption among same-sex couples.¹³⁰ On December 1, 2005 Belgium’s Chamber of Representatives approved these amendments. This proposal was passed in April 2006, and as a result, same-sex couples were legally allowed to adopt, as well as co-parent children.¹³¹

The mission that started in Belgium in 1998 reached its primary goal five years later in 2003, and there has been additional broadening of family law ever since. Despite a lack of public support for same-sex marriage, with a change in political party power, same-sex legislation was introduced and passed without major opposition.

IV.

HISTORY OF SAME-SEX MARRIAGE RIGHTS IN SPAIN

On July 3, 2005, *Cortes Generales*, a law passed by Spain’s parliament legalizing marriage between same-sex couples, went into effect, making Spain the third country in the world to legalize same-sex marriage. Eight days later, Emilio Menendez and Carlos Baturin German legally married in a ceremony in Tres Cantos, a town just outside of Madrid. Pedro Zerolo, Spain’s Socialist Party’s senior official for social issues, attended the wedding.¹³²

Spain presents an important case study for two reasons. First, unlike some other countries that have legalized same-sex marriage—such as the Netherlands,

126. Article 143(2) of the amended Code does not extend the presumption of paternity to children born into same-sex marriages. Waaldijk, *supra* note 119, at 117.

127. Article 345 permits second parent adoption only in opposite-sex marriages. *Id.*

128. Article 346 only allows adoption by married partners of the opposite sex. *Id.*

129. Todd Savage, *Belgium Says ‘I do;’ The Country Becomes Only the Second in the World to Grant Legal Recognition to Same-Sex Marriage*, THE ADVOCATE, Mar. 18, 2003.

130. Waaldijk, *supra* note 119, at 117.

131. THE PEW FORUM, *supra* note 30.

132. *First Gay Marriage Held In Spain*, BBC News, July 11, 2005, <http://news.bbc.co.uk/2/hi/europe/4673845.stm>. It should be noted that Mr. Mendez and Mr. German were the first same-sex couple legally married in Spain. In 1901, over one hundred years prior to the extension of marriage rights for same-sex couples, two women were married by the Catholic Church. However, one of the women had adopted a false male identity in order to deceive the officiating priest. Though the priest subsequently denounced the couple, the marriage was never annulled. See Louise Ciallella, *Making Emotion Visible: Filipe Trigo and La sed de amar (educación social)*, 3 DECIMONÓNICA 1 (2006).

Norway, and Sweden—Spain is not known for its political liberalism.¹³³ Rather, the strong role of the Catholic Church in Spanish society made Spain an unlikely candidate for same-sex marriage rights.¹³⁴ Indeed, Catholic leaders lobbied hard against the law, calling it a threat to society.¹³⁵ Furthermore, Spain's citizens are more religious than those of other countries that have introduced full marriage rights.¹³⁶ Due to the strength of religious opposition to same-sex marriage rights, Nicolás Pérez Cánovas, Spanish scholar of civil law, wrote as late as 2001 that “the opening up of civil marriage to homosexual couples is not imminent in Spain.”¹³⁷

Within four years of Cánovas' statement, however, Spain had passed one of the most extensive same-sex marriage laws in the world. Unlike all other countries under study,¹³⁸ Spain had not previously passed any legislation recognizing same-sex unions through domestic partnerships registrations or civil unions. Thus, the Spanish case is also notable for the extent of equality it grants to same-sex couples. Spain's law goes further than both the Dutch and Belgian laws in that it extends the same rights to same-sex couples as heterosexual

133. Much of Spain's modern history was shaped by Franco's dictatorship, which lasted nearly four decades from 1936 to 1975. Spanish politics during Franco's reign were heavily shaped by nationalism, Catholicism, and so-called traditional values. Perhaps not surprisingly, homosexuality was considered a criminal act during this period. For a history of Spain under the Franco regime, see STANLEY G. PAYNE, *THE FRANCO REGIME 1936-1975* (2000).

134. Nearly 80% of Spaniards self-identify as Catholic, and traditionally the Catholic Church has had enormous influence over family policy. Renwick McLean, *Spain Legalizes Gay Marriage; Law Is Among the Most Liberal*, N.Y. TIMES, July 1, 2005.

135. *Id.*

136. According to religiosity measures calculated from successive waves of the World Values Survey, 44% of Spanish citizens regularly attend Catholic Church services. In comparison, rates of regular church attendance in other countries under study include: Belgium (36%); The Netherlands (35%); Norway (13%); Sweden (12%). In contrast, 58% of Americans attend church regularly. See Michael Minkenberg, *Religion and Public Policy: Institutional, Cultural, and Political Impact on the Shaping of Abortion Policies*, 35 COMP. POL. STUD. 221 (2002).

137. Nicolas Perez Canovas, *Spain: The Heterosexual State Refuses to Disappear*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 33, at 504. Though several regions had introduced bills to their legislatures proposing to extend marriage recognition to de facto couples, Cánovas was not hopeful because few regional legislatures in Spain have jurisdiction over civil law and, in particular, “the forms of marriage,” suggesting that any regional-based law would be extremely limited in its effects. *Id.* Kursad Kahramanoglu, co-secretary of the International Lesbian and Gay Association echoed this sentiment immediately following the passage of the marriage law, stating “Lots of people 15 or 20 years ago would have thought it would be impossible for Catholic Spain to get to this moment.” McLean, *supra* note 134.

138. All other countries that have extended full marriage rights to same-sex couples did so after introducing legislation recognizing same-sex partnerships. Prior to extending full marriage rights, the Netherlands introduced registered partnership legislation in 1998, Waaldijk, *supra* note 56; Belgium introduced statutory cohabitation in 1998, Schutter and Weyembergh, *supra* note 109, at 441. Norway introduced registered partnerships in 1993, Norwegian act on Registered Partnership of April 30, 1993, nr. 40 www.ub.uio.no/ujur/ulov and Sweden introduced registered partnerships in 1995. Hans Ytterberg, ‘From Society's Point of View, Cohabitation Between Two Persons of the Same Sex is a Perfectly Acceptable Form of Family Life’ *A Swedish Story of Love and Legislation*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 33, at 427.

couples, even in the arena of family law and adoption.¹³⁹ Indeed, Spain's law simply adds the following sentence to existing law: "Marriage will have the same requirements and results when the two people entering into the contract are of the same-sex or of different sexes."¹⁴⁰

How did a country like Spain gain global distinction in the fight for same-sex marriage rights, despite strong religious and political opposition? Early battles to end discrimination against same-sex couples were met with opposition from the *Tribunal Constitucional*, Spain's Constitutional Court. Despite the potentially inclusive language of the liberal 1978 Constitution,¹⁴¹ the *Tribunal* repeatedly upheld rules that denied same-sex benefits available to opposite-sex married couples from same-sex couples.¹⁴² Spain was also somewhat of a European late-comer in terms of decriminalizing homosexual acts, amending a law equating homosexuals with "social dangers" as late as 1979 and removing the offense of "public scandal" from the penal code in 1988.¹⁴³

In terms of marriage and family law, Spanish courts have historically interpreted Article 32(1) of the Constitution, which references "man and woman" when referring to marital contracts and family relations for the sake of civil law, as excluding same-sex couples.¹⁴⁴ Indeed, as late as 1994, the *Tribunal* rejected a claim by a male partner of a deceased man for survivor benefits by stating "the union between persons of the same biological sex is not a legally regulated institution."¹⁴⁵ However, even as the courts, including the *Tribunal*, consistently ruled against same-sex couples based on the gender-specific language in the Constitution, the *Tribunal* also held that the decision of whether to allow same-sex cohabitating couples access to the full rights and benefits of marriage was left to the Spanish legislature.¹⁴⁶

139. McLean, *supra* note 133.

140. *Id.*

141. For instance, Section 14 of the Constitution prohibits discrimination based on birth, race, sex, religion, and opinion or any other personal or social condition or circumstance. The full text of the 1978 Constitution is available in English at: http://www.congreso.es/constitucion/ficheros/c78/cons_ingl.pdf.

142. Canavos, *supra* note 137, at 493.

143. *Id.* at 494. By comparison, Denmark decriminalized homosexuality in 1933, Hungary in 1962, Iceland in 1940, and Sweden in 1944. Other latecomers include France and Germany, which did not decriminalize homosexuality fully until the 1980s. Alan Freedman, *Key Developments Worldwide*, SODOMY LAWS AROUND THE WORLD, <http://www.sodomylaws.org/> (last visited Nov. 14, 2010).

144. Canavos, *supra* note 137, at 495. However, Canavos notes that this historical interpretive tendency does not necessarily represent a literal interpretation but rather a product of conventional wisdom based, in part, on the tendency of the Constitution to employ gender-neutral language elsewhere.

145. *Id.* The Tribunal's ruling further stated, "unlike marriage between a man and a woman which is a constitutional right . . . the full constitutionality of the heterosexual principle as qualifying the marital link must be accepted, as our Civil Code provides." S.T.C., July 11, 1994 (*Auto* TC 222/1994), *quoted in* Canavos, *supra* note 137, at 495-96.

146. In the 1994 decision against the claimant for survivor benefits, the *Tribunal* held that their

When the *Tribunal Constitucional* placed the issue solidly in the hands of the Spanish legislature in the mid-1990s, the legislature extended *de facto* marriage rights to couples irrespective of sex or sexual orientation in a small handful of statutes.¹⁴⁷ However, the body initially showed few signs of extending *full* marriage and family rights to same-sex couples.¹⁴⁸ The ascension to power in 1996 of the conservative People's Party, which was closely aligned with the Roman Catholic Church, raised further barriers to the extension of marriage and family rights to same-sex couples. In fact, several bills aimed at recognizing *de facto* couples, irrespective of sexual orientation, were rejected in the wake of the People's Party's rise.¹⁴⁹ According to Canavos, this party's stance toward same-sex unions represented an "obsessive refusal" to recognize the legitimacy of same-sex partnerships and families.¹⁵⁰

Overall, the 1990s can best be characterized as a regressive period in the battle for same-sex marriage rights in Spain.¹⁵¹ Attempts to regulate and/or exclude same-sex couples from marriage and family benefits continued with the reelection of the conservative People's Party in the 2000 elections. Shortly thereafter, the People's Party defeated four *de facto* couple bills introduced by more liberal and progressive parties. It restated its focus on protecting the right to "family life," a thinly veiled commitment to protect traditional family structures and norms.¹⁵² These efforts, aimed at denying rights to same-sex couples, were met with very little popular resistance from GLBT groups. Indeed, the GLBT movement in Spain has been weaker than those in other countries under study.¹⁵³

A major turning point for the advancement of equality came in 2004, with the accession to power of a Socialist government headed by Jose Luis Rodriguez Zapatero. During his campaign, Zapatero strongly championed extending full

decision "does not preclude the legislature from establishing an equivalent system permitting homosexual cohabitants to enjoy the full rights and benefits of marriage, as proposed by the European Parliament." *Id.*

147. According to Canavos, these included but were not limited to a 1994 decision by the Mayor of the city of Victoria that allowed partner registration of *de facto* couples, including same-sex couples. This local registration practice was duplicated in several regions as a result. Canavos, *supra* note 137, at 497-98.

148. Indeed, Canavos notes that among other discriminatory decisions, the legislature strongly prohibited same-sex couples from adopting children in *Ley de Adopcion* on November 11, 1987. *Id.*

149. Canavos, *supra* note 137, at 500-501.

150. *Id.* at 500.

151. However, despite repeated setbacks at the national level in the 1990s, four regions (Catalonia, Aragon, Valencia, and Navarra) extended family and marriage benefits to same-sex *de facto* couples between the late 1990s and 2001. Though symbolically important, these regional legislative decisions held little sway over the constitutional rights of same-sex couples since regional governments lack jurisdiction over civil legislation or the Constitution. *Id.*

152. *Id.* at 500-501.

153. THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS: NATIONAL IMPRINTS OF A WORLDWIDE MOVEMENT (Barry Adam et al. eds., 1998).

marriage rights to same-sex couples.¹⁵⁴ After his party's election, Zapatero immediately began working to extend marriage and family rights to same-sex couples through modification of the Civil Code. Indeed, in one of his first speeches to Parliament following his election as Prime Minister, Zapatero proclaimed, "The moment has finally arrived to end once and for all the intolerable discrimination which many Spaniards suffer because of their sexual preferences."¹⁵⁵

At the time of Zapatero's ascension to power, public attitudes toward same-sex marriage were favorable.¹⁵⁶ However, there remained strong and well-organized opposition to rights for same-sex couples. Leaders of the Catholic Church headed most of the organized political opposition, both domestically and internationally.

Despite this opposition, within a year of Zapatero's election, the Spanish Parliament introduced a law that would recognize same-sex marriage and grant full equality to same-sex couples. In April 2005 the Spanish Congress of Deputies, Spain's lower house, approved the bill.¹⁵⁷

In response to these efforts and before the bill went to the Senate for approval, several Catholic bishops, the leaders of Spain's Forum for the Family, and members of Spain's conservative Popular Party, organized a massive protest in Madrid. Thousands of Spanish citizens attended.¹⁵⁸ In addition, the Vatican denounced the proposed bill as "profoundly iniquitous,"¹⁵⁹ and several mayors around the country stated that they would refuse to marry same-sex couples should the bill become law.¹⁶⁰ While these religious and political leaders continued to voice opposition, in the months leading up to the passage of the law in 2005, 62% of Spanish citizens supported legalizing gay marriage.¹⁶¹

154. *Spain's New Government to Legalise Gay Marriage*, REUTERS NEWS, Apr. 15, 2004. Zapatero had also run on a platform aimed at removing the Catholic Church's influence over national politics, streamlining the divorce process and relaxing restrictions on abortion. *Spain Approves Gay Marriage Bill*, BBC NEWS, Oct. 1, 2004, <http://news.bbc.co.uk/2/hi/europe/4673845.stm>.

155. Reuters, *supra* note 154.

156. Opinion polls in 2004 and 2005 suggested that a majority of Spaniards supported gay marriage. *Spain in Same-Sex Marriage Rally*, BBC NEWS, June 18, 2005, <http://news.bbc.co.uk/2/hi/europe/4106890.stm> [hereinafter *Rally*].

157. *Spain Paves Way for Gay Marriage*, BBC NEWS, Apr. 21, 2005, <http://news.bbc.co.uk/2/hi/europe/4469653.stm>.

158. *Id.*

159. *Rally*, *supra* note 143. This statement was made by Roman Catholic Cardinal Alfonso Lopez Trujillo, who led the Pontifical Council for the Family at the Vatican. *Id.* He went on say that same-sex marriage, as well as non-marital cohabitation, was "destroying, bit by bit, the institution of marriage." He further argued that permitting the adoption of children by same-sex couples, which the proposed law promised to do, would commit "moral violence" against children. Robinson, *supra* note 94.

160. Reuters, *supra* note 154.

161. *Spain's Parliament Legalizes Gay Marriage*, FOX NEWS, June 30, 2005, <http://www.foxnews.com/story/0,2933,161176,00.html>.

Nevertheless, the Spanish Senate rejected the bill that the lower house had approved. This defeat was the result of a coalition of members from the Catalan Christian Democrat Party and the center-right Popular Party.¹⁶² However, Spanish law does not treat the vote of the upper house, the Senate, as binding.¹⁶³ Following the bill's rejection by the Senate, the bill returned to the lower house where it was approved and made into law on June 30, 2005 by a margin of 187 in favor and 147 opposed.¹⁶⁴

Despite several challenges to the law since its passage,¹⁶⁵ it remains in effect. To date, the *Tribunal* has rejected challenges from two lower court judges who refused to issue marriage licenses to same-sex couples.¹⁶⁶ Within three years of the law's passage, more than 10,000 same-sex couples had married.¹⁶⁷

V. HISTORY OF SAME-SEX MARRIAGE RIGHTS IN NORWAY

On January 1, 2009, Norway became the sixth country in the world and the fourth country in Europe to grant full marriage rights to same-sex couples.¹⁶⁸ As in Spain, marriage rights in Norway also included full adoption rights for married same-sex couples.¹⁶⁹

Norway began its path toward expanding rights to same-sex couples in 1993, with the passage of the Registered Partners Act.¹⁷⁰ While Norway was only the second country in the world after Denmark to recognize registered partnerships at the federal level, the rights available to same-sex couples under this act did not equal the full range of rights available to legally married couples.¹⁷¹ Nine years later, an amendment to the Registered Partners Act

162. *Spanish Senators Reject Gay Bill*, BBC NEWS, June 23, 2005, <http://news.bbc.co.uk/2/hi/europe/4118374.stm>.

163. *Same-Sex Marriage: Legalization in Spain*, RELIGIOUS TOLERANCE, http://www.religioustolerance.org/hom_marsp.htm (last visited Nov. 14, 2010).

164. Law amending the Civil Code concerning the right to marry (B.O.E. 2005, 11364), available at http://estaticos.elmundo.es/documentos/2005/06/30/ley_matrimonio_hom.pdf.

165. For example, the conservative People's Party has challenged the constitutionality of the law before the Tribunal. The Spanish Catholic Bishops Conference has called for this law to be opposed "through all legitimate means." Religious Tolerance, *supra* note 163.

166. THE PEW FORUM, *supra* note 30.

167. *Id.*

168. Between Spain and Norway's passage of full marriage rights to same-sex couples, Canada (7/20/05) and South Africa (11/30/06) had also legalized same-sex marriage. *Gay Marriage Around the Globe*, BBC NEWS, Dec. 22, 2005, <http://news.bbc.co.uk/2/hi/4081999.stm>.

169. *Norway Passes Law Approving Gay Marriage*, MSNBC.com, June 17, 2008, <http://www.msnbc.msn.com/id/25218048/>.

170. Norwegian Act on Registered Partnership of April 30, 1993, nr. 40, www.ub.uio.no/ujur/ulov.

171. See Wolfson, *supra* note 39, for a general review of the differences between domestic partnership rights and marriage rights. For a review of domestic partnership legislation in Norway

allowed partners to adopt the biological children of their registered partner.¹⁷² However, same-sex registered partners were still barred from adopting children jointly.¹⁷³

Norwegian citizens did not demonstrate high levels of support for same-sex marriage or adoption by same-sex couples in the years leading up to the extension of full marriage rights. In 2003, only 40% of citizens in Norway approved of same-sex marriage and only 12% supported extending adoption rights to same-sex couples.¹⁷⁴ Nevertheless, marriage rights proponents continued to work toward full rights for same-sex couples. In 2004, members of the Socialist Party proposed a bill that would make marriage laws gender neutral.¹⁷⁵ The bill was withdrawn pending further investigation of the issue.¹⁷⁶

Following the 2005 parliamentary elections, Stoltenberg's Second Cabinet, a center-left coalition government led by the Labour and Socialist Left parties, replaced Norway's center-right government.¹⁷⁷ The resurgence of the Labor Party to the majority after four years in opposition¹⁷⁸ would also prove to be a major turning point in the fight to advance same-sex marriage rights.

In 2008, Norway's Ministry of Children and Equality under the new ruling coalition, Anniken Huitfeldt, developed a series of "white" proposals for the

specifically, see Turid Noack, Ane Seierstad, & Harald Weedon-Fekjær, *A Demographic Analysis of Registered Partnerships (Legal Same-Sex Unions): The Case of Norway*, 21 EUR. J. OF POPULATION (2005). According to Festy and Rogers, *supra* note 37, Norway's domestic partnership law granted about 86% of the rights available to married couples. However, the same law granted same-sex domestic partners only 44% of the parental rights available to legally married couples.

172. Foundations Act § 36 (2001) (Norway), available at <http://www.lovddata.no/all/hl-20010615-059.html#36>.

173. Gunnar Andersson et. al., *The Demographics of Same-Sex Marriages in Norway and Sweden*, 83 DEMOGRAPHY 79 (2006). Note the authors use "same-sex marriage" and "registered partnership" interchangeably, thus they analyze the demographics of "marriage" prior to the passage of same-sex marriage rights laws in either Sweden or Norway. Registered partners were also barred from obtaining medically assisted insemination. *Id.*

174. See Festy and Rogers, *supra* note 37. In contrast, in Sweden 51% approved of same-sex marriage and 27% approved of adoption; in the Netherlands, 62% approved of same-sex marriage and 39% approved of adoption; in Belgium 37% approved of same-sex marriage and 19% approved of adoption. What is peculiar about the lack of support for same-sex marriage in Norway is the relative lack of religiosity relative to its European neighbors. According to the World Values Survey, only about 13% of citizens in Norway regularly attend church. Other Nordic countries with comparable levels of religiosity such as Sweden and Denmark, tend to have much higher levels of support for same-sex marriage. Specifically, 12% of citizens in Sweden attend church regularly and 51% support same-sex marriage; 19% of citizens in Denmark attend church regularly and 66% support same-sex marriage.

175. Robinson, *supra* note 106.

176. *Id.*

177. Stoltenberg's Second Government, REGJERINGEN.NO, <http://www.regjeringen.no/en/the-government/stoltenberg-ii.html?id=85843> (last visited Nov. 13, 2010).

178. Walter Gibbs, *Leftist Coalition Seems to be the Winner in Norway's Election*, N.Y. TIMES, Sept. 13, 2005.

Norwegian Parliament.¹⁷⁹ Out of these proposals came new legislation, titled “A Marriage Act for All,”¹⁸⁰ which was intended to make marriage gender neutral by amending the definition of civil marriage in federal law. Huitfeldt said of the legislation: “this new marriage law is a step forward along the lines of voting rights for all and equality laws.”¹⁸¹ According to a poll conducted in the months leading up to the enactment of the new law, a majority of Norwegian citizens (58%) supported legalizing same-sex marriage;¹⁸² this represented an important change from five years earlier. But, in spite of majority public support of marriage rights for same-sex couples, there remained strong and organized opposition to the law. For example, two members of Norway’s ruling center-left coalition government refused to endorse the bill.¹⁸³ Furthermore, the largest religious institution in Norway, the Lutheran Church,¹⁸⁴ was deeply split over whether to support or oppose the bill. Most of the opposition concerned expanding the range of parental rights available to same-sex couples. Both Norway’s Minister of Transportation and Minister of Local Government opposed the bill on the grounds that it would expand same-sex couples’ access to state funds for insemination.¹⁸⁵

The Parliamentary hearing and final vote on the marriage act was held on June 11, 2008. After heated debate on the floor, the lower house approved the act by 84 votes to 41.¹⁸⁶ Six days later, on June 17, Norway’s upper house passed the bill 23 to 17.¹⁸⁷ The coalition supporting the law was diverse and included three center-left parties, as well as the Conservative and Liberal Parties. The votes against the law came from members of the Christian Democrat Party and the far-right Progress Party.¹⁸⁸ Opposition leaders from these parties opposed the law on the grounds that the law would negatively impact children.¹⁸⁹ Despite dissent from these parties, the King of Norway

179. *Information about Common Marriage Act for Heterosexuals and Homosexuals*, MINISTRY OF CHILDREN AND EQUALITY, <http://www.regjeringen.no/en/dep/bld/Topics/homosexuality/information-about-common-marriage-act-fo.html> (last visited Dec. 1, 2009).

180. *Id.*

181. *Norway: Marriage Law Grants Gay Rights*, VITA, Mar. 16, 2008.

182. Nina Berglund, *Gays to Win Marriage Rights*, AFTENPOLTEN, Mar. 14, 2008, available at <http://www.aftenposten.no/english/local/article2313762.ece>.

183. *Same-sex Marriage and Civil Unions in Norway*, RELIGIOUS TOLERANCE, <http://www.religioustolerance.org/hommarno.htm> (last visited Oct. 11, 2010).

184. Approximately 85% of Norway’s citizens are registered members of the Lutheran Church of Norway; however, as noted above, only 13% of Norwegians report regular church attendance.

185. Berglund, *supra* note 182.

186. *Norway Adopts Gay Marriage Law*, AGENCE FRANCE-PRESSE, June 11, 2008, available at http://afp.google.com/article/ALeqM5jko_BIHizUFFqUtmEaUrAEoPXFww.

187. *Norway Passes Law Approving Gay Marriage*, L.A. TIMES, June 17, 2008, <http://www.latimes.com/news/local/la-on-norwaymarriage18-2008jun18,0,402614.story>.

188. Berglund, *supra* note 182.

189. Catherine Stein, *Same Sex Marriage Law Passed by Wide Majority*, AFTENPOLTEN.NO, Dec. 6, 2008.

granted royal assent and the law took effect on January 1, 2009.¹⁹⁰

Under Norway's marriage rights law, same-sex couples can not only marry, but can adopt children and undergo artificial insemination.¹⁹¹ The new legislation does not require any church to perform same-sex marriage ceremonies.¹⁹² However, the church remains divided on the issue, leading to an ongoing split among conservative and liberal factions within the church.¹⁹³

While Norway was only the second country in the world to recognize domestic partnerships in 1993, it took fifteen years to grant full marriage rights to same-sex couples. The turning point for same-sex marriage rights came in the 2005 elections when the labor party returned to power. A shift in political power paralleled a shift in public opinion in support of marriage rights, leading to a historic vote in June 2008.

VI.

HISTORY OF SAME-SEX MARRIAGE IN SWEDEN

In April 2009, Sweden became the fifth European country to legalize same-sex marriage when it passed a bill making marriage gender-neutral.¹⁹⁴ Sweden's path toward marriage equality began in 1973, when the Committee on Civil Law Legalization within the Swedish Parliament took up the issue of same-sex cohabitation.¹⁹⁵ After examining the status of same-sex unions, the committee concluded that current law placed same-sex couples in a "disadvantageous situation compared to cohabitants of different sexes."¹⁹⁶ Though the Committee turned down a proposal to provide legal recognition of same-sex partnerships, its official report stated, "from society's point of view, cohabitation between two persons of the same-sex is a perfectly acceptable form of family life."¹⁹⁷ This

190. Associate Press, *Norway Gay Marriage Ban Passes Final Hurdle*, 365GAY.COM, Jun. 17, 2008, <http://www.365gay.com/news/norway-gay-marriage-bill-passes-final-hurdle/>.

191. Thus the law introduced marriage rights but also amended the Adoption Act, Act on Biotechnology and the Children Act. THE PEW FORUM, *supra* note 30. Specifically, Norway's marriage law grants full parenting rights to same-sex couples in the case of adoption and full parental rights of the non-biological partner to biological child of a same-sex partner from the moment of conception.

192. *A Marriage Act for All*, MINISTRY OF CHILDREN AND EQUALITY, <http://www.regjeringen.no/en/dep/bld/Topics/homosexuality/a-marriage-act-for-all—entering-into-fo.html?id=509376> (last visited Dec. 1, 2009).

193. Øivind Østang, *Church of Norway Doctrinal Commission Split on Homosexuality*, CHURCH OF NORWAY, Jan. 24, 2006.

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

195. Ytterberg, *supra* note 138, at 427-428. Specifically the Committee drafted a motion addressing the situation of sexual "deviants," including gay and lesbian couples.

196. *Id.* at 428.

197. Standing Committee on Civil Law Legislation Report (bet.) 1973:LU20, at 116 in Ytterberg, *supra* note 138, at 428.

report was an important step toward legalization of same-sex marriage because it acknowledged and legitimized same-sex cohabitation in Sweden.¹⁹⁸

Same-sex civil unions were not officially recognized in Sweden until 1994, however, with the passage of a registered partner statute.¹⁹⁹ Sweden was the third European country, after Denmark and Norway, to introduce domestic partnerships for same-sex couples.²⁰⁰ This statute was passed despite firm opposition from conservative and Christian factions.²⁰¹ Those opposed to registered partnerships—or any legal or official recognition of same-sex partners—thought that, by acknowledging same-sex unions, the state risked damaging the reputation of marriage and thereby reducing citizens' commitment to marriage.²⁰²

These civil unions, available only to same-sex couples, were intended to create a non-marriage institution parallel to legal marriage. While the passage of the registered partnership statute represented an important step forward in terms of recognizing and legitimizing same-sex partnerships, the original statute imposed several significant restrictions and limitations. For example, the original statute only recognized same-sex partnerships comprised of Swedish citizens. In 2000, the statute was amended to include partners from Denmark, Iceland, Norway, and the Netherlands, as long as one partner is a resident or citizen of Sweden.²⁰³

The original registered partnership statute was expanded again in 2003, with passage of the Cohabitation Act; this provision substantially increased the property rights of same-sex couples.²⁰⁴ It also addressed the original statute's denial of access to medically assisted insemination to women in same-sex

198. Ytterberg argues that this early acknowledgement in Parliament had short-term impacts in terms of decriminalization of homosexuality and long-term impacts in terms of formal recognition of same-sex unions. *Id.* In terms of the short-term impacts, the age of consent was equalized to 15 for both same-sex and opposite sex relationships in 1978. And as of 1979, homosexuality was no longer considered a mental disorder. Anti-discrimination laws that prohibited discrimination on the basis of sexual orientation were passed in 1987.

199. See The Registered Partnership Act (Svensk forfattningssamling [SFS] 1994: 1117) (Swed.), available at: <http://www.homo.se/o.o.i.s/1630> (in English).

200. BBC News, *supra* note 194.

201. Ytterberg, *supra* note 138.

202. Anders Agell, *Alternative Legal Policies: A Comparative View from a Swedish Observer*, in *Living Arrangements and Family Structures – Facts and Norms*, 31-37 (Laszlo A. Vaskovics & Helmuth A. Schattovits eds., 1998). As noted above, fears of a “decline of marriage” have also motivated opposition to same-sex marriage rights in the U.S. In her review of the “marriage movement” in the U.S., Bernstein argues that the premise of this movement is that marriage, assumed to be socially desirable, is under threat and in need of protection. See Bernstein, *supra* note 10; see also Judith Stacey, *supra* note 10, at 26.

203. The 2000 amendment included the following statement: “For the purposes of this Act, citizens of Denmark, Iceland, the Netherlands and Norway are treated as Swedish citizens.” Registration of Partnership Act (SFS 1994:1117) (Amended SFS 2000:374) (Swed.).

204. The Cohabitation Act (SFS 2003:376) (Swed.), available at <http://www.homo.se/o.o.i.s/1784>.

partnerships, and of adoption rights to all same-sex partners.²⁰⁵ Indeed, the amendments opened up all forms of adoption—second-parent, joint, and inter-country—to same-sex couples.²⁰⁶ Yet, while this series of amendments served to address some of the inequities between same-sex partnerships and legal marriages, they did not fully address the legal, social, cultural, and economic inequities between same-sex and opposite-sex couples.²⁰⁷

In the wake of these amendments, public approval of same-sex marriage and child adoption by same-sex couples was higher in Sweden than in most of its neighboring European countries: in 2003, 51% of Swedes approved of same-sex marriage and 27% approved of adoption by same-sex couples.²⁰⁸

In 2004, the Swedish Parliament formed an independent committee to investigate the effects of the registered partnership laws and to determine the consequences of amending marriage law to make it gender neutral.²⁰⁹ Following a lengthy inquiry, the committee issued a report that recommended amending Swedish marriage law to grant full marriage rights to couples irrespective of gender.²¹⁰

205. Agell, *supra* note 202, at 35. According to Agell, the original limitations on joint adoption and legal custody among same-sex partners reflected deeply-held cultural beliefs that “it is in the best interests of a child to have a father and a mother, and not two parents of the same-sex.” *Id.*; Andersson et. al., *supra* note 173.

206. Waaldijk, *supra* note 122; *see also* SFS 2002:603 (Swed.).

207. Following these amendments, same-sex registered partners had access to about 91% of the legal rights associated with marriage. However, same-sex partners only enjoyed about 76% of the parental rights granted to legally-married couples. In other words, 24% of the parental rights granted to married couples were denied to same-sex partners even after parental rights laws were amended. Waaldijk, *supra* note 119. Prior to the extension of full marriage rights in 2009, Andersson used “registered partnerships” and “marriage” interchangeably in the Swedish case because they argued that “registered partners have the same rights and duties as married heterosexual couples in relation to each other and society.” Andersson et. al., *supra* note 173, at 83. They justify this assumption by pointing to the fact that the Swedish welfare state grants rights and benefits to citizens based on individual characteristics and not marital status. Thus, according to the authors, the legal rights and duties of legal marriage are not as significant in Scandinavia as in other countries, such as the U.S. While we agree with their overall assessment of the individual basis of social rights in social democratic welfare regimes, we disagree that registered partnerships carry the same legal, cultural, and symbolic significance as legal marriage. Beyond the symbolic and cultural differences in partnerships versus legal marriages, Agell identifies several areas of Swedish law, including family law, tort law, tax law and criminal law, which in many cases do not treat registered partners and married couples equally. Agell, *supra* note 202. Indeed, Agell states plainly that the very terminology of “registered partnership—including “partnership” vs. “marriage”, “dissolution” vs. “divorce”, and “registration” vs. “wedding”—implies that “partnership is not the same thing as marriage.” Agell, *supra* note 202, at 5, 35.

208. Only Denmark and the Netherlands reported higher levels of approval: In Denmark 66% approved of same-sex marriage and 31% approved of adoption; in the Netherlands 62% approved of marriage and 39% approved of adoption. All other European countries in a given study—Finland, Norway, Germany, Belgium, and France—had lower approval ratings. Festy and Rogers, *supra* note 37, at 437.

209. Kees Waaldijk, *The Legal Recognition of Same-Sex Relationships within the European Union*, 82 TULANE L. REV. 1949, 1956 (2009).

210. *Id.* While recommending the extension of full marriage rights to same-sex couples, the

In August 2006, the committee recommended that the government extend full marriage rights to same-sex couples;²¹¹ this was followed by a formal proposal to amend Swedish marriage law. The government continued to weigh these proposals in the face of opposition by Christian Democrats in Parliament. The opposition of the Christian Democrats effectively prevented further advancement of revisions to Sweden's marriage law in 2007. However, the Moderate Party's decision to formally back same-sex marriage rights in October 2007 effectively granted majority support to pro-marriage proponents.²¹² The Moderates' switch meant that only the Christian Democrats, a right-wing party with a very small proportional representation, remained opposed to same-sex marriage.²¹³

In early 2008, Sweden's opposition parties, comprised of Social Democrats, Greens, and Left Parties, announced plans to force a vote on a bill legalizing same-sex marriage.²¹⁴ In describing his party's position, a member of the Christian Democrats called the move "immoral" and announced the party's plans to continue to fight any extension of marriage rights to same-sex couples.²¹⁵ However, the opposition of the Christian Democrats—which had already been weakened by the defection of the Moderate Party—was further diminished in early 2009, when two leading members of the party broke rank and backed same-sex marriage reform.²¹⁶

On January 21, 2009, a bill was introduced in the Swedish Parliament to legally revise marriage law in order to make marriage gender-neutral.²¹⁷ On April 1, 2009, this bill passed with 261 votes in favor and 22 votes against.²¹⁸ The overwhelming majority in favor of the bill included members of six out of the seven major political parties in the country.²¹⁹ Only members of the Christian Democrats opposed the bill, saying that the party wanted to protect "a

report also recommended allowing religious organizations to refuse to perform marriages for same-sex couples, thus angering gay rights proponents. *Inquiry Gives Green Light to Gay Marriage*, THE LOCAL, Mar. 21, 2007, <http://www.thelocal.se/6757/20070321/>.

211. Robinson, *supra* note 106.

212. *Sweden to Become Seventh Country to Legalize Gay Marriage*, ON TOP MAG., Jan. 22, 2009, <http://www.ontopmag.com/article.aspx?id=3103&MediaType=1&Category=24>.

213. *Id.* The leader of the Christian Democrats at that time, Goran Hagglund, vowed to fight the proposal by any means. He stated, "My position is that I have been tasked by the party to argue that marriage is for men and women." *Moderates Back Gay Marriage*, THE LOCAL, Oct. 27, 2007, <http://www.thelocal.se/8923/20071027/>.

214. According to Carina Moberg, a Social Democrat and chair of the Committee on Civil Affairs, the coalition was "prepared to steamroller the government." *Opposition Bill Could Force Through Gay Marriage Bill*, THE LOCAL, Jan. 15, 2008, <http://www.thelocal.se/9661/20080115/>.

215. *Id.*

216. Robinson, *supra* note 106.

217. *Id.*

218. Sophie Wilkinson, *Sweden Approves Same-Sex Marriage*, PINK NEWS, Apr. 01, 2009, <http://www.pinknews.co.uk/news/articles/2005-11834.html/>.

219. *Id.*

several hundred year old concept” that was marriage between one man and one woman.²²⁰ The bill went into effect on May 1, 2009.²²¹

The opposition by the Christian Democrats did not reflect the position of the largest religious organization in Sweden, the Lutheran Church of Sweden. With 74% of Swedish citizens self-identifying as members,²²² the Church had supported same-sex marriage since 2007.²²³ Prior to the passage of the same-sex marriage bill, however, the church did not apply the term “matrimony” to these marriages and instead reserved that term for marriages between a man and a woman. Following the initial report that recommended extending marriage rights to same-sex couples, the leader of the church, Archbishop Anders Weijryd, threatened to refuse to perform same-sex weddings should the state require that they use the word “matrimony.”²²⁴ However, in the months following the passage of the marriage rights bill, the church voted to allow congregations to perform same-sex marriage ceremonies.²²⁵ This vote made Sweden one of the first countries in the world to grant same-sex couples access to church weddings.²²⁶

VII.

COMPARATIVE SUMMARY

Before identifying how our comparative case studies can inform proponents of same-sex marriage rights in the U.S., we consider three theories that have been used to explain the extension of marriage rights to same-sex couples: (1) the decline of marriage thesis, (2) the political mobilization thesis, and (3) the policy evolution thesis. We find that all three of these theories fail to adequately explain the sequence of events in the five countries under study.

Some scholars have argued that the extension of marriage rights to same-sex couples corresponds to the decline of marriage as an institution.²²⁷ For

220. *Id.*

221. RELIGIOUS TOLERANCE, *supra* note 163.

222. *Church of Sweden Says Yes to Gay Marriage*, THE LOCAL, Oct. 22, 2009, <http://www.thelocal.se/22810/20091022/>. It should be noted that, while a strong majority of Swedes identify as members of the Lutheran Church of Sweden, only 12% of Swedes regularly attend religious services, positioning Sweden as one of the least religious nations in the world. Minkenberg, *supra* note 137.

223. RELIGIOUS TOLERANCE, *supra* note 163.

224. *Inquiry Gives Green Light*, *supra* note 210.

225. Peter Kenny, *Swedish Church Says Matrimony is only for Heterosexuals*, ENINEWS, Mar. 21, 2007, <http://www.eni.ch/featured/article.php?id=705>. 249 members of the church voted to allow the church to perform weddings for same-sex couples, while 176 voted against. The vote did not affect individual pastors' ability to refuse to perform marriage ceremonies for same-sex couples. *Church of Sweden Says Yes*, *supra* note 222.

226. *Id.*

227. Andrew Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. OF MARRIAGE AND FAMILY 848 (2004); Festy & Rogers, *supra* note 37.

example, Festy and Rogers argue that the expansion of legal recognition to same-sex couples starting in the 1980s occurred in several European countries undergoing a transition to “demarriage”: a broad retreat from marriage as an institution.²²⁸ Similarly, American sociologist Andrew Cherlin argues that we are currently witnessing the “deinstitutionalization” of marriage in Western democracies, including the U.S.²²⁹ According to Cherlin, deinstitutionalization refers to “a weakening of the social norms that define partners’ behavior . . . over the past few decades.”²³⁰

Evidence for both “demarriage” and the “deinstitutionalization” of marriage include declines in overall marriage rates, delays in the age at first marriage, rising divorce rates, non-marital births, and growing rates of cohabitation.²³¹ According to this theory, extending marriage rights to same-sex couples in this context represents less of a threat to politics than it did historically. Thus, as marriage declines in terms of its social, political, and economic significance, the rate at which marriage rights are extended to same-sex couples will increase.²³²

While this theory may explain very general trends, it is less able to explain the particular processes at the country level. Indeed, the degree of “demarriage” does not adequately explain our findings. Rather, the countries in our sample represent a broad range of marriage contexts. For instance, while Sweden has some of the highest rates of cohabitation in Europe, Spain has some of the lowest.²³³ While marriage rates in Europe are generally declining,²³⁴ there

228. See Festy & Rogers, *supra* note 37, at 423.

229. See Cherlin, *supra* note 227.

230. Cherlin, *supra* note 227, at 848. Cherlin identifies two transitions that have led to deinstitutionalization of marriage. First, the cultural transition from “institutional marriage” to “companionate marriage,” the marital partners’ desire to enter marriage for the sake of gaining a romantic companion and achieving emotional satisfaction rather than as a requisite institutional transition in the life course. The second transition concerns the cultural of view of marriage not as an institution in which social, political, and economic goals can be achieved, but as an institution where personal choice and individual fulfillment are emphasized.

231. For a general overview of changing family behavior in Europe and the United States, see Tomas Sobotka and Laurent Toulemon, *Changing Family and Partnership Behaviour: Common Trends and Persistent Diversity Across Europe*, 19 DEMOGRAPHIC RESEARCH 85 (2008). On cohabitation rates in the U.S. see Larry Bumpass and Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children’s Family Contexts in the United States*, 54 POPULATION STUD. 29 (2000). For rates in Europe see Kathleen E. Kiernan, *Unmarried Cohabitation and Parenthood in Britain and Europe*, 26 J. L. & POL’Y (2004). On declining marriage rates see Festy & Rogers, *supra* note 37. On rising divorce rates, see Michael Wagner and Bernd Weiss, *On the Variation of Divorce Risks in Europe: Findings from a Meta-Analysis of European Longitudinal Studies*, 22 EUR. SOC. REV. 483 (2006). On rising rates of non-marital births, see John Ermisch, *The Rising Share of Nonmarital Births: Is it only Compositional Effects?* 46 DEMOGRAPHY 193 (2009).

232. Cherlin, *supra* note 227; see also Festy & Rogers, *supra* note 37.

233. Kiernan, *supra* note 231 (arguing that European countries are currently undergoing different stages of acceptance with regard to cohabitation. While Sweden is in stage four—the most advanced stage—Spain remains in stage one).

234. Festy & Rogers, *supra* note 37.

remain robust differences.²³⁵ In our study, marriage rates in Belgium and Spain are consistently higher than in Sweden.²³⁶ Overall, the variation in terms of the institution of marriage among countries in our sample suggests that other factors—perhaps political factors—played a stronger role in shaping the pathways toward full marriage equality.

A second theory used to explain the expansion of minority rights considers the political process directly. Proponents of political mobilization theory suggest that in order to achieve same-sex marriage rights, certain political contextual factors are necessary. These contextual factors include the presence of strong lesbian, gay, bisexual and transgender (LGBT) organizations at the national level, weak political opposition, the existence of favorable international models and policy networks, and a ruling government that views LGBT activists' human rights claims as legitimate.²³⁷ Again, however, the case studies in our study do not present any clear support for this theory.

First, the countries in our sample varied a great deal in terms of the relative strength of a national-level LGBT movement mobilizing for the expansion of marriage rights. While Sweden had a strong, well-organized national-level movement,²³⁸ Spain's movement was relatively scattered and weak.²³⁹ The strength of the political opposition also varied; in Spain, the mobilized opposition (i.e., the conservative People's Party and the Catholic Church) was well organized, well funded, and nationally and internationally powerful.²⁴⁰

235. Sobotka and Toulemon, *supra* note 231, at 92-94.

236. *Id.*

237. Kelly Kolman, *Same-Sex Unions: The Globalization of an Idea*, 51 INT'L STUD. Q. 329, 338 (2007).

238. The major organizational behind Sweden's gay rights movement was the Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL). Founded in 1951, RFSL is one of the oldest gay rights organizations in the world and the largest gay rights organization in Sweden with more than 6,000 members. Since the 1980s, RFSL has been publicly funded, which has allowed it to significantly expand its political activities by building organizational centers throughout Sweden and hiring a professional staff. In the decades leading up to the passage of marriage rights in Sweden, RFSL pursued active and aggressive lobbying, public relations, and legal monitoring campaigns at the national and local levels. Linda Briskin and Mona Eliasson, *WOMEN'S ORGANIZING AND PUBLIC POLICY IN CANADA AND SWEDEN* 324-26 (1999).

239. Under the Franco regime that ended in 1975, homosexuality and political dissent were illegal, repressed, and strictly persecuted, and the Catholic Church was the official religion of Spain. Together these factors made political gay rights activism virtually impossible. Homosexuality was not decriminalized in Spain until 1976. Partly as a legacy of this history, the gay rights movement in Spain remains small, unorganized, and regionally uneven. There are few gay publications and the few rights organizations that do exist lack national recognition. Daniel Eisenberg, *SPANISH WRITERS ON GAY AND LESBIAN THEMES: A BIO-CRITICAL SOURCEBOOK* 23-25 (1999).

240. The major political opposition to extending marriage rights came from the conservative People's Party (PP), which was closely aligned with the Roman Catholic Church and the political wing of the Church, Opus Dei. As late as 2000, the PP held majority seats in both Spain's Congress and Senate, effectively blocking any national-level advancement of gay rights. Canovas, *supra* note 137, at 499-501. In advance of the legalization of marriage in Spain, the Catholic Church organized demonstrations in opposition, Pope Benedict XVI weighed in on the debate, calling same sex marriage a form of "anarchic freedom" and a threat to the family, and a statement of Spain's

Thus, while in other countries the organized opposition may have been moderate, or in the case of Sweden and the Netherlands, relatively weak,²⁴¹ the opposition to same-sex marriage rights was very strong in Spain.

The existence of favorable international models upon which to build justification to expand law also does not explain our cases. When the Dutch Parliament approved same-sex marriage rights on December 19, 2000, there were no international models in existence to which leaders or elected officials could look to justify their votes. Finally, while we agree that support for marriage rights among the ruling parties is necessary, the rhetoric of marriage rights did not always—and does not necessarily—involve explicit reference to human rights.²⁴²

The final theory, based on the concept of policy evolution, is one adopted and promoted by several marriage rights proponents around the world. The basic premise of this evolutionary model is that major policy advancements such as full marriage equality can be achieved only after advancing several small policy initiatives, for example, non-discrimination policies.²⁴³ According to this model, the most fruitful pathway to achieving full marriage rights is to begin with a series of less ambitious initiatives and “build up” to full marriage recognition.²⁴⁴ This model has led same-sex marriage advocates in the U.S. to pursue state-by-state domestic partnership, civil union, and marriage statutes, with the assumption that these steps are necessary for eventually winning full marriage rights at the federal level.²⁴⁵

Catholic Bishops organization called same sex marriage laws “unjust” and promised to oppose the laws by any legitimate means. Jennifer Green, *Spain Legalizes Same-Sex Marriage*, WASH. POST, Jul. 1, 2005.

241. Waaldijk notes the debate over marriage rights in the Netherlands was never burdened with issues such religion, taxes, social security, the welfare of children, or the sanctity of family. Rather, since the early 1980s, most Dutch citizens have favored the continued extension of rights to same sex couples. Waaldijk, *supra* note 56, at 439, 453.

242. For example, the issue of same-sex partnership rights—the precursor to granting full marriage rights—was introduced as early as 1973, long before the human rights frame was used by global gay rights activists. In fact, Sweden’s Legislation Committee stated in 1973 that it viewed “cohabitation between two persons of the same sex is a perfectly acceptable form of family life.” According to Ytterberg, this marked a turning point in Sweden in which policy makers saw gay rights as legitimate political issue. Ytterberg, *supra* note 137, at 428. Kolman dates the emergence of the human rights frame among transnational gay rights activist networks to “the past decade and a half,” or approximately in the early to mid-1990s. Kolman, *supra* note 237, at 329, 331.

243. Waaldijk refers to this theory as “the law of small change.” By this he means the evolutionary process by which small legal steps herald subsequent legal victories. Waaldijk, *supra* note 56, at 437.

244. According to Waaldijk, by the time full marriage rights were introduced in the Netherlands, the issue seemed like “only a small change” because so many preceding legal advances had chipped away at the issues that might have been raised against marriage rights, including parental and adoption rights, family stability, social security, and religion. *Id.* at 453.

245. State-by-state equality campaigns are part of a long-term strategy by gay rights activists and extend to marriage and partnership rights and anti-discrimination ordinances. This strategy is based on the evolutionary theory outlined in which small, incremental victories will shape public

Our analysis does not support this theory. While several countries in our study had introduced civil union and domestic partnership statutes prior to introducing marriage rights laws, this was not true for Spain. Prior to the extension of full marriage rights in 2005, Spain had not passed any legislation recognizing same-sex unions through domestic partnerships registrations or civil unions.

Policy evolution theory would also predict that over time, small policy changes would improve public support for full marriage rights, thus driving big political gains, including same-sex marriage statutes.²⁴⁶ However, there was little evidence of such a trend in our case studies. While public opinion polls in the Netherlands, Sweden, and Spain in years immediately preceding the passage of full marriage rights show that a majority of citizens strongly supported same-sex marriage, opinion polls in Norway and Belgium show that only a minority of citizens strongly supported same-sex marriage rights.²⁴⁷ These data undermine the argument that public opinion drives policy. In fact, rather than driving or predicting policy advancements, there is some evidence that public support actually follows from policy innovations. In the years since the passage of same-sex marriage rights in Belgium, a majority of Belgians have come to strongly support marriage rights for same-sex couples.²⁴⁸ There is also evidence that public support for same-sex marriage went up over time in every country that introduced marriage rights.²⁴⁹ Thus, we do not find evidence that marriage

opinion positively as well as long-term skepticism within the movement that judicial strategies are limited by the political divide within the Supreme Court. Ashley Surdin, *Gay Groups Say Loss Won't Alter Strategy*, WASH. POST, Nov. 5, 2009. In addition to state-by-state electoral campaigns, gay rights activists have also pursued state-by-state judicial victories, assuming that victories in state courts may build legal precedent while avoiding Supreme Court review. This strategy, like the electoral strategy, has led to significant state-level victories. David Cole, *How Will Gay Marriage Fare in the Supreme Court?*, N.Y. REV. BOOKS, Aug. 11 2010.

246. Lund-Andersen promotes this thesis in the case of Denmark, where she writes that legal advances, such as the introduction of registered partnerships, improve public opinion toward LGBT individuals. Specifically, she argues that while part of the purpose of gay rights legislation is political, to advance rights and benefits for same-sex couples and LGBT individuals, another purpose is cultural. She writes that Denmark's 1989 Registered Partnership Act was "an instrument to change attitudes." Lund-Andersen, *supra* note 33, at 417.

247. For opinion poll results in years preceding extension of same-sex marriage rights in the Netherlands, see *Netherlands Legalizes Gay Marriage*, BBC NEWS, Sept. 12, 2000, <http://news.bbc.co.uk/2/hi/europe/921505.stm>; for Sweden, see Angus Reid, *Eight EU Countries Back Same-Sex Marriage*, PUB. MONITOR, Dec. 24, 2006, http://www.angus-reid.com/polls/view/eight_eu_countries_back_same_sex_marriage/; for Spain, see *id.*; for Norway see EOS Gallup Europe, *Homosexual marriage, child adoption by homosexual couples: is the public ready?* 2 (2003) in Festy & Rogers, *supra* note 37, at 437; for Belgium see *id.*

248. In 2006, 62% of Belgians strongly approved of same-sex marriage whereas in 2003, the year the marriage act was passed, only 37% strongly approved of same-sex marriage rights. Reid, *supra* note 247. For data on opinions in 2003, see EOS Gallup Europe, *supra* note 247.

249. For instance, by 2006, 82% of Dutch citizens strongly approved of same-sex marriage; equivalent numbers were 71% in Sweden, 62% in Belgium, and 56% in Spain. Reid, *supra* note 247. In 2003, 62% of Dutch citizens strongly supported same-sex marriage; equivalent numbers were 51% in Sweden, 40% in Norway, and 37% in Belgium. *Id.*

rights necessarily are achieved through an evolutionary political process or that public support drives policy changes.

Ultimately, we conclude that none of these three dominant theories explain the findings from our detailed case histories. The outcomes in these countries cannot be adequately explained by demographic characteristics, the strength or weakness of non-governmental political factions, nor incremental policy precursors. Rather, the common factor present in all cases under study is the ascension of a strong, leftist ruling party or coalition that was willing to push through marriage legislation. These parties advanced legislation in the face of limited public support, as in the case of Norway and Belgium, without strong and supportive LGBT political mobilization, as in Spain, and in the absence of any previous legislation recognizing same-sex partners, again, as in Spain. Indeed, we identify this as the single most important factor in each of our case studies. This factor not only explains the policy innovation itself, but also the timing. We now consider this finding in light of identifying a viable pathway for achieving full marriage equality in the U.S.

VIII.

CONCLUSION: VIABLE PATHWAY FOR ACHIEVING MARRIAGE RIGHTS IN THE U.S. BASED ON EUROPEAN COMPARISONS

The single most important factor predicting the extension of marriage rights in the five countries under study was the ascension of a strong leftist ruling party or coalition committed to extending marriage rights to same-sex couples. Neither the strength of non-governmental support, nor the weakness of political opposition explains the outcomes in the countries we reviewed. Strong approval by the public was also not necessary, nor was a history of pro-partnership legislation. And in no case we examined were marriage rights achieved through a national- or state-level referendum.

What strategies can American proponents of same-sex marriage rights learn from these case histories? First, evidence from our case histories suggests that marriage rights advocates should abandon the current state-by-state strategy and instead focus on building a national-level movement for marriage equality. Second, marriage proponents in the U.S. should focus less on gaining limited recognition through domestic partnership statutes and civil union registries at the state, municipal, and county level. While domestic partnerships and civil unions go some distance in closing the gap between same-sex partnerships and legal marriages, they do not in any case fully address the inequities. And, as our findings suggest, achieving full marriage rights at the national level does not necessarily depend on an evolutionary approach to partnership recognition. Finally, our case histories suggest that local, state, or national referendums should not be seen as a critical, or even preferred,²⁵⁰ strategy for achieving

250. Particularly given the number of states to date that have voted in favor of amending state

same-sex marriage rights. In two cases, Belgium and Norway, public opinion was *against* extending marriage rights to same-sex couples.²⁵¹

Taken together, these lessons suggest that the best strategy for achieving marriage equality in the U.S. must be drastic and far-reaching, and must be initiated at the federal level. One logical point of intervention, therefore, would be to focus on amending or repealing the Defense of Marriage Act (DOMA), which was passed in 1996 and codifies marriage in federal law as “a legal union between one man and one woman as husband and wife.”²⁵² Not only does DOMA effectively restrict over one thousand federal benefits to same-sex couples ranging from social security, veteran’s benefits, taxation, and criminal law,²⁵³ but it also limits the potential impact of state-level marriage laws that recognize same-sex partnerships. This is because DOMA’s second provision relieves any state from having to recognize same-sex marriages performed in another state.²⁵⁴ Thus, under DOMA, same-sex marriage rights are not recognized federally and are not transferable across state boundaries.

Legal challenges to DOMA have already been fought. In March 2009, Gay & Lesbian Advocates and Defenders (GLAD) filed a suit on behalf of eight Massachusetts married couples and three surviving spouses, challenging the constitutionality of DOMA.²⁵⁵ The state of Massachusetts followed, initiating a lawsuit challenging DOMA in July 2009.²⁵⁶ Both suits relied on Supreme Court precedent holding that marriage is a fundamental right. In 1967, the Supreme Court ruled in *Loving v. Virginia* that denying marriage rights on the basis of race represented a denial of a fundamental right,²⁵⁷ and that marriage was “one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”²⁵⁸ This logic, the plaintiffs in the DOMA suits argued, should be extended to denial of marriage based on sex as well. In a ruling on issued in July 2010, United States District Court Judge Joseph Tauro held that section 3 of DOMA, which stipulates that marriage is a union between one man and one

constitutions to deny marriage to same-sex couples. Thirty-eight states currently ban same-sex marriage. See Freedom to Marry, *supra* note 4.

251. In 2003, only 40% of citizens in Norway and 37% of citizens in Belgium strongly supported same-sex marriage. Festy & Rogers, *supra* note 37.

252. For a detailed list and description of all federal statutory provisions that distinguish between opposite sex married couples and all other couples, see U.S. GEN. ACCOUNTING OFFICE, *supra* note 21.

253. *Id.*

254. Pub. L. No. 104-199, 110 Stat. 2419, 28 U.S.C. § 1738C.

255. Gay & Lesbian Advocates & Defenders, *GLAD Challenges DOMA Section 3*, GLAD, Nov. 9, 2010, <http://www.glad.org/doma/lawsuit>.

256. Martin Finucane, *Mass. Challenges Federal Defense of Marriage Act*, BOSTON GLOBE, July 8, 2009, available at http://www.boston.com/news/local/breaking_news/2009/07/mass_to_challen.html.

257. *Loving v. Virginia*, 388 U.S. 1, 12 (1967). In an earlier case, the Court referred to marriage as one of the “basic civil rights of man.” *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

258. *Loving*, 388 U.S. at 1 (quoting *Skinner*, 316 U.S. at 541).

woman, was unconstitutional.²⁵⁹ Judge Tauro based his ruling on two grounds. First, in preventing states from defining their own standards of marriage, DOMA violated the Tenth Amendment, which has historically been interpreted in a way that allows marriage and family practices to be determined at the state, rather than the federal, level.²⁶⁰ Second, the ruling stated that DOMA violated constitutional principles of equal protection.²⁶¹

Despite this substantial judicial victory in Massachusetts, court challenges to DOMA are unlikely to achieve full marriage rights in the U.S. Such battles can be extremely lengthy, lasting many years in some cases,²⁶² and the outcome of any challenge to DOMA given the current composition of the Supreme Court is unpredictable. Indeed, gay rights activists have traditionally viewed court battles over marriage rights in the U.S. as risky and counter-productive.²⁶³ The path of California's stalled battle for same sex marriage rights illustrates the risks involved in a court-driven political strategy. The ruling of the Ninth Circuit Court of Appeals on Proposition 8 will result in a watershed for same sex marriage rights or, alternatively, for banning same sex marriage at the state level.²⁶⁴ Regardless of the outcome of this decision, however, the battle has been and will continue to be lengthy, and any pro-same-sex marriage decision

259. *Massachusetts v. Dept. of Health and Human Servs.*, 698 F. Supp. 2d 234 (2010).

260. Specifically, the opinion stated that the enforcement of DOMA at the federal level "encroaches upon the firmly entrenched province of the state, and, in doing so, offends the Tenth Amendment." *Id.* at 254.

261. The ruling states, "DOMA failed to pass constitutional muster even under the highly deferential rational basis test DOMA, therefore, violates core constitutional principles of equal protection." *Id.* at 248.

262. For example, the landmark case *Lawrence v. Texas* took over three years to reach the Supreme Court. *Lawrence v. Texas*, 539 U.S. 558 (2003). Likewise, *Romer v. Evans* was pending for just under three and a half years. *Romer v. Evans*, 517 U.S. 620 (1996).

263. Daniel Pinello, professor of criminal justice, summarizes this approach in the following way: "The most strategic approach was to look at state action, not federal action, because a United States Supreme Court and federal judiciary dominated by Republican appointees did not provide a very favorable risk analysis for litigation." John Schwartz, *Despite Setback, Gay Rights Move Forward*, N. Y. TIMES, Sept. 21, 2010. However, there is some evidence that recent cases, including the recent decision overturning California's Proposition 8, are leading some activists to reconsider the potential benefits of judicial strategies. *Id.* Though recent cases are leading to greater optimism among some gay rights activists, some are still concerned about the risks of a rights strategy that centers on getting a case before the Supreme Court, as federal cases are likely to do. According to legal scholar Nan Hunter, "It's a big risk, big gamble. I don't see [a favorable] decision coming out of this court in the next few years I would feel a lot more confident if [activists'] strategic decisions about timing had been made in concert with an alliance of groups, rather than this cowboy effort to take it up." Tovia Smith, *Same-Sex Marriage Inches toward High Court*, NAT'L PUB. RADIO, July 16, 2010.

264. In 2010, Federal Judge Vaughn R. Walker overturned Proposition 8 but stayed the ruling. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). Immediately thereafter, the United States Court of Appeals for the Ninth Circuit issued a stay on the performance of marriages until it determines the constitutionality of the marriage ban. *Perry v. Schwarzenegger*, No. 10-16696 2010 WL 3212786 (9th Cir. Aug. 16, 2010).

by the Ninth Circuit risks being overturned by the Supreme Court on appeal.²⁶⁵

Rather than relying on prolonged and unpredictable legal battles, and in keeping with the lessons gained from the European case studies, same-sex marriage rights may be gained by a Democratic administration willing to spend substantial political capital on amending or repealing DOMA legislatively. While President Obama supported the repeal of DOMA during his campaign,²⁶⁶ there have been no serious challenges to DOMA during his tenure in office.²⁶⁷ To the contrary, the current administration supported DOMA on substantive grounds in a 2009 brief released by the U.S. Department of Justice.²⁶⁸ Furthermore, during the period prior to the 2010 midterm elections, when the Obama administration enjoyed a Congressional majority, the administration failed to advance equal rights for gays and lesbians in any substantive way,²⁶⁹ thus squandering an important window of opportunity.²⁷⁰ However, despite

265. Jesse McKinley, *Both Sides in California's Gay Marriage Fight See a Long Court Battle Ahead*, N.Y. TIMES, June 26, 2010.

266. Calvin Woodward, *Where Obama Stands on the Issues*, ASSOCIATED PRESS, Nov. 5, 2008.

267. To the contrary, advocates of same-sex marriage rights have been largely disappointed in the Obama administration's position on DOMA thus far. In 2009, the administration defended DOMA in a court brief, and is currently reviewing the possibility of an appeal of a recent ruling by a District Court Judge in Massachusetts who ruled in July 2010 that some of the provisions of DOMA are unconstitutional. Sahil Kapur, *On Same-Sex Marriage Ruling, Obama Risks Alienating His Base*, WASH. INDEP., July 13, 2010.

268. Memorandum of Points and Authorities in Support of Defendant United States of America's Motion to Dismiss at *Smelt v. Orange County*, No. SACV09-00286 DOC (MLGx), 2009 WL 1683906 (C.D. Cal. June 11, 2009). Marriage rights advocates viewed the fact of the brief, as well as its content, as a major betrayal by the Obama administration, which has the potential to significantly set back the fight for marriage equality. In response to the brief, the ACLU wrote in a press release, "We are very surprised and deeply disappointed in the manner in which the Obama administration has defended the so-called Defense of Marriage Act," and also described the reasoning in the DOJ brief as "the same flawed legal arguments that the Bush administration used." American Civil Liberties Union, *LGBT Legal and Advocacy Groups Decry Obama Administration's Defense of DOMA*, ACLU, June 12, 2009, http://www.aclu.org/lgbt-rights_hiv-aids/lgbt-legal-and-advocacy-groups-decry-obama-administrations-defense-doma.

269. There are two notable exceptions to this claim. First, in 2009 the administration extended benefits to same sex partners of federal employees. Mark Z. Barabak and Jessica Garrison, *Obama to Offer Benefits to Gay Partners of Federal Employees*, L.A. TIMES, June 17, 2009. Second, also in 2010, the Labor Department extended one portion of the Family and Medical Leave Act to same-sex couples, allowing same-sex partners to take leave to care for sick or newborn children. Robert Pear, *Gay Workers Will Get Time to Care for Partner's Sick Child*, N. Y. TIMES, June 21, 2010 at A13.

270. The Obama administration's record on gay rights has been critiqued on several fronts. In response to a 2009 brief supporting DOMA, the president of Human Rights Campaign, a prominent gay rights organization, wrote, "This brief would not have seen the light of day if someone in your administration who truly recognized our humanity and equality had weighed in with you." Laura Meckler, *Gay Group Slams Policies of President*, WALL ST. J., June 16, 2009. Liberal politicians, such as San Francisco mayor Gavin Newsom, have also critiqued the administration and Obama personally for inaction on gay rights. In a 2010 interview, Newsom stated, "I am very upset by what [Obama has] not done in terms of rights of gays and lesbians . . . it is fundamentally inexcusable for a member of the Democratic Party to stand on the principle that separate is now equal, but only on the basis of sexual orientation." Maureen Dowd, *The Trials of Gavin Newsom*, N.Y. TIMES, Jan. 19, 2010.

losing a Congressional majority in the 2010 midterm elections, the administration could advance same-sex rights by pushing for meaningful amendments to, or the full repeal, of DOMA. If the administration chooses to modify DOMA, it should focus on section 3, which defines marriage as a union between a man and a woman.²⁷¹ The administration could advocate for the repeal of the section altogether,²⁷² or for removal of any reference to the sex of a spouse.²⁷³ Either strategy would effectively end the major obstacle to marriage rights in the U.S. Alternatively, the administration could call for a full repeal of DOMA, thus eliminating the harmful effects of the law altogether. Repealing or amending DOMA would provide access to a range of federal benefits to legally married same-sex couples, from social security to tax benefits. Most importantly, it would create momentum toward granting full marriage rights to same-sex couples at the federal level. However, such prospects seem increasingly dim in light of the substantial resistance such efforts would face in the Republican-controlled Congress.

271. 1 U.S.C. §7.

272. This is the approach promoted by the American Bar Association. *ABA Calls For Equal Benefits For Same-Sex Couples*, CBS 2, Aug. 4, 2009, available at <http://cbs2chicago.com/topstories/aba.gay.rights.2.1114064.html>. The ABA House of Delegates approved on a voice vote a resolution urging repeal of a portion of the federal Defense of Marriage Act that defines marriage as between a man and a woman.

273. Amending the section thus would leave the following language: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word *marriage* means only a legal union between two parties sanctioned by state law as a marriage, civil union, or domestic partnership, and the word *spouse* refers only to a person who is a legally recognized marital or domestic partner in a state sanctioned marriage, domestic partnership or civil union."