Religion, Polygamy, and Non-Traditional Families: Disparate Views on the Evolution of Marriage in History and in the Debate Over Same-Sex Unions

Charles P. Kindregan, Jr.

I. INTRODUCTION

For many decades the definition of marriage lay at the backwater of family law analysis. This began to change over a decade ago when the Supreme Court of Hawaii ruled favorably on an attempt by same-sex couples to obtain marriage licenses, prompting the United States Congress to respond by enacting the “Defense of Marriage Act.” Since then, state legislatures in a few states have conferred some of the benefits of marriage on same-sex couples entering into civil unions or domestic partnerships. For example, the New Jersey Supreme Court ruled that same-sex couples must be accorded equal treatment under the law with opposite-sex couples who choose to marry, but left it to the legislature to decide if this meant marriage or some other marriage-like status. Meanwhile, Canada, a common law country, redefined marriage to include same-sex couples, and several other countries did the same. In the United States, as discussed below, the Massachusetts Supreme Judicial Court...
(SJC) has rewritten the common-law definition of civil marriage by a judicial decision.

Another noteworthy development in the definition of marriage is a proposal developed by the American Law Institute, which effectively equates marriage to the relationship of unmarried domestic partners who maintain a common household, have a common child, and meet other requirements. The proposal would bestow on these couples property rights historically associated with marriage. If enacted into law, this idea would require cohabitating individuals who qualify for such a “marriage-like” designation to specifically opt out of the legal consequences of their relationship if they wish not to be bound by the law. These and other developments, such as civil unions and domestic partnerships, have put marriage and its would-be imitators back on the public and political agenda.

In the United States, the public debate over same-sex marriage has focused attention on the nature of marriage. When the Massachusetts SJC ruled that same-sex couples have the right to obtain civil marriage licenses under the state constitution in Goodridge v. Department of Public Health, the majority opinion contained numerous historical references. Chief Justice Marshall, writing the majority opinion, aptly commented that “[o]ur concern . . . is whether historical, cultural, religious, or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry.”

The Goodridge decision was the first made by the highest court in any American state to recognize the right of same-gender persons to marry. In its ruling, the Massachusetts SJC brought an edge to the national debate about the nature of marriage. This debate has since touched on historical, cultural, religious, social, and constitutional themes inherent in the discussion of same-sex marriage. This Article examines these various themes in light of the continuing debate over the law governing marriage in the United States and elsewhere.

The decision by one state to recognize a form of marriage different from the traditional definition of marriage—defined as “a legal union between one man and one woman as husband and wife”—was bound to encounter widespread controversy here, as it has in other Western countries. The debate over the definition of marriage has been so intense that the President of the United States actually supported an amendment to the Constitution that would limit
marriage to the traditional definition. A debate among legal scholars about the issues underlying the very concept of marriage has also intensified to the point where the American Law Institute suggests that the obligations of marriage might justly be imposed on persons living in non-marital cohabitation relationships, unless they choose to contract out of such duties.

This Article attempts to provide historical perspective to assist in understanding the marriage debate both in the United States and other countries. To those who argue that the nature of marriage is not subject to debate because it has been fixed since the evolution of human society, I suggest that such a proposition is historically inaccurate. To those who argue that certain religious beliefs prohibit tampering with the definition of marriage, I suggest that history shows the evolution of legal marriage into a civil union independent of its religious origins. As the nature of marriage has evolved over time and marriage has become a recognized civil union, rather than a religious one, I propose that changes in societal views of marriage are not abnormal. Further, I urge that the law must adjust to accommodate such changes.

II. THE PERSONAL AND CULTURAL VIEW OF MARRIAGE

People living in a particular culture and given period of time often assume that their own personal experiences of marriage and family have been the norm throughout history. For many individuals, their own family life, schooling, and religious beliefs often reinforce this construct. Some people have difficulty acknowledging that the concept of marriage has changed throughout history or that marriage may differ from their own moral or religious convictions. Many believe the state’s definition of civil marriage should conform to their own personal experience of family life, while refusing to accept alternative family


views. For these people, views of marriage and family life have remained static for centuries and cannot change. This is especially true when issues such as same-sex unions, polygamy, long-term cohabitation, or domestic partnerships are raised.

Each human being has a mental photograph of what marriage and family mean in his or her mind. It is, therefore, understandably difficult for many to see anything other than the view developed in their own experience as proper. In this Article, I ask the reader to consider whether his or her mental photograph, which may be perfectly valid as a religious, moral, or personal concept, is also relevant to the state’s legal definition of civil marriage. It may be easier for the reader to form an opinion on this question by considering whether marriage has actually changed throughout history, or whether it has remained static.

In some respects attempting to understand the meaning of marriage throughout history may be a retro-study. Today much of the academic study of family law has moved far beyond the concern about the form of the marital union. Instead of concerns about the technical form of a relationship, legal issues involving the family today come to focus on substantive issues of personal partnerships, caregivers, implied and express contractual arrangements, wealth distribution, termination of parental rights, parentage, parenting plans, and matters other than the marital status of adult couples. Despite concerns over these other substantive issues, however, the concept of marriage itself still remains important to both individuals and society as a whole.

Modern academic scholarship represents an infusion of reality into current thinking. However, as the intensity of the debate over same-sex marriage demonstrates, marital status remains of vital interest to many people. I do not suggest that it is the most important issue confronting scholars of the family, but it has and will continue to have significant relevance. For many people, the choice of living in a marital status offers the advantage of commitment in a legally fostered and protected institution. For this reason alone, consideration


19. See Charles P. Kindregan, Jr., The Year of Same-Gender Marriage: How It Happened, in FAMILY LAW UPDATE 1, 1-21 (Laura Morgan ed., 2005) (discussing various historical factors which impacted the development of civil marriage).

of the nature of marriage remains important. I believe that the history of marriage has valuable lessons to teach us regarding how the law can evolve in regulating the family.

III. IS MARRIAGE A STATIC INSTITUTION?

When the Massachusetts SJC announced that the state could not exclude same-sex couples from access to the license needed to enter a valid civil marriage because such exclusion violated several articles of the Massachusetts Constitution, the decision produced a political firestorm. Then Massachusetts Governor Mitt Romney denounced the decision by saying that the court had overturned “three thousand years of recorded history.” Apparently the Governor, himself a Mormon, was unaware that more than a century earlier this nation was so intensely divided on the definition of marriage that it actually resulted in a small civil war. This struggle occurred because the Church of the Latter Day Saints initially refused to accept the majority view of marriage, which restricted the union to one between two people. It was only after decades of conflict that the Mormon Church finally accepted the majority idea of marriage as a monogamous union, and then only


22. The decision was based on Articles 1, 6, 7, and 10 of the Massachusetts Constitution, providing for free and equal rights and liberties; the denial of title to community or public advantages by some over others; the need for government to protect the safety, prosperity, and happiness of all, and not for the private interest of one man, family, or class of men; and the right of each individual to be protected in life, liberty, and property according to law. See MASS. CONST. art. I; MASS. CONST. art. VI; MASS. CONST. art. VII; MASS. CONST. art. X. The court did not consider claims under Article XII or Article XVI. Goodridge, 798 N.E.2d at 950 n.7-8. Chief Justice Marshall wrote for the court, joined by Justices Ireland and Cowin. Justice Greaney concurred, basing his reasoning on the Equal Rights Amendment to the state constitution. See id. at 970-74 (Greaney, J., concurring). The three dissenting judges—Justices Spina, Sosman, and Cordy—all joined the dissenting opinions written by each other. They argued that, among other things, the common-law definition of marriage was not irrational, the majority’s decision so extended due process as to distort its meaning, and the majority intruded into the legislative function of government through its decision. See id. at 974-1005 (Spina, Sosman, & Cordy, JJ., dissenting).

23. Frank Phillips & Rick Klein, Lawmakers are divided on response, BOSTON GLOBE, Nov. 19, 2003, at A1 (quoting Governor Romney). The question of whether legal recognition of same-sex unions will harm traditional ideas about marriage quickly became a post-Goodridge element in the marriage debate. See generally Robert Justin Lipkin, The Harm of Same-Sex Marriage: Real or Imagined?, 11 WIDENER L. REV. 277 (2005) (stating while same-sex couples should be allowed to marry as part of a compassionate normative environment). The author also believes legal recognition of same-sex marriage will do some harm to individuals committed to traditional male-female marriage.

24. In 1857, the United States Army was sent into the Utah Territory to end the Mormon government. The Mormon government was openly promulgating bigamous marriage, a view of marriage which the majority of Americans found objectionable. This started a dispute between the Mormon Church and the federal government which lasted almost a half century, and resulted in criminal convictions of Mormon leaders. See generally SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2002) (recounting history of Mormon practice of polygamy and the Church’s conflict with government over several decades).
after intense conflict with the federal government. The early Republican Party argued that Congress had a duty to enforce the majority view of marriage as a monogamous institution through federal legislation.\(^ {25} \) It took a Supreme Court decision enforcing this concept of monogamous marriage,\(^ {26} \) a congressional enactment revoking the charter of the Church of Latter Day Saints,\(^ {27} \) and a federally mandated state constitutional prohibition on polygamy as a condition of Utah’s admission to the Union to finally compel the acceptance of monogamy as the legal form of state-sanctioned civil marriage.\(^ {28} \)

The intense controversy over polygamy demonstrates that civil marriage has been the subject of disagreement and religious conflict throughout American history.\(^ {29} \) Religious differences will likely continue to influence the debate over civil marriage in future years. The debate over polygamy reminds us, however, that even though the law has rejected polygamous marriages, some people in our society nevertheless continue to live in polygamous relationships. While common-law marriage may be recognized in only a few states today, informal unions between one man and two or more women are not unknown in contemporary America. Such unions have no legal status and are hardly referenced on public surveys, but where they do occur, the death of a breadwinner or end of the relationship can have a negative economic impact on one or more of the women and their children. This reality may be beyond the reach of the law practically, but it suggests that private consensual relationships can create social problems independent of legal marriage status or religious opinions.

**IV. THE RELIGIOUS ORIGIN OF MARRIAGE AND THE EVOLUTION OF CIVIL MARRIAGE**

The concept of marriage has been influenced by Judeo-Christian theology in the Western world. Over centuries, however, the legal construct of state-defined civil marriage has changed in significant ways and does not always conform to its early religious origins. Supreme Court Justice Sandra Day

---


27. *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 64-65 (1890) (upholding legislation revoking 1851 Church charter on grounds that Church’s primary purpose was promotion of polygamy).

28. *Utah Const.* art. III, § 1 (providing “polygamous or plural marriages are forever prohibited”).

29. See *Gordon*, supra note 24, at 206 (noting identification of Mormon and Roman Catholic “despotism” in the minds of many Nineteenth Century Protestants). As to the Mormon advocacy of polygamy, Professor Gordon suggests this rejection of the majority view is similar to the Catholic rejection of Protestant-dominated public schools, and that by instituting plural marriage the Mormons were challenging the “prevailing Protestant theories of child-rearing and education.” *Id.* at 198.
O’Connor wrote that “many religions recognize marriage as having spiritual significance,” but many reject that view and others interpret it in different ways. Diverse religions certainly have different concepts of marriage, even in the Western world. Since marriage is a religious institution for many people, it is important to distinguish between religious concepts and the state-created institution of civil marriage. This distinction is especially important in a republic, where different religious beliefs flourish but one law governs all.

In light of the criticism of the Goodridge decision by many religious leaders, the historical connection between religion and the early evolution of marriage is relevant to understanding the changes which have marked the evolution of modern civil marriage. As Massachusetts Chief Justice Margaret Marshall acknowledged, “[m]any people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral.” Given the early historical evolution of marriage as a religious institution, we should consider how contemporary ideas of marriage as a state licensed civil institution came about.

The origins of marriage at the dawn of civilization are obscure. Marriage may have evolved as a way of binding a male and female to each other in order to raise their children. This might give the male a stake in the family unit and provide a motive for him to remain bound. Perhaps the family was also a means of dividing labor or providing protection against other hostile family units or societies. Whatever the practical or social reasons that marriage evolved as a form of family life, it also took on religious meaning at a relatively early historical period.

The oldest extant Western religious text commenting on marriage is the Torah, the Five Books of Moses. “The LORD GOD said, ‘It is not good for man to be alone; I will make a fitting helper for him . . . . Hence a man leaves his father and mother and clings to his wife, so that they become one flesh.”

Given the theology of the Torah, it is understandable that the institution of marriage came to be institutionalized in Jewish law. Thus, the law included prohibitions on incest and on having “carnal relations with your neighbor’s wife.” It also prohibited a man from “l[y]ing with a male as one lies with a

31. Michael Paulson, Protestants Weigh Same-Sex Marriage, BOSTON GLOBE, November 30, 2003, at B10 (describing internal debate in various denominations over court’s same-sex marriage decision); Jenna Russell, Bishops Call SJC Decision “Tragedy,” BOSTON GLOBE, November 30, 2003, at B1 (noting Catholic Bishops called for mobilization against same-sex marriage ruling and urged support for constitutional amendment to reaffirm marriage as union between one man and one woman).
34. Leviticus 18:6–18.
35. Leviticus 18:20; see also Ezekiel 16:38 (referring to the “punishment of women who commit adultery”).
woman.” These legal prohibitions may have served practical civil functions, such as the reduction of potential sexual abuse through restrictions on incest, and the promotion of procreation by prohibiting homosexual unions. Despite any practical civil function, however, these laws were attributed to “the LORD” who “spoke to Moses,” making them religious in nature.

While the texts quoted above suggest ancient Hebrew society viewed marriage as something like modern monogamous marriage, the texts also cite other models of family life. For example, Jacob was married to Leah and later also took Rachel as his wife; subsequently, both women gave Jacob their maids as concubines. Over centuries, however, Jewish law evolved, and in time, monogamous marriage became the norm.

Christianity built on the Jewish concept of marriage and viewed marriage as a religious act. In the Christian scriptures, when Jesus is asked to explain marriage, he quotes Genesis 2:24, and then adds “so they are no longer two, but one. What therefore God has joined together, let no man put asunder.” The Christian churches taught that God is the author of marriage. Since marriage originates from God under the Christian theological view, the Church eventually mandated the solemnization of marriage in a church ceremony with blessing from a priest before the marriage attained validity. Tertullian, an early father of the Christian Church, wrote in the Second Century that a marriage not solemnized in church was almost as bad as fornication. In 1215, Pope Innocent III ordered that throughout the Christian world marriage banns must be published in church; and later, in 1563, the Council of Trent ordered that marriages must be solemnized in the presence of a priest.

Even after the Roman and English churches broke apart in the Sixteenth Century, the Church of England continued to be influenced by the Catholic concept of marriage. This influence was significant since the ecclesiastical courts of the established Church of England had effective jurisdiction over marriage-related disputes. Parliament’s enactment of Lord Hardwicke’s Act

36. Leviticus 18:22.
37. See Leviticus 18:1.
38. See Genesis 29:1-30:43 (telling story of Jacob and his wives).
40. See Second Vatican Council, Pastoral Constitution on the Church in the Modern World, in VATICAN COUNCIL II: CONSTITUTIONS, DECREES, DECLARATIONS 950 (Austin Flannery ed., 1975) (providing a formulation of the concept by stating “God is the author of marriage”). While most of the Protestant reformers did not accept the Roman Catholic doctrine of sacramental marriage, they basically accepted the idea that marriage is from God. The Judeo-Christian view of divinely inspired marriage influenced the law of marriage in the United States. “Anywhere on the side and shifting spectrum of Protestantism in the early republic, from deism to Anglicanism, the basic Christian beliefs about marriage were in place.” NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 11 (2000).
41. OTTO E. KORGEEL, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES 11 (1922).
42. Id. at 11-13.
43. See id. at 32 (noting Lord Hardwicke’s Act passed in 1753 as “An Act for the better preventing
affirmed the religious nature of marriage by requiring that solemnization take place in a church. The English example is especially important since the American colonies imported the English legal system.

The Norman Conquest of England resulted in the creation of both common-law civil courts and separate ecclesiastical courts. While civil courts enforced the King’s justice, the ecclesiastical courts enforced canon law, including matters affecting marriage. It was not until 1857, long after the American Revolution, that jurisdiction over marriage cases was transferred from the English ecclesiastical courts to the civil courts. While many American colonies were established by people who dissented from the teachings of the Anglican Church, and ecclesiastical courts based on the English model were rare in the American colonies, portions of the substantive law of marriage developed in English ecclesiastical courts were eventually imported into the United States.

English civil law came to reflect the country’s religious view of marriage as a permanent monogamous union of one man and one woman. Under English law, the wife was subject to her husband, i.e., under the disabilities of coverture, and judicial divorce was not sanctioned. American colonial society, however, was heavily influenced by Protestant religious dissenters. In New England, marriage was considered a “civil thing” rather than a purely religious relationship, notwithstanding that marriage in America had religious roots in the Judeo-Christian tradition.

Over time, the common-law view of marriage in America evolved even further away from its religious roots. This evolution included the adoption of the Married Women’s Property Acts, abolishing the biblically-inspired disabilities of married women, and movement away from the biblical view of husband and wife as one person. The disability of a married woman was...
based on the Biblical concept that husband and wife are “one flesh.” Early English religious tradition also held that marriage was indissolvable, i.e., it could not be terminated by divorce. America abandoned this resistance to the concept of dissolvable marriage before divorce was legally permitted in England. For example, the Massachusetts Constitution provided for divorce in 1780, whereas English law did not authorize divorce until three quarters of a century later.

While traditional Jewish and Christian theology held that marriage was monogamous, the growth of Mormonism in the last half of the Nineteenth Century provoked a major debate over the nature of marriage. Although Mormon advocacy of polygamous marriage produced much friction and political debate, that advocacy was ultimately unsuccessful in legal and political forums. The religious teachings on marriage espoused by Mormon founder Joseph Smith were the catalyst for conflict on the subject. These conflicts ended only after the imprisonment of many polygamous Mormon leaders and the dissolution of the Church’s charter by federal legislation, on the grounds that the Church was a criminal enterprise promoting polygamy.

Unlike Mormonism, the Muslim religious tradition allowing polygamous marriage had so little influence in the United States that the United States Supreme Court denounced it as “almost exclusively a feature of the life of Asiatic and African people.” Apparently, the views of such “foreign” people were not considered because they differed from the Judeo-Christian teachings

---

51. Civil divorce was not made legal in England until the enactment of the Divorce and Matrimonial Causes Act of 1857. Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85 (Eng.).
52. Mass. Const. pt. 2, ch. 3, art. V (providing for divorce actions to be heard by governor and council until legislature authorizes grant of divorce by judiciary).
53. See CLARK, supra note 44, at 33.
54. See generally GORDON, supra note 24 (providing good modern account of these events).
55. Sarah Barringer Gordon, Law and Cultural Conflict: A War of Words: Revelation and Storytelling in the Campaign Against Mormon Polygamy, 78 Chi.-Kent L. Rev. 739, 743 (2003). In the Revelation on Celestial Marriage, Joseph Smith asserted divine revelation based in part on the bigamous example of Abraham, who, of course, is revered by Jews, Christians, and Muslims alike. See JOSEPH SMITH, DOCTRINE & COVENANTS 132 (1876). Brigham Young also actively promoted the practice of polygamy. The polygamy debate was one of the most prominent conflicts involving religious beliefs and marriage, and the issue still occasionally arises in the courts. See generally Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997). In Shahar, the court upheld the right of a state attorney general to revoke a job offer made to a female attorney when the official learned that she had married another woman in a Reconstructionist Jewish ceremony. Id. at 1110-11. The court rejected the woman’s argument that revocation of her offer constituted interference with her freedom of religion. Id. at 1102. See also Mark Strasser, Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise, and Constitutional Guarantees, 33 Loy. U. Chi. L.J. 597, 616-619 (2002) (discussing implications of Shahar decision).
56. See GORDON, supra note 24, at 206 (discussing anti-polygamy legislation).
57. Reynolds v. United States, 98 U.S. 145, 164 (1878). The Court also noted the marriage laws of England were formed and enforced in the church courts. Id. at 164-165.
predominating among the majority. This absolute rejection of religious polygamy may not remain so firmly established in the Western world as Muslims play a more influential role in American and European life. Polygamy does in fact exist in some Muslim immigrant enclaves in the West, although feminist ideas, in the long run, could transform the institution.58

Assuming polygamy does exist in parts of Europe, it is still unlikely that such unions will find acceptance in law in the immediate future. This lack of acceptance leaves people living in such relationships without access to legal remedies, except those which equity may provide on a case-by-case basis. An equally foreign concept to Americans is the Muslim Shi‘i allowance of temporary marriage,59 which is not even recognized in most parts of the Muslim world.

The effect of Muslim influence on the concept of marriage in the United States remains to be seen, but the Islamic Koran expressly forbids homosexuality,60 making it very unlikely that Muslims would approve of same-sex relationships. Meanwhile, other religious concepts of marriage, such as those of Hinduism, have also developed independent of Western influences. Unlike Judaism and Christianity, these religions have had no impact on the development of civil marriage in the United States.61

Reflecting on these historical considerations, I conclude that in a religiously diverse society such as the United States, we must be careful not to allow particular religious views to determine the law of civil marriage. The divergence between religious beliefs and purely civil concepts of marriage and family make it nearly impossible for those who view marriage as a bedrock religious tradition to reconcile the two ideas. Certainly, people with strong religious values must be allowed, and encouraged, to participate in the democratic process of lawmaking. The theological concept of one religion alone, however, cannot be allowed to define the nature of civil marriage.

One solution for reconciling religious and civil concepts of marriage may be to withdraw the law from determinations of what constitutes a marriage, instead leaving that decision to the churches and individuals.62 My solution, however,
would take the alternative approach. I would define marriage as a civil institution in which rights, liabilities, and status are defined by law. The solemnization of marriage through religious ceremony should still be an available option, with the law recognizing that such religious marriages have civil consequences. In defining civil marriage and providing for its legal consequences, the law should not only be paramount, it should be free from the dictates of religion. The decision to live according to the beliefs of a certain religious theology would then be left to individuals and their spouses.

V. THE COMMON-LAW MARRIAGE CHALLENGE TO FORMAL RECORDED CEREMONIAL MARRIAGE

Marriage has gradually evolved from a religious institution to a civil status under American law. This evolution has been uneven though, for as late as the end of the Nineteenth Century, the Supreme Court of the United States still equated marriage with Christian doctrine. In 1890, Justice Field wrote that there had been “sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse” while upholding the government’s “punitive power” to compel marriage conformity to the view of “the Christian world in modern times.”

While the Supreme Court was promulgating the Christian view of marriage, however, it was also undermining a traditional religious concept promulgated both by the Council of Trent and the Church of England, i.e., that valid marriage depends on solemnization. In 1877, the Court recognized informal or so-called common-law marriage. Common-law marriage is created through the consent and cohabitation of a couple rather than being solemnized and recorded by a church or government.

While the practice of solemnizing marriage originated in ecclesiastical law, Massachusetts, for example, never required a religious solemnization in order to create a valid civil marriage. On the other hand, Massachusetts had always rejected legal recognition of informal unions. The Supreme Court’s decision

63. Davis v. Beason, 133 U.S. 333, 343 (1890); see Gordon, supra note 24, at 232 (stating anti-polygamists believed constitutional doctrine had to be based on a “Christian foundation”).
64. Meister v. Moore, 96 U.S. 76, 81 (1877) (holding Michigan statute governing formalities of marriage was directory only and did not invalidate informal marriage to which parties consented).
affirming the right to legally create common-law marriages, in 1877, began to move the concept of marriage away from one of its religiously-based premises. The Court’s ruling marked a substantially new interpretation of marriage. It was certainly a change from the prior law of many states, which held that compliance with marriage licensing and formalities was the only way to create a valid marriage. 68 While most states eventually enacted express prohibitions on informal common-law marriages, the Supreme Court’s ruling took a significant step in the identification of marriage as a civil matter rather than a religious one.

VI. FROM MANDATE FOR TO REJECTION OF BANS ON INTERRACIAL MARRIAGE

Another area in which American concepts of marriage have evolved is the American view towards interracial marriage. In early America, it was commonly accepted that persons of different races could not enter into valid marriages. The protection of racial purity was a fundamental component to the law of marriage. Most American colonies had laws prohibiting marriages between persons of different races and many states continued to ban such unions even after the Declaration of Independence. 69 For decades, American law accepted as fact that legal marriage between persons of different races was impossible. 70 Some states viewed the prohibition on interracial marriage as an essential element of marriage, mandated by God. 71 Abraham Lincoln even rejected interracial marriage in the famous Lincoln-Douglas debates, his own views on the subject reflecting the popular views of the time. 72

The American view of interracial marriage eventually began to change, but progress was far from swift. It was not until 1967, about a century after the Civil War, that the United States Supreme Court held states could no longer prohibit interracial marriages. 73 A seemingly unremarkable decision by today’s

---


69. See generally Peter Wallenstein, Tell the Court I Love My Wife: Race, Marriage, and Law—An American History (2002) (providing extensive review of state statutes governing inter-racial marriage, from enactment of first miscegenation statute in colonial Maryland to repeal of last such statute in Alabama in 2000).

70. Races were classified in many different ways, but the practical difficulty with race classifications is illustrated by the dilemma Virginia faced in enacting a miscegenation statute in 1924. Wallenstein, supra note 69, at 139. Virginia exempted the socially prominent descendants of the interracial marriage between John Rolfe, a white man, and Pocahontas, a Native American. Id. The result was the Act to Preserve Racial Integrity, which declared these descendants “white” so long as there was no African ancestry in their bloodline. Id.

71. See Kinney v. Commonwealth, 71 Va. (30 Gratt.) 858, 869 (Va. 1878). The Supreme Court of Virginia declared that interracial marriages are “so unnatural that God and nature seem to forbid them.” Id.

72. Wallenstein, supra note 69, at 54-57.

73. Loving v. Virginia, 388 U.S. 1, 12 (1967).
standards, this decision was a revolutionary development at the time. By ending legal miscegenation in *Loving*, the Supreme Court opened the door for consideration of other unions banned by the states, including same-sex marriage. Marriage commentators began to ask whether the same constitutional basis that overturned bans on interracial marriage could also be used to strike down bans on same-sex marriages.74

In the *Loving* decision, Chief Justice Earl Warren wrote that the “freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the ‘basic civil rights of man’ fundamental to our very existence and survival.”75 In *Goodridge*, both the majority opinion and concurring opinion quoted Warren’s language approvingly in upholding a state constitutional right of same-gender couples to marry.76 Noting that “history must yield to a more fully developed understanding of the invidious quality of the discrimination,” the Massachusetts SJC acknowledged the parallel between denying marriage to a couple based on “skin color” and doing so based on “sexual orientation.”77

VII.EVOLUTION OF THE NON-TRADITIONAL FAMILY

Discord between civil and religious views of marriage is unavoidable in a democratic society that must accommodate people with numerous religious differences. While many Americans today continue to promote the Judeo-Christian view of the marital family, a significant and growing number now live in alternative, non-traditional families.78 The latter group includes various alternative family structures existing outside of traditional marriage, each of which has achieved varying degrees of legal recognition.79 The existence of alternative living arrangements outside of traditional marriage may seem irrelevant, but is actually closely related to the issue of same-sex marriage.


75. *Loving*, 388 U.S. at 12.


77. Id. at 958 (majority opinion); see also Josephine Ross, The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage, 37 HARV. C.R.-C.L. L. REV. 255, 255 (2002) (drawing parallel between opposition to legalization of interracial marriage and same-sex marriage).

78. See U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000 1 (2003). The 2000 Census showed that nearly 5,000,000 heterosexual couples were cohabitating in non-marital unions while approximately 600,000 same-sex couples were also cohabitating. Id. The same Census showed marriage continues to be important to many, as over 54,000,000 couples live in marital unions. Id.

79. This includes non-marital cohabitation or sexual relations. See, e.g., Marvin v. Marvin, 557 P.2d 106, 111-12 (Cal. 1976) (recognizing contract rights of non-marital cohabitation); Martin v. Zehl, 607 S.E.2d 367, 371 (Va. 2005) (holding state’s anti-fornication statute void); Watts v. Watts, 405 N.W.2d 303, 313 (Wis. 1987) (holding non-marital cohabitations can result in application of equitable remedies).
Some people believe that the legal recognition of non-marital unions based on contract or equitable theories is subversive to marriage itself. Others have argued, however, that it is senseless for the law to refuse recognition of non-marital family structures and provide standards for such families, since these alternative structures have gained wide societal acceptance. Alternatives to the marital family are so common today that they may be properly called “the new family.”

Massachusetts acknowledged the growth of alternative, non-traditional families before the SJC’s decision permitting same-sex marriage. A decade before Goodridge, the Massachusetts SJC interpreted the adoption statute to permit the adoption of a child by a same-sex couple. In doing so, the SJC recognized a non-traditional family based on the need of the child rather than leaving the decision in “legal limbo for years while [the children’s] future is disputed in the courts.”

In another case, only five years before the Goodridge decision, the SJC recognized the right of unmarried, cohabiting couples to enter binding, legally-enforceable contracts with respect to their property and financial interests. Subsequently, the SJC also asserted equity jurisdiction in holding that a non-biological father, formerly the domestic partner of the child’s biological

---


81. See J.A.L. v. E.P.H., 682 A.2d 1314, 1320 (Pa. Super. Ct. 1996) (allowing visitation to mother’s former same-sex domestic partner who was not child’s biological parent). The Pennsylvania Superior Court noted that

[i]n today’s society, where increased mobility, changes in social mores, and increased individual freedom have created a wide spectrum of arrangements filling the role of the traditional nuclear family, flexibility in the application of standing principles is required in order to adapt those principles to the interests of each particular child.

Id.


84. Adoption of Tammy, 619 N.E.2d 315, 320 (Mass. 1993). In Fintuen v. Crutcher, the Tenth Circuit held, under the Full Faith and Credit Clause, a state cannot refuse to recognize an adoption decree rendered in another state allowing a same-sex couple to adopt. 496 F.3d 1139, 1156 (10th Cir. 2007).

85. Tammy, 619 N.E.2d at 320.

mother, had standing to seek visitation with the child even though it was not her own, stating:

A child may be a member of a non-traditional family in which he is parented by a legal parent and a de facto parent . . . . The recognition of de facto parents is in accord with notions of the modern family. An increasing number of same gender couples, like the plaintiff and the defendant, are deciding to have children. It is to be expected that children of non-traditional families, like other children, form parent relationships with both parents whether those parents are legal or de facto.87

In his dissent to the E.N.O. decision, Justice Charles Fried, a Harvard law professor and former Solicitor General of the United States, correctly predicted that the majority’s decision had opened the door to the recognition of same-sex marriage in Massachusetts:

What the court must be saying is that a contract of union between a same-sex couple creating expectations of mutual care for a child stands on a special footing. The subject of same-sex unions is difficult, controversial, and important. The court’s decision is a clear step in granting legal force to such unions. If that is what the court intends, it should say so directly.88

VIII. THE CHANGING LAW OF MARRIAGE

Changes in the way the law has viewed marriage have coincided with the divergence of religious beliefs from other segments of civil society as well. Historically, conduct that religious groups believed to be sinful was prohibited through incorporation into criminal law. In recent decades, though, courts have set aside many criminal laws which were based on religious tradition. Laws criminalizing certain conduct have been declared unconstitutional, including laws banning abortion,89 contraception,90 and sodomy.91 Further, laws prohibiting conduct such as blasphemy, adultery, and fornication have either been repealed or routinely go unenforced.

Another area of substantive change has been in the laws governing marriage

88. Id. at 898 (Fried, J., dissenting).
dissolution. These laws have changed in every generation over the last century, while shifting their focus from marital fault to the resolution of the practical economic, social, and child-centered issues.\textsuperscript{92} Over the last 150 years, the legislatures of each state have enacted divorce laws, and then gradually liberalized them.\textsuperscript{93} Churches and religious leaders have often opposed the enactment or liberalization of civil divorce laws as being destructive to marriage.\textsuperscript{94} Their argument is based on the theological premise that marriage should be permanent and indissoluble.

Professor Homer Clark, a leading family law scholar, noted that during the last half of the Twentieth Century, marriage and divorce law underwent a remarkable transformation. Professor Clark attributed this evolution to radical changes in social attitudes about marriage and divorce.\textsuperscript{95} This adjustment in attitude was accompanied by the fact that people could obtain divorces more easily. The enactment of no-fault divorce laws, abolition of the common-law prohibition on husband-wife contracts, the introduction of equitable property division, increased enactment of uniform state and federal laws governing child custody and child support, and other statutes all served to revolutionize family law in America.\textsuperscript{96}

It has been said that, in the United States today, different views of marriage are competing with each other.\textsuperscript{97} One proposal argues that individual couples should have freedom to choose what laws will apply to their marriages.\textsuperscript{98} The

\textsuperscript{92} See generally RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE’S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Robin Fretwell Wilson ed., 2006) (providing commentaries on ALI proposals to focus family law on pragmatic treatment of family issues rather than from historical traditions of law).

\textsuperscript{93} See KINDREGAN & INKER, supra note 46, at §§ 1:6-1:8 (providing analysis of legislation changing divorce laws between adoption of Massachusetts Constitution in 1780 and present).

\textsuperscript{94} See GORDON, supra note 24, at 172-181 (providing excellent discussion of anti-divorce movement in Nineteenth Century America). The anti-divorce movement was so strong that some political leaders advocated a federal marriage law that would restrict marital termination. \textit{id.} at 178. At the onset of the Civil War, Presidents Buchanan and Lincoln both argued that the federal union was like a marriage, i.e., not dissolvable by the parties. \textit{id.}

\textsuperscript{95} CLARK, supra note 44, at § 13.1 (noting greater acceptance of divorce, legalization of no-fault divorce statutes, and growing acceptance of mediation to deal with marital breakdown).

\textsuperscript{96} See Herbie DiFonzo, No Fault Dissolution: The Bitter Triumph of Naked Divorce, 31 SAN DIEGO L. REV. 519, 521 (1994) (arguing change from fault-based divorce to no-fault divorce created culture of “divorce on demand”). Some people are so alarmed about the liberalization of divorce laws that they have supported proposed changes in the law of marriage. These proposals advocate an alternative form of marriage called covenant marriage. See Elizabeth S. Scott, The Legal Construction of Norms: Social Norms and the Legal Regulation of Marriage, 86 V.A. L. REV. 1901, 1959 (2000) (discussing covenant marriage as alternative to now extant civil marriage in order to reduce potential for divorce).


\textsuperscript{98} See Brian H. Bix, Choice of Law and Marriage: A Proposal, 36 FAM. L. Q. 255, 265 (2002) (suggesting marriage applicants should be given choice of marriage structure from legislatively created menu of options).
availability of easy divorce has sparked the idea of “covenant marriage,” by which a marrying couple committing to such union agrees to certain restrictions on divorce. The problem with recognizing two different and competing concepts of marriage is that recognition by one state may not prevent legal issues of recognition in others. Even those who advocate the legalization of same-sex marriage have expressed concerns over the “dominance of narrowly focused marriage advocates.”

IX. PRE-GOODRIDGE CHALLENGES TO PROHIBITION OF MARRIAGE LICENSES TO SAME-SEX COUPLES

Massachusetts was not the first state to confront the question of whether a state can be required to issue marriage licenses to same-sex couples. In the 1970s, court decisions in both Kentucky and Washington held that the states were not constitutionally mandated to issue such licenses because marriage is a union of a man and a woman only. In 1993, however, the Supreme Court of Hawaii ruled that under the Hawaiian Constitution’s equal protection clause, a marriage license denial to a same-sex couple was presumptively unconstitutional unless the state established a compelling reason for the denial. The lawsuit was later dismissed, however, as the Hawaiian Constitution was amended, allowing the legislature to define marriage as between a man and woman. Despite this seemingly complete defeat of same-sex marriage in Hawaii, there was still some expansion of marital rights to same-sex couples. The Hawaiian legislature became the first state legislature to enact laws giving same-sex couples domestic partnership rights, although not full-fledged marital rights.

Subsequent to the developments in Hawaii, the states of Vermont and

99. See Scott, supra note 96, at 1959 (discussing covenant marriage). Those entering covenant marriages choose for their relationship to be bound by some restrictions on divorce and agree to undergo divorce counseling before exercising option to divorce. A few states have enacted statutes allowing covenant marriage. See ARIZ. REV. STAT. ANN. §§ 25-901 to -904 (1999); ARK. CODE ANN. §§ 9-11-801 to -811 (2001); LA. REV. STAT. ANN. §§ 9:272-309 (1997); see also Katherine Shaw Spaht, What’s Become of Louisiana Covenant Marriage Through the Eyes of Social Scientists, 47 LOY. L. REV. 709, 722-23 (2001) (discussing effects of covenant marriage choice and requirements for successful implementation).


105. See HAW. REV. STAT. § 572C-1 to -7 (1997) (creating same-sex domestic partnerships).
Alaska also extended benefits to same-sex couples. The Supreme Court of Vermont held that the common benefits clause of the state constitution required Vermont to provide qualified same-sex couples with the same legal benefits accorded to opposite-sex couples in marriage. The Vermont legislature responded by authorizing same-sex couples to enter civil unions, in which the partners enjoy a lengthy list of benefits previously available only to married couples. And while the Hawaii and Vermont decisions were based on principles of equal treatment under the law, an Alaskan trial court grounded its decision in the right to privacy. In 1998, the Alaskan court ruled that the right of privacy guaranteed in the state constitution gave same-sex couples the right to choose life partners. After that decision, however, the Alaskan Constitution was amended to define marriage as a relationship between a man and a woman, making the court’s decision moot.

These lawsuits challenging the exclusion of same-sex couples from marriage, especially the case in Hawaii, heightened the national debate over the issue of same-sex marriage. Proponents of “traditional” marriage argued for national legislation that would prevent one state from legalizing same-sex marriages which would then be given recognition in all others under the full faith and credit clause of the United States Constitution. In response to this concern, Congress enacted the Defense of Marriage Act, which provides that

shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

Many states also enacted legislation or adopted constitutional amendments exempting themselves from the need to give recognition to same-sex marriages recognized elsewhere. It is highly probable that, in the coming years,

110. U.S. CONST. art. 4, § 1.
111. Defense of Marriage Act, 28 U.S.C. § 1738C (2006). Congress has also codified a definition of marriage for the purpose of interpreting the words “marriage” or “spouse” in federal statutes. “Marriage” is defined as “a legal union between one man and one woman as husband and wife.” 1 U.S.C. § 7 (2006). “Spouse” is defined as “a person of the opposite sex who is a husband or a wife.” Id.
X. SAME-SEX MARRIAGE RECOGNIZED IN ONE AMERICAN STATE

When the same-sex marriage issue came before the Massachusetts SJC, the remarkable changes in civil marriage law throughout American history played a significant role in the court’s analysis. For example, the SJC noted that Massachusetts had abrogated the “doctrine immunizing a husband against certain suits because the common-law rule was predicated on ‘antediluvian assumptions concerning the role and status of women in marriage and in society.’”113 The Goodridge opinion also noted the changes in domestic relations law “since at least the middle of the Nineteenth Century,” including “the expansion of the rights of married women and the introduction of ‘no fault’ divorce.”114 Chief Justice Marshall added optimistically that “[m]arriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution” after the advent of same-sex marriage.115 These comments clearly reflect the majority’s belief that civil marriage is not unchangeable, since it has undergone frequent evolution throughout time.

As of the time of this Article’s writing, Massachusetts is still alone among American states in recognizing same-sex marriage. Nevertheless, ferment over the issue remains. Divided panels in both the New York Court of Appeals and the Supreme Court of Washington have declined to mandate state recognition of marriage between persons of the same gender.116 While the Goodridge model has failed to garner widespread acceptance, some states have begun accepting the premise that the advantages of marriage ought to be available to same-sex couples. For example, the Connecticut legislature enacted a bill giving same-sex couples the right to enter into civil unions,117 while California recognized registered domestic partnerships.118 Both arrangements effectively...
treat qualifying non-marital partnerships as practical equivalents of marriage. Interestingly, California and Washington permit different-sex couples over the age of 62, as well as same-sex partners, to choose a registered domestic partnership as an alternative to formal marriage. New Jersey also recognizes domestic partnerships for both same-sex and opposite-sex couples. With time, these types of experimentation with marriage and its effective equivalents could gradually spread further throughout the United States.

XI. THE CANADIAN EXPERIENCE

To see how marriage and its quasi-equivalents may evolve in the United States, one must only look to the north. Canada, like the United States, is a multi-religious and multi-ethnic country. Canada was less resistant than the United States, however, to changing the common-law definition of marriage and approving same-sex marriages. The Canadian debate over the nature of marriage became intense in 1999. At that time, the Canadian House of Commons adopted a resolution defining marriage as “the union of one man and one woman to the exclusion of all others.” The Province of Alberta then amended its law to define marriage in accordance with traditional concepts, as a union between a male and female. As the issue underwent continued debate, the focus shifted to the courts.

Much like the United States, Canadian courts follow the common law and a constitutional scheme embodying principles of equality. Thus, developments in Canadian constitutional interpretations of marriage law should hold considerable interest for American lawyers and judges. In fact, the Goodridge court noted that “Canada, like the United States, adopted the common law of England that civil marriage is ‘the voluntary union for life of one man with one woman, to the exclusion of all others.’”

The Court of Appeal for Ontario had ruled that the common-law definition first state legislature to approve a bill legalizing same-sex marriage. The bill, however, was vetoed by the governor.


120. N.J. STAT. ANN. §§ 26:8A-1 to -13 (2006); 2006 N.J. Laws 103 (giving same-sex couples the protections of marriage). New Jersey’s “Domestic Partnership Act” provides domestic partners with the same rights and benefits accorded married couples. N.J. STAT. ANN. § 26:8A-2 (2006). It also provides that certain health and pension benefits are available only to same-sex couples who are not able to marry. Id.


of civil marriage violated § 15.1 of the Canadian Charter of Rights and Freedoms because it discriminates by excluding same-sex couples from marriage. A similar ruling from the British Columbia Court of Appeal also held that the Charter invalidates the same-sex marriage prohibition inherent in the common-law rule of marriage. A trial court in Quebec also ruled in favor of same-sex marriage, notwithstanding that a civil union bill enacted by the legislature had given same-sex couples the benefits of marriage without the right to enter the marital state. The Quebec Court of Appeal upheld the ruling, and ordered that same-sex partners be allowed to marry immediately.

Other Canadian courts soon reached similar results. The Yukon Territorial Supreme Court, for example, entered a novel ruling. The court found that since other courts had ruled same-sex couples could marry on constitutional grounds, and the Attorney General had declined to appeal those decisions, Yukon would accept those rulings as law. The court took this approach in order to avoid creating a situation in which same-sex couples could be married in some parts of Canada and not in others. Further litigation followed in Nova Scotia, Saskatchewan, Newfoundland and Labrador, New Brunswick, and the Northwest Territories, but action in Parliament soon made further court proceedings unnecessary. A bill authorizing same-sex marriage throughout Canada passed both the House of Commons and the Senate and received Royal Assent from the Deputy Governor General, becoming law on July 20, 2005. This Act changed the common-law definition of marriage that had been recognized in Canada for centuries, redefining civil marriage as a union of two persons.

XII. CHANGING NORMS IN A FEW OTHER COUNTRIES

Developments in Canada’s view on the definition of marriage are most significant to the American marriage debate due to the similarity of our legal family law traditions. However, same-sex marriage has evolved in other

---

125. Canada Act, 1982, c. 11, § 15 (U.K.). This section provides that “[e]very individual is equal before and under the law and has the right to equal protection and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” Id.


128. See generally Hendricks v. Quebec (Procureur Gen.), [2002] R.J.Q. 2506 (Can.). The trial court considered the civil union bill adopted unanimously by the L’assemble Nationale du Quebec (Bill 84) in 2002. Id. The court determined that offering marriage benefits to same-sex partners under a different scheme from that afforded to heterosexual partners in marriage, was unjustified under the Charter.


131. Id.

132. Civil Marriage Act, 2005 S.C., ch. 33 (Can.).
countries as well, and these developments may also serve to influence the American view of marriage. In South Africa, for example, the Supreme Court of Appeal declared that, under the South African Constitution, same-gender couples must be allowed to marry. This decision mandated rejection of the common-law definition of marriage as between a man and woman, an idea affirmed by the South African Constitutional Court in May 2005. Debate over the definition of marriage has flowed in Europe as well. As a result, Belgium, the Netherlands, and Spain have all legalized same-sex civil marriage, notwithstanding their religious traditions steeped in Calvinist and Catholic doctrines. Some other European and Latin American countries have joined the marriage debate and chosen to confer some legal protections of marriage to non-married persons while still reserving marriage as its own special category.

Another development abroad that may influence American views of marriage is the acceptance of polygamous marriage. While polygamous marriages currently receive legal recognition only in countries with strong Islamic traditions, it is possible that Western nations may explore recognition as well. For example, in the Netherlands polygamous marriage is not recognized by law, but a civil union cohabitation contract between one man and two women was registered and the Minister of Justice rejected requests to challenge the union’s legality. The continued ferment over the meaning of marriage and civil unions in various parts of the world shows little sign of abating and promises to continue evolving in future years.

---


134. See Scott Long, Jessica Stern & Adam Francoeur, Appendix B: Countries Protecting Same-Sex Couples’ Immigration Rights, in FAMILY, UNVALUED DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW, available at http://hrw.org/reports/2006/us0506/10.htm#_Toc132691986 (noting legalization of same-sex marriage in Belgium). Belgian law also allows foreign nationals to enter same-sex marriages if one spouse has lived in Belgium for at least three months. Id.


136. See Jennifer Green, Spain Legalizes Same-Sex Marriage: Prime Minister Makes Unexpected Speech Backing Law Termed ‘Unjust’ by Church, WASH. POST, July 1, 2005, at A14; Renwick McLean, Spain Legalizes Gay Marriage; Law is Among the Most Liberal, N.Y. TIMES, July 1, 2005, at A9 (noting Spain’s Cortes Generales approved legislation permitting same-gender couples to marry on June 30, 2005). The law was published with the assent of the King on July 2, 2005.


XIII. MASSACHUSETTS CHANGES THE DEFINITION OF MARRIAGE

In *Goodridge v. Department of Public Health*, the Massachusetts SJC noted that the state’s marriage-licensing statute does not define marriage. The legislative failure to specifically define marriage as a relationship between a man and woman did not, however, support the plaintiff’s argument that the licensing statute could not be interpreted to include same-sex unions. In accord with common rules of statutory interpretation, the SJC ruled that in enacting a compulsory marriage-licensing law the legislature incorporated the common-law definition of marriage, defined as a union between persons of different genders. The court also noted, however, that Massachusetts courts had previously abrogated a common-law doctrine immunizing a husband from suit by his wife, a doctrine which had been an inherent part of established marriage law.

The plaintiffs in *Goodridge* directly challenged the common-law definition of marriage. The Massachusetts SJC was then faced with the question of whether the common-law definition could be sustained yet remain consistent with the state constitution. Unlike plaintiffs in previous cases in other jurisdictions, the *Goodridge* plaintiffs were not seeking benefits equal to those who entered into legal marriage. Rather, the *Goodridge* plaintiffs were seeking the right to marry itself. The majority decision held that restricting access to civil marriage to opposite-gender couples offended the guarantee of equality before the law found in the Massachusetts Constitution. The majority also held that the restriction offended the liberty and due process provisions of the state constitution.

The SJC’s constitutional analysis was precipitated in part by a decision of the United States Supreme Court only a few months prior. In *Lawrence v. Texas*, the Supreme Court reviewed a Texas statute criminalizing sodomy between competent consenting adults and declared the statute unconstitutional. The case proceeded from the arrest of two men who were convicted of “deviate sexual intercourse, namely anal sex, with a member of the same sex (man).” The Supreme Court granted certiorari to consider the

---

140. *Goodridge*, 798 N.E.2d at 953-54.
141. *Id.* at 967.
142. *Id.* at 949-50.
143. *Id.* at 961.
144. *Goodridge*, 798 N.E.2d at 961.
147. *Lawrence*, 539 U.S. at 563.
defendants’ challenges to their conviction on equal protection and due process grounds.148 The Court also took the opportunity to reconsider its earlier decision in Bowers v. Hardwick, which had upheld the state’s power to criminalize even consensual sodomy.149

Justice Kennedy, writing for the majority in Lawrence, stated the defendants’ “right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.”150 In reaching that conclusion, Justice Kennedy provided historical analysis on the legal history of privacy and its evolution over prior decades. He noted that “[t]hese references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. ‘[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.’”151 Foreshadowing the due process analysis conducted in Goodridge, Justice Kennedy also commented that the drafters of the due process clause “knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”152 Similarly, Justice O’Connor wrote a concurring opinion in Lawrence that foreshadowed the equality argument of Justice Greaney’s concurrence in Goodridge, stating that the Texas sodomy statute discriminated against homosexuals. She wrote, “[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’”153

In his dissent to Lawrence, Justice Scalia argued the decision was not “deeply rooted in this Nation’s history and tradition”154 and that the “Court has taken sides in the culture war, departing from its rule of assuring, as neutral observer, that the democratic rules of engagement are observed.”155 Justice Scalia anticipated a future ruling like Goodridge, stating that the Lawrence decision “dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned . . . .”156 Justice Scalia also questioned “what justification can there possibly be for denying the benefits of

150. Lawrence, 539 U.S. at 578.
152. Id. at 579.
153. Id. at 583 (O’Connor, J., concurring) (quoting Romer v. Evans, 517 U.S. 620, 633 (1966)).
154. Id. at 594 (Scalia, J., dissenting).
155. Lawrence, 539 U.S. at 602 (Scalia, J., dissenting).
156. Id.
marriage to homosexual couples” after Lawrence.157

Writing “history cannot and does not foreclose the constitutional question,” Massachusetts Chief Justice Marshall, in Goodridge, expressed that marriage is not static and must be viewed in light of evolving constitutional principles.158 The equality provisions of the state constitution prohibit unwarranted government interference into the private life of its citizens.159 They also protect the freedom to share in the benefits which the government creates for the common good.160 The Massachusetts court ruled that because the common-law definition of marriage does not even meet a rational standard of review under the due process or equal protection tests, there was no need to apply judicial strict scrutiny.161

XIV. THE PROCREATION ARGUMENT

At the superior court level, the trial judge in Goodridge ruled that Massachusetts’ ban on licenses for same-sex marriage was justified, citing the state’s goal of promoting marriage primarily for the procreation of children.162 The United States Congress had previously taken the same view in enacting the Defense of Marriage Act.163 The belief that the sole or primary purpose of marriage is to conceive and raise children is derived from Christian religious teachings. However, the decrees of the Second Vatican Council, for example, no longer promulgate such an exclusive purpose to marriage.164

This “procreation theory” of marriage is problematic when one attempts to apply it to civil marriage as the theory has no basis in the law of marriage. For one thing, fertility of the marrying partners is not and never has been a basis for determining marriage validity.165 No marriage licensing statute in history has

---

159. Id. at 970-74 (Greaney, J., concurring) (asserting equality of rights should be basis for court’s decision).
160. See id. at 955-57 (explaining benefits include protections of marriage to spouses and their children).
161. Id. at 960-61.
164. Brief for Monroe Inker and Charles Kindregan as Amici Curiae Supporting Petitioners, Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (arguing state never required fertility or intent to have children in order to marry). But see Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 1002 (Mass. 2003) (Cordy, J., dissenting) (arguing in favor of procreation as element of marriage). Justice Cordy’s dissent states that “[a]s long as marriage is limited to opposite-sex couples who can at least theoretically procreate, society is able to communicate a consistent message to its citizens that marriage is a (normatively)
required applicants to either have children or possess the ability to have children. “[I]t is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.”

Another problem that arises when attempting to equate the procreation theory with traditional male/female marriage is the status of children. Family law is based on legal equality in the treatment of all children, regardless of whether the children are born to married parents or not. Further, the law permits same-sex couples to adopt children, and contemporary family law recognizes, in some circumstances, de facto parenthood for persons living in same-sex relationships with a biological parent while co-parenting a child.

Technology provides an argument against the procreation theory. Most states have clinics that research and provide alternative reproductive technology services. Generally speaking, American law has been favorable to the use of medical services to procreate. Same-sex couples, like heterosexual couples, have had children using alternative reproductive technology methods. In recent years, the treatment of children conceived by non-sexual alternative methods has been identical to the treatment of children conceived by coitus. For example, Massachusetts statutory law states that a husband who consents to his spouse’s insemination with sperm from a third necessary part of their procreative endeavor.” Id. Interestingly, courts, in equity, have historically annulled marriages based on fraud when one party knowingly conceals or misrepresents his or her fertility or lack of intent to have children prior to the marriage. The relationship between this issue of fraud and same-sex marriage, however, has not been deemed relevant.

166. Goodridge, 798 N.E.2d at 961.


171. See E.N.O. v L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (involving child conceived by intrauterine insemination from donor sperm and co-parenting agreement between same-sex partner). “An increasing number of same gender couples, like the plaintiff and the defendant, are deciding to have children.” Id. at 891.

party donor is the father of her child, so long as he consents to the procedure.173 Courts have also approved agreements for the use of donor gametes to have children through a surrogate birth mother.174 These examples clearly show that Massachusetts law, prior to the Goodridge decision, treated alternative reproductive methods of procreation favorably. This common acceptance of alternative procreation made it easier for the SJC to reject the state’s argument that sexual reproduction is a primary purpose of marriage.

XV. THE INTERSTATE CONFLICT ARGUMENTS

When one state changes its definition of marriage, it complicates the issue of marriage recognition for all the other states. In Goodridge, the state argued that approving same-sex marriage in Massachusetts would trigger interstate conflicts. While Massachusetts could not presume to dictate how other states should respond to the Goodridge decision, Chief Justice Marshall’s opinion stressed that, regardless of what other states do, “each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.”175 While noting Chief Justice Marshall’s statement, impartial commentators must nevertheless acknowledge that conflicts between the laws of Massachusetts and other states, as well as conflicts between Massachusetts and joint federal-state programs, will present courts with many difficult issues in the future. This problem is made more difficult because Massachusetts is one of only a few states to have enacted the Uniform Marriage Evasion Act.176 This Act effectively prevents non-resident same-sex couples from obtaining marriage licenses in Massachusetts if their own state prohibits same-sex marriage. Massachusetts courts have upheld the application of the statute despite constitutional challenges.177 While such an Act eliminates one source


of potential conflict, potential conflicts still exist should a same-sex couple residing in Massachusetts marry in the state before relocating to another. There will be much litigation in the coming years over both the constitutionality of the Federal Defense of Marriage Act and the application of the full faith and credit clause to similar state legislation. One United States Supreme Court decision, *Romer v. Evans*, has indicated any state constitutional amendment that singles out homosexuals for disparate treatment is potentially invalid. It remains to be seen whether there are other constitutional theories under which plaintiffs will challenge legislative efforts denying same-sex couples marriage rights equal to heterosexual couples.

**XVI. Conclusion**

A historical evaluation of civil marriage and its evolution is necessary to understand disputes over the nature of marriage today. The lessons of history have been argued passionately by both the United States Supreme Court justices, in *Lawrence*, and the Massachusetts SJC justices, in *Goodridge*. The debate over marriage requires all those concerned to determine the essence of our legal history and traditions. It requires a balancing of interests between retaining the best of the past and flexibility in legal responses to the realities of today’s society.

It remains to be seen whether the debate over the status of marriage will merely be a footnote in the development of family law or a landmark, with lasting consequences, in the evolution of marriage. Previous court decisions involving marriage have initially created great public controversy but came to be accepted, over time, as basic law. Will the court decisions and the legislative changes discussed in this Article, all serving to refine the concept of marriage, prove to be legal dead-ends? I think not. It is more likely that radically different views of marriage will develop in different jurisdictions.

Scholars and commentators will study the issue of marriage in the future, and only then will the issue be put into reasonable perspective. In the midst of

---


180. Id. at 634-35 (holding Equal Protection Clause of Fourteenth Amendment prevents states from amending constitutions to deny homosexuals special legislative protections).

181. Legislative efforts to deny marriage based on sexual orientation are most obviously challengeable on the constitutional theories of equal protection and due process. As to the Defense of Marriage Act, application of the Full Faith and Credit clause to challenge bars on interstate marriage recognition is an alternative theory.
the political, social, and religious controversy now raging over the nature of marriage, it is difficult for many to take the long view of history. If the brief analysis in this article stands for anything, it is that lawyers should appreciate the lessons history teaches about the evolution of modern civil marriage in the law and the reality that law will change from time-to-time and in different places. These changes need to be both understood and accommodated.