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# MIMICKING MARRIAGE: AS THE EVOLUTION OF THE LEGAL RECOGNITION OF SAME-SEX MARRIAGE PROGRESSES, CIVIL UNIONS CURRENTLY REPRESENT THE BEST ALTERNATIVE TO MARRIAGE

*Erin Stefanec\**

[T]he perpetuation of marriage discrimination in the United States represents a denial of civil rights to same-sex couples. . . . This discrimination requires the continued intervention of the courts to protect the civil rights of gays and lesbians from legislative and popular majorities that would deny those rights.<sup>1</sup>

## I. INTRODUCTION

The issue of legally recognizing same-sex couples, described as “one of this decade’s most important domestic policy issues in the United States,”<sup>2</sup> requires an attack upon a pervasive social injustice. The United States has struggled with the recognition of rights, both social and economic, applicable to same-sex partners. Courts in only four states, however, have held that limiting the right to marry to opposite sex couples violates the constitutions of those states.<sup>3</sup> In two of those states, constitutional amendments later rendered those decisions moot by explicitly limiting marriage to a union between a man and a woman.<sup>4</sup> Despite these setbacks, Vermont remains at the forefront of granting

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<sup>1</sup> *Developments in the Law: II Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 Harv. L. Rev. 2004, 2006 (2003) [hereinafter *Differing Paths*].

<sup>2</sup> Lynn D. Wardle, *Essay: “Multiply and Replenish”: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 Harv. J.L. & Pub. Policy 771, 772 (2001).

<sup>3</sup> Until recently, Alaska, Hawaii, and Vermont were the only states to hold that a ban on same-sex marriage violates their state constitutions. *Differing Paths*, *supra* n. 1, at 2005 (citing *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 at \*6 (Alaska Super. Ct. Feb. 27, 1998); *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993); *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999)). Recently, however, Massachusetts held that it is against their constitution to ban same-sex marriage. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003) (holding that a ban on same-sex marriage violates the Massachusetts Constitution’s guarantees of equality and due process). In contrast, Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah passed amendments to their state constitutions banning same-sex marriages in the 2004 elections.

<sup>4</sup> See Alaska Const. art. I, § 25 (amended 1998); Haw. Const. art. I, § 23 (amended 1998).

rights applicable to same-sex partners - recognizing same-sex civil unions - which mirror the traditional rights and obligations attendant to a legally valid marriage.

Several other states and municipalities have enacted legislation providing “functional recognition”<sup>5</sup> to same-sex couples by an extension of the benefits and obligations associated with marriage.<sup>6</sup> The most common functional recognition of same-sex couples is the domestic partnership registry, which is a partnership created by unmarried, same or opposite sex couples, who live together and seek the economic and noneconomic benefits granted to their married counterparts.<sup>7</sup> Further, the American Law Institute (“ALI”) recently recommended that same-sex domestic partnerships be recognized and accorded many of the same rights and responsibilities as traditional marriages, including inheritance and health benefits.<sup>8</sup> Although the ALI described their proposed legal relationship as a “domestic partnership” by granting a majority of the rights and responsibilities attendant to a legally valid marriage, they were essentially advocating a solution analogous to the civil union of Vermont. Therefore, the civil union may provide a solution without the setbacks. Vermont’s civil union, compared to the legal institution of

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<sup>5</sup> *Differing Paths*, *supra* n. 1 at 2013 (stating “[f]inally - and perhaps most significantly - same-sex couples in the United States have been tacitly accorded various forms of functional recognition entailing many of the benefits and burdens associated with marriage, including the right to adopt children. Such functional recognition may present an alternate, counterintuitive route to the legalization of marriage: the recognition of same-sex families as a precursor to the recognition of same-sex couples”). Throughout this paper, the author will refer to all “non-marriage” type relationships, including domestic partnerships, reciprocal beneficiaries and civil unions, as a “functional recognition” of same-sex couples.

<sup>6</sup> See MSNBC News, *Mass. Lawmakers Suspend Gay Marriage Debate: Constitutional Convention to Resume March 11*, <http://www.msnbc.msn.com/id/4240022> (last updated Feb. 13, 2004) (offering an interactive map of the United States, including a description of all fifty states’ current status of their same-sex marriage laws or functional equivalents); see also *Differing Paths*, *supra* n. 1 at 2005 (citing Lambda Legal Defense and Education Fund, *Partial Summary of Domestic Partner Registry Listings*, <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=403> (accessed Sept. 15, 2004) (listing states and municipalities with domestic partnership registries)).

<sup>7</sup> FindLaw, *Domestic Partnership Benefits: Learn About the Benefits of Domestic Partnerships – And Whether They May Be Available to You*, <http://public.findlaw.com/family/nolo/ency/86D4108D-25D1-498A-B38AF4AB25F14E84.html> (accessed Sept. 15, 2004) (defining domestic partnership registries and offering a thorough discussion of the rights and obligations attendant to those partnerships). Among the states at the forefront of domestic registry law are California and New York. See California Secretary of State Kevin Shelley, *Domestic Partners Registry*, <http://www.ss.ca.gov/dpregistry/> (accessed Sept. 15, 2004) (offering a comprehensive analysis of California’s domestic registry laws); N.Y.C. Admin. Code (N.Y.) § 3-240 (LEXIS current through Dec. 2003); *Slattery v. City of New York*, 266 A.D.2d 24, 24 (N.Y. App. Div. 1st Dept. 1999) (stating that New York City did not impermissibly legislate in the area of marriage by enacting a city ordinance that established a registry for domestic partners and extended certain rights and benefits to domestic partners of city employees and city residents who become domestic partners).

<sup>8</sup> See Am. Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations*, § 6.03(1) (2002) (defining domestic partners as “two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple”).

marriage, offers citizens essentially all the rights and obligations attendant to a legally valid marriage.<sup>9</sup> Consequently, Vermont's civil union statutes currently offer the optimal solution to this pervasive social injustice because they grant nearly all of the rights and obligations attendant to a legally valid marriage without the political and religious implications of legally recognizing same-sex marriage.

Discussing the plight of same-sex couples in their search for legal recognition, Part II will examine the history of marriage and the legalization of same-sex relationships which have culminated thus far in a tangled web of law woven by various states. Part III will argue the necessity of consistent state enforcement of the rights and obligations attendant to marriage as made applicable to same-sex couples through legally recognized same-sex civil unions. Specifically, this article advocates state by state adoption of civil unions.<sup>10</sup> Finally, Part IV will conclude that, although progress remains primarily in its judicial conception, state recognition of civil unions is the essential, preliminary step that can propel the United States into the next phase of the legal recognition of same-sex marriage.

## II. BACKGROUND

The refusal to legally recognize same-sex couples is a divisive social problem, because without such recognition by government, same-sex couples are deprived of the numerous rights and obligations attendant to a legally valid marriage. As the United States searches for an appropriate response to this issue, a progressive approach has emerged internationally. This approach advocates an evolutionary process by which certain rights and obligations need to be conferred to same-sex couples before others may follow. For example, prior to the enactment of anti-discrimination legislation, most European nations have repealed their anti-sodomy laws, which in turn allowed for the legalization of same-sex registered partnerships. The United States is currently on a path similar to various European nations and Canada, with the most recent advancement being the Supreme Court decision that held all anti-sodomy laws unconstitutional.<sup>11</sup> Further, as more states and cities enact legislation that gives same-sex couples certain benefits of marriage, including domestic partnership registries and civil union laws, a foundation has been laid upon which a viable solution may exist. Currently, although no state in the union legally recognizes same-sex *marriage*, Vermont recognizes same-sex civil unions that confer

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<sup>9</sup> Vt. Stat. Ann. tit. 15, §§ 1201-1207 (LEXIS current through 2003 Reg. Sess.).

<sup>10</sup> The focus of this article is on state by state adoption of same-sex civil unions and will not address the issue of a federally recognized same-sex civil union, nor the implications stemming from such an argument.

<sup>11</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

essentially every state right and obligation attendant to a legally valid marriage to same-sex couples. Therefore, as consistent granting of the rights and obligations attendant to a legally valid marriage is necessary among the states, civil unions currently represent a solution just short of legalizing same-sex marriage.

A. *Refusal to Legally Recognize a Relationship Between Same-Sex Couples is a Pervasive Social Injustice in Need of Correction*

Seeking the right to marry is not merely a symbolic fight for societal acknowledgment, but a fight for the legal rights and duties that accompany marriage. Once a couple marries, their relationship becomes legally recognized.<sup>12</sup> Attendant to that legal status are an abundance of rights and obligations that are not granted to single persons.<sup>13</sup> Despite the fact same-sex couples have the same needs as opposite sex couples,<sup>14</sup> several significant rights and duties are granted only to those who enter into a legally sanctioned marriage, including inheritance rights, medical rights, and the obligation of divorce.<sup>15</sup> It would seem then, that recognizing those rights attendant to a legal marriage, and making them available to same-sex couples, would lead to the legalization of same-sex

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<sup>12</sup>FindLaw, *Valid and Invalid Marriages*, <http://public.findlaw.com/family/newcontent/flaw/chp3.html?newcontent/national> (accessed Sept. 15, 2004) (discussing marriage as a legal and social institution) [hereinafter *Valid and Invalid Marriages*].

<sup>13</sup> *Id.* (stating “[m]arried persons may have rights to their partner’s property and future income; they may be responsible for each other’s debts; and they are subject to different tax rates than single persons”); see also Find Law, *State Laws on Marriage and Living Together*, [http://public.findlaw.com/family/family\\_stateindex.html](http://public.findlaw.com/family/family_stateindex.html) (accessed Sept. 15, 2004) (offering a comprehensive review of state laws on marriage and living together).

<sup>14</sup> Sean Cahill & Samuel Slater, *Marriage: Legal Protections for Families and Children* p. 2, <http://www.nglrf.org/downloads/MassMarriageBrief.pdf> (accessed Sept. 15, 2004) (stating “same-sex couples are often emotionally and economically interdependent, sharing household and financial responsibilities, and often raising children or taking care of other family members together. Studies show that gay and lesbian couples are comparable to straight couples in many ways, and that relationship quality and satisfaction are about the same across all couple types”).

<sup>15</sup> See Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 *Law and Sexuality* 63, 86 (1991) (stating “[t]he rights enjoyed by persons who marry, and of which lesbian and gay people now are universally deprived, are numerous and, arguably, extremely important. These rights include, but are not limited to: the right of inheritance (particularly in the case of intestacy); the right to file joint tax returns; the right to claim dependency deductions and statuses; the right to claim estate and gift tax benefits; the right to sue for infliction of emotional distress by injury to the partner, for loss of consortium, wrongful death and other personal injuries; the right to claim marital communication privilege; the right to live in housing for married persons; the right to visit the partner in jail, hospitals, mental institutions, and other places restricted to family members; and the right to obtain health insurance, bereavement leave, and make decisions when the partner is incapacitated.”); see also Elliot H. Gourvitz & Ari H. Gourvitz, Student Author, *Movement for Same-Sex Couples’ Right to Marry Hits N.J.*, 20 no. 7 *Matrimonial Strategist* 1 (2002) (discussing the rights attendant to those people with full marital status, including tax obligations and benefits, social security benefits, work-related benefits, and the right to court appointment or guardianship for a partner who is mentally incompetent); *Goodridge*, 798 N.E.2d at 955 (stating that “[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death”).

marriage. Consequently, the denial of these rights to same-sex couples places an undue burden upon them financially, socially, and emotionally.

As the United States struggles with the recognition of rights applicable to same-sex couples, it is important to note that the institution of marriage has evolved both socially and legally over time, because without recognizing past advancement, future advancement becomes virtually impossible. Today, society recognizes marriage not only as an important social institution, but also as “a way to express commitment, strengthen intimate bonds, and provide mutual emotional support.”<sup>16</sup> Further social evolutions of marriage include the blurring of traditional roles of husband and wife, as well as the encompassing of more “non-traditional” couples entering into marriage.<sup>17</sup>

As society rethinks traditional notions of marriage, the judicial system also advances more progressive views of marriage. In 1978, the United States Supreme Court declared marriage to be “of fundamental importance for all individuals.”<sup>18</sup> The Court described marriage as “one of the ‘basic civil rights of man’” and “the most important relation in life.”<sup>19</sup> The Court also noted that “the right to marry is part of the fundamental ‘right to privacy’” in the U.S. Constitution.<sup>20</sup> More recently, a state supreme court stated that “[b]arred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community’s most rewarding and cherished institutions.”<sup>21</sup> Therefore, as marriage has continually evolved legally and socially, the progression of the gay movement should not unnaturally force such an evolution to stall.<sup>22</sup>

Despite evolving trends, opponents to the legalization of same-sex marriage, including current President George W. Bush, often cite to

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<sup>16</sup> See *Valid and Invalid Marriages*, *supra* n. 12.

<sup>17</sup> Over time, marriage has evolved from women being considered property of their husband, to what is acceptable as the actual composition of a couple wishing to marry. See Larry R. Peterson, *The History of Marriage as an Institution*, <http://www.buddybuddy.com/toc.html> (accessed Sept. 16, 2004) (offering a comprehensive look at the transformation of the institution of marriage over the past few centuries); see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (rejecting the argument that interracial marriages are inherently unnatural or an innate impossibility, the Court struck down the state’s ban on interracial marriage).

<sup>18</sup> *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (declaring marriage is a fundamental right).

<sup>19</sup> *Id.* at 383-84.

<sup>20</sup> *Id.* at 384.

<sup>21</sup> *Goodridge*, 798 N.E.2d. at 949 (declaring “[exclusion from the ability to marry] is incompatible with the constitutional principles of respect for individual autonomy and equality under law”).

<sup>22</sup> See *Valid and Invalid Marriages*, *supra* n. 12 (stating “[m]arriage will remain, but it also will continue to evolve”); see also *Langan v. St. Vincent’s Hosp.*, 196 N.Y. Misc. 2d 440, 452 (N.Y. Super. Ct. 2003) (stating that “concepts of marriage evolve over time”).

the preservation of the “sanctity of marriage.”<sup>23</sup> Under the evolving concepts of marriage, however, the legalization of same-sex civil unions, and eventually same-sex marriage, does not undermine the sanctity of marriage as a legal and social institution, because it perpetuates the policies of financial, emotional, and familial security in the same manner as does “traditional” marriage.

The federal government has recently tried to circumvent the legal recognition of same-sex couples. In 1996, Congress enacted the Defense of Marriage Act (“DOMA”), which defines a legally recognized marriage as between one man and one woman, and does not require any state to acknowledge the validity of a sister state’s recognition of same-sex marriage.<sup>24</sup> More recently, however, the federal government has proposed the Federal Marriage Amendment.<sup>25</sup> In May 2003, a resolution was introduced in Congress to “amend the U.S. Constitution to define marriage as between a man and a woman, and to prevent legislatures or courts from mandating more limited benefits, such as civil unions or domestic partnerships.”<sup>26</sup> Proponents of this amendment argue that it is

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<sup>23</sup>Bush-Cheney ’04, Inc.: News Releases, *Statement by the President*, <http://www.georgewbush.com/News/Read.aspx?ID=2213> (last updated Feb. 4, 2004) (quoting President George W. Bush as stating: “We must do what is legally necessary to defend the sanctity of marriage.”).

<sup>24</sup> 28 U.S.C. § 1738C (1996). DOMA has two sections, one addressing federalism issues pursuant to Article IV, Section 1 of the Constitution, the Full Faith and Credit Clause, and the other clarifying the intent of federal law. U.S. Const. art. IV, § 1. The section enacted pursuant to Congress’ “effects” power under the Full Faith and Credit clause, reaffirms the power of the states to make their own decisions about marriage. 28 U.S.C. § 1738C (stating “[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such a relationship”); *see also* 1 U.S.C. § 7 (stating “[i]n 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 wife”). It is unclear, however, whether DOMA would withstand constitutional scrutiny if ever challenged. *Langan*, 196 N.Y. Misc. 2d at 445 (stating “[i]t is unclear by what authority the Congress may suspend or limit the full faith and credit clause of the Constitution, and the constitutionality of DOMA has been put in doubt”); CNN, *Bush: States Shouldn’t Change Marriage*, <http://www.cnn.com/2004/ALLPOLITICS/01/20/same.sex.marriage/index.html> (last updated Jan. 21, 2004) (stating that “supporters of same-sex marriage say such laws are unconstitutional because the ‘full faith and credit’ clause of the Constitution requires states to recognize one another’s legal proceedings”).

<sup>25</sup> *See Bush: States Shouldn’t Change Marriage*, *supra* n. 24 (reporting on President George W. Bush’s characterization of a constitutional amendment banning same-sex marriage as a “possible course of action” during his January 2004 State of the Union address); H.J. Res. 56, 108th Cong. (May 21, 2003) (stating “[m]arriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups”).

<sup>26</sup> H.J. Res. 56, 108th Cong. As the debate among Congress continues, a recent revision to the proposed amendment attempts to make the intent of the legislature clearer, although still banning same-sex marriage.

necessary to “prevent the meaning of marriage from being changed forever.”<sup>27</sup>

Despite recent advances by the federal government to circumvent the legal recognition of same-sex couples, this is a state issue.<sup>28</sup> The Constitution has been amended only 17 times since the original Bill of Rights in 1791, and, historically, amendments have only been used to protect or clarify rights and liberties, not to remove rights and liberties.<sup>29</sup> The proposed amendment would effectively strip same-sex couples of any hope of achieving the rights and responsibilities attendant to marriage, and the symbolic importance of having their relationship legally validated. Even some opponents to same-sex marriage agree that a constitutional amendment is not the appropriate response, because the legal recognition of same-sex couples should remain a state issue and the Constitution should not be utilized as a tool to deprive its citizens of rights and responsibilities.<sup>30</sup> Therefore,

<sup>27</sup>CNN, *Transcript of Bush Statement*, <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.transcript/index.html> (last updated Feb. 24, 2004) (publishing President George W. Bush’s statement that announced his support for a constitutional amendment to ban same-sex marriage).

<sup>28</sup> See Partners Task Force for Gay and Lesbian Couples, *State Legislative Reactions to Suits for Same-Sex Marriage*, <http://www.buddybuddy.com/t-line-2.html> (last updated Aug. 19, 2004) (stating that “[i]n the United States, marriage licenses are granted by individual states, not the Federal [sic] system. . . . Marriage licenses are legal contracts between the couple and the state”); CNN, *States Determine Marriage Laws*, <http://www.cnn.com/2003/LAW/11/18/states.marriage.laws/> (last updated Jan. 13, 2004); see *States Shouldn’t Change Marriage*, *supra* n. 24, at <http://www.cnn.com/2004/ALLPOLITICS/01/20/same.sex.marriage/index.html> (stating that Vice President Dick Cheney believes “the issue should be left to the states to resolve”).

<sup>29</sup> See Cahill & Slater, *supra* n. 14 (stating that “[a]mending the U.S. Constitution is very unusual and has only been done to address great public policy need”); see also CNN, *Furor and Action Over Same-Sex Marriages*, <http://www.cnn.com/2004/US/03/03/same.sex.main/index.html> (last updated Mar. 3, 2004) (quoting Senator Russ Feingold as stating that a federal amendment to the Constitution would be “unnecessary, divisive and utterly inconsistent with our constitutional traditions”). The only amendment to ever restrict the liberties of American citizens was repealed fourteen years after enactment. See U.S. Const. amend. XVIII (repealed in 1933 by U.S. Const. amend. XXI (referring to the eighteenth amendment, which prohibited the “manufacture, sale, or transportation of intoxicating liquors,” and the twenty-first amendment, which repealed the eighteenth amendment in 1933, fourteen years after the eighteenth amendment was ratified)). Proponents of the Federal Marriage Amendment argue that it is “needed to protect the foundation of American society[.]” because permitting same-sex marriages “devalues what marriage is.” CNN, *Bush Amendment Proposal Prompts Strong Reaction*, <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.marriage.react/index.html> (last updated Feb. 25, 2004). These proponents, however, do not specifically address how the legalization of same-sex marriage deconstructs the policies behind legal marriage, including the promotion of family stability and financial security.

<sup>30</sup> Human Rights Campaign Foundation, *Conservative and GOP Quotes on Constitutional Amendment*, <http://www.hrc.org/Template.cfm?Section=Partners&CONTENTID=17477&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last updated Mar. 17, 2004) (quoting Senator Chuck Hagel (R-Neb.): “I don’t think the Constitution was ever written and set up for those kinds of amendments . . . . I think those kinds of issues are better left to the states.”); see also *Bush Amendment Proposal Prompts Strong Reaction*, *supra* n. 29, at <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.marriage.react/index.html> (quoting House Judiciary Committee Chairman F. James Sensenbrenner, co-sponsor of DOMA, as stating that a constitutional amendment is “awfully strong medicine” and that DOMA is “sufficient” to address the issue).

although the federal government attempts to preempt state advancement of the legal recognition of same-sex couples, this is a state issue.

B. *Distinct Patterns Have Evolved on How to Resolve the Legal Recognition of Same-Sex Couples*

The United States is not the first nation to grapple with the issue of how to legally recognize same-sex couples, and throughout the efforts of other countries, a distinct pattern of progression has emerged. Marriage reform throughout Europe provides “a benchmark for similar efforts in the United States, insofar as the European process has followed a consistent pattern of gradually expanding rights for gays and lesbians, culminating in formal recognition of same-sex unions.”<sup>31</sup> As rights are gradually expanded to same-sex couples, the emerging pattern reveals that “each step in the expansion of civil rights is critical to enabling the next.”<sup>32</sup> Therefore, it is important to recognize that there is a natural progression to be followed.

1. *Resolving the Legal Recognition of Same-Sex Couples by Adherence to the Evolutionary Theory of Law*

The road toward the full legal recognition of same-sex couples, however inevitable, is indeed evolutionary. Radical social change in the United States does not develop over night.<sup>33</sup> For example, in 1967, the U.S. Supreme Court struck down state anti-miscegenation laws, i.e. laws prohibiting interracial marriages, in *Loving v. Virginia*.<sup>34</sup> As a result of the decision, 15 other states had their anti-miscegenation laws declared unconstitutional.<sup>35</sup> Also, in 1978, New York became the first state to

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<sup>31</sup> *Differing Paths*, *supra* n. 1 at 2007 (stating that “[w]hile cultural and political factors limit the applicability of the European model to American reform efforts, the European experience suggests that certain steps may be critical to marriage reform in the United States, including the reversal of *Hardwick* and the decriminalization of same-sex sodomy”).

<sup>32</sup> *Id.* at 2009.

<sup>33</sup> Larry R. Peterson, *The History of Marriage as an Institution*, <http://www.buddybuddy.com/peters-1.html> (accessed Sept. 16, 2004) (discussing “historical notations about some of the dramatic changes in the legal structure of marriage in Western Europe and the United States”).

<sup>34</sup> 388 U.S. at 12 (stating that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival. To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.”) (citations omitted).

<sup>35</sup> See Peterson, *supra* n. 33, at <http://www.buddybuddy.com/peters-1.html> (listing Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and West Virginia as the states that declared their anti-miscegenation laws unconstitutional and stating that “[i]n the fifteen years prior to the decision, fourteen states had repealed their anti-miscegenation laws. Those fourteen states were: Arizona, California, Colorado, Idaho, Indiana, Maryland, Montana, Nebraska, Nevada, North Dakota, Oregon, South Dakota, Utah, and Wyoming”).

outlaw rape in marriage.<sup>36</sup> Therefore, it is not surprising, nor should it be expected, that the legalization of same-sex marriage be different.<sup>37</sup>

The doctrine of “‘necessary process,’<sup>38</sup> in which each step in the expansion of civil rights is critical to enabling the next,”<sup>39</sup> is essential to the legal recognition of same-sex couples. “In this process, the decriminalization of homosexual conduct precedes the prohibition of discrimination on the basis of sexual orientation, which precedes the affirmative extension of various economic and social rights to gay men and lesbians.”<sup>40</sup> This process mandates that the courts, state legislatures, and society be cognizant of the evolving trends and growing acceptance of same-sex couple recognition under the law,<sup>41</sup> because “[e]ach ‘small change’ . . . helps make the next change more socially palatable.”<sup>42</sup> Further, this approach is not only accepted and applied by the judicial system, but the gay community is also aware of the progression that must

<sup>36</sup> *Id.* (stating that “[b]y 1990, only a total of ten states outlawed rape in marriage. In thirty-six states rape in marriage was a crime only in certain circumstances. In four states, rape in marriage was never a crime.”).

<sup>37</sup> *Langan*, 196 N.Y. Misc. at 452 (“concepts of marriage evolve over time”); see *Differing Paths*, *supra* n. 1, at 2011 (quoting William Eskridge, Jr., *Equality Practice: Civil Unions and the Future of Gay Rights*, 148 (Routledge 2002)) (advocating “equality practice,” Eskridge argues that “[a] process that forces minority rights onto an unwilling populace will often not ‘stick’ in a democracy,” and concluding that “immediate full equality is not always possible, not practical, not even desirable”). The same plight was endured during the nation’s endeavor to legalize interracial marriages. See *Loving*, 388 U.S. at 12 (rejecting the argument that interracial marriages are inherently unnatural or an innate impossibility, the Court struck down the state’s ban on interracial marriage); *Zablocki*, 434 U.S. at 384 (declaring marriage is a fundamental right).

<sup>38</sup> See *Differing Paths*, *supra* n. 1 at 2009 (citing Yuval Merin, *Equality for Same Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States*, 308-310 (U. of Chi. Press 2002) (“necessary process”). The evolutionary theory advanced in this article is based upon the doctrine of “necessary process” that is advocated by Merin.

<sup>39</sup> *Id.* (stating that “each step in the expansion of civil rights is critical to enabling the next”).

<sup>40</sup> *Id.* at 2009 (citing Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands* [hereinafter *Small Change*], as cited in *Legal Recognition of Same-Sex Partnerships* 417, 437 (Robert Wintemute & Mads Andenaes eds., 2001) [hereinafter *Same-Sex Partnerships*]; Kees Waaldijk, *Civil Developments: Patterns of Reform in the Legal Position of Same Sex Partners in Europe*, 17 Can. J. Fam. L. 62, 66, 86 (2000) [hereinafter *Civil Developments*] (stating that although each step in the process is “logically necessary for the next step to occur . . . each ‘small change’ also helps make the next change more socially palatable”).

<sup>41</sup> See *Differing Paths*, *supra* n. 1 at 2009 (quoting Eskridge, *supra* n. 37) (advocating “equality practice,” Eskridge argues that “[a] process that forces minority rights onto an unwilling populace will often not [‘]stick’ in a democracy,” and concludes that “immediate full equality is not always possible, not practical, not even desirable”).

<sup>42</sup> *Id.* at 2009. The progression in the United States has seen a recent increase in momentum, which, although promoting the “necessary process” theory, also pushes the envelope in terms of the theory’s caution that warns a change should be “socially palatable” before it takes place. *Id.*; see also Elizabeth M. Gillespie, *Seattle to Recognize Marriages of Gay City Workers and Mayor Pushes for Citywide Rights*, <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/a/2004/03/08/national0306EST0427.DTL&type=printable> (last updated Mar. 8, 2004) (quoting the lawyer of one of the same-sex couples who recently applied for a marriage license in King County Washington, “I think what we’ve seen starting slowly over the last 10 years and really accelerating in the last four months . . . is an enormous groundswell, close to a popular uprising, of gay couples demanding the right to marry”).

endure.<sup>43</sup> Therefore, an evolutionary progression of tolerance, acceptance, and legal recognition may be essential to the legal recognition of same-sex civil unions, and ultimately, same-sex marriage.

a. International Legal Recognition of Same-Sex Couples

“[A] distinct trend toward protecting the committed relationships of same-sex couples” is emerging internationally.<sup>44</sup> Specifically, the international trend is a progressive approach, which resembles the evolutionary theory advocated here.<sup>45</sup> The European countries that have legalized same-sex marriage have followed a path of reform that has been extremely consistent. Therefore, various European nations are significant proof of the theory that there is a natural progression toward the legal recognition of same-sex couples.

The Netherlands is illustrative of this evolutionary pattern. The country repealed sodomy laws in 1810, equalized the age of sexual consent between same-sex and opposite sex couples in 1971, enacted antidiscrimination legislation protecting gays and lesbians in 1983, established same-sex registered partnerships in 1998, and legalized same-sex marriages in 2001.<sup>46</sup>

Most recently, Canada has made significant advances in its attempts to legalize same-sex relationships.<sup>47</sup> Although the nation as a whole does not recognize same-sex marriage, same-sex couples have increasingly been treated as common law couples since the mid-1990s.<sup>48</sup> Currently, however, Ontario and British Columbia, which make up over

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<sup>43</sup> See Shaila K. Dewan, *Pataki Signs Law Protecting Rights of Gays*, N.Y. Times A1 (Dec. 18, 2002) (In December 2002, after New York’s civil rights statute was amended to protect gays and lesbians from discrimination based on their sexual orientation, Matt Forman, executive director of New York’s largest gay rights group, the Empire State Pride Agenda, was quoted as stating, “[New York’s amended civil rights law] is the foundation upon which we can finally get moving on the rest of our long-stalled agenda, which includes recognition of our relationships, ending unfair taxation, making our schools safe for young gay and lesbian people, and transgendered people.”).

<sup>44</sup> See Cahill & Slater, *supra* n. 13 (discussing the benefits of marriage, approaches to legalizing same-sex marriage and analyzing the effects of a recent Massachusetts Supreme Court decision holding unconstitutional a ban on same-sex marriage).

<sup>45</sup> See *Differing Paths*, *supra* n. 1 at 2009 (citing Merin, *supra* n. 38, at 308-10) (stating that “[t]he path of reform has been remarkably consistent in each of the European countries that have legalized same-sex partnerships, leading one scholar to label it a ‘necessary process’ in which each step in the expansion of civil rights is critical to enabling the next”).

<sup>46</sup> *Id.* (citing Merin, *supra* n. 38, at 308-10).

<sup>47</sup> Susan B. Boyd & Claire F.L. Young, *Law & Sexuality: “From Same-Sex to No Sex”?: Trends Towards Recognition of (Same-Sex) Relationships in Canada*, 1 Seattle J. Soc. Just. 757 (2003) (analyzing Canada’s approach to the legal recognition of same-sex couples, common law spouses, and their current struggle with the legal recognition of same-sex marriage).

<sup>48</sup> *Id.* at 760 (citations omitted) (“Based on a period of cohabitation, many, but not all, of the rights and duties of marriage [are] extended to common law couples. . . . Thus, . . . same-sex cohabitants are treated as spouses for income tax purposes, their entitlement to social assistance payments may be reduced if they have a partner, and they are spouses for a myriad of family law purposes including having the right to sue ex-partners for spousal support.”).

one-half the country's population, allow the legal marriage of same-sex couples.<sup>49</sup>

Despite Ontario and British Columbia's recognition of same-sex marriage, the national refusal of such advancement is the foundation of much dispute among Canadian citizens and their government. There is very little difference between the legal status of married persons and that of common law spouses yet there is a "recent focus by many in the lesbian and gay movement on the right to legally marry."<sup>50</sup> As Canada's legal evolution of same-sex marriage develops, marriage remains the ultimate goal for several reasons. First, "the issue is about more than legal rights and responsibilities."<sup>51</sup> "There is a tremendous symbolism attached to marriage, a symbolism that includes public recognition of one's commitment."<sup>52</sup> Second, marriage offers a public recognition of a personal relationship, which allows for more acceptance among family, friends, and society.<sup>53</sup> Finally, "permitting same-sex couples to marry is . . . about being valued as members of society."<sup>54</sup> Therefore, indicated by Canada's current plight, while an evolutionary advancement of the legal recognition of same-sex couples is evident, the ultimate goal remains nothing less than same-sex *marriage*.

b. The United States Follows the Canadian and European Progressive Trend Towards Legally Recognizing Same-Sex Couples

The United States is following a progressive approach, similar to Canada and various European nations, towards the legal recognition of same-sex couples.<sup>55</sup> This progression requires an evolution of traditional legal and social concepts. First, according to the evolutionary approach, legal barriers to the recognition of same-sex couples must be removed to advance to the next necessary phase.<sup>56</sup> A major obstacle to the legal recognition of same-sex couples in the United States is sodomy laws. Repealing these laws is an essential, preliminary step in the granting of rights and obligations attendant to a legally valid marriage to same-sex

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<sup>49</sup> See Cahill & Slater, *supra* n. 14 (analyzing the international influences of the legalization of same-sex marriage).

<sup>50</sup> See Boyd & Young, *supra* n. 47, at 770 (analyzing several reasons why the legal recognition of same-sex marriage remains the ultimate goal).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 771 (citations omitted) (quoting a trial judge in British Columbia who presided over a same-sex marriage case, "[one of the same-sex applicants] is of the view that having the choice to marry and having the relationship recognized by government and society is important to her and would make her feel she is no longer a second class citizen").

<sup>55</sup> See *Differing Paths*, *supra* n. 1, at 2012-2025 (describing "[t]he 'Necessary Process' in the United States").

<sup>56</sup> See *supra* n. 40 (and accompanying text) (discussing the "necessary process" of legally recognizing same-sex couples).

couples.<sup>57</sup> The United States passed this step and moved on to the next when it held anti-sodomy laws unconstitutional in *Lawrence v. Texas*.<sup>58</sup>

*Lawrence v. Texas* exemplifies the United States' role in this evolutionary process toward the legalization of same-sex marriage. *Lawrence* arrives nearly two decades after *Bowers v. Hardwick*, a Supreme Court ruling that disapproved of homosexuality.<sup>59</sup> Published prior to *Lawrence*, one author stated that overturning *Hardwick* "would send a powerful message of tolerance, while significantly bolstering the quest for equal marriage rights."<sup>60</sup> Therefore, evidence of the United States' progression, similar to various European nations, is the *Lawrence* decision, which, in overturning *Hardwick*, held anti-sodomy laws unconstitutional.<sup>61</sup>

The second obstacle to the legal recognition of same-sex couples is social tolerance, because "a strong institution endures by accommodating social and cultural shifts."<sup>62</sup> As the Supreme Court modernizes its opinion of same-sex couples, the American population also grows in its acceptance of same-sex relationships, including the granting of rights and obligations attendant to a legally valid marriage.<sup>63</sup> Currently, a majority of states are enacting laws that prohibit the

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<sup>57</sup> *Id.* (referring to the Netherlands evolutionary approach to same-sex marriage, beginning with the nation's repeal of sodomy laws).

<sup>58</sup> 539 U.S. 558 (2003) (holding that a Texas statute, which made it a crime for two persons of the same sex to engage in certain intimate sexual conduct, was unconstitutional, as applied to adult males who engaged in the consensual act of sodomy in the privacy of their home).

<sup>59</sup> 478 U.S. 186 (1986).

<sup>60</sup> See *Differing Paths*, *supra* n. 1 at 2025; see also N.Y. Dom. Rel. Law § 170 (McKinney 2003) (effective Nov. 1, 2003) (amending the language pertaining to adultery under New York's divorce laws to be consistent with the ruling in *Lawrence*, i.e. "anal sexual conduct" replaces "deviate sexual intercourse").

<sup>61</sup> 539 U.S. 558; see also *Zagarow v. Zagarow*, 105 N.Y. Misc. 2d 1054, 1057 (N.Y. Supp. 1980) (stating that "marital sexual relations . . . are, per se, part of the essential structure of marriage . . .").

<sup>62</sup> National Gay and Lesbian Task Force, *Talking Points on Marriage Equality for Same-Sex Couples*, <http://www.thetaskforce.org/downloads/TalkingPointsonMarriage.pdf> (last updated Aug. 18, 2004) (citations omitted).

<sup>63</sup> See CNN, *Gay Marriage a Hot-Button Issue for '04 Race*, <http://www.cnn.com/2003/ALLPOLITICS/11/19/judy.desk.gay.marriage/index.html> (last updated Nov. 19, 2003) (stating that "Americans tend to show more support for granting gay couples legal rights – the right to adopt, to get health insurance coverage, or to receive inheritance benefits. But on the issue of "marriage," the public to date has been less comfortable."). It is important to consider Americans' views on this topic, because of its political implications. See also CNN, *Gay Marriage Ruling has '04 Democrats Walking Fine Line*, <http://www.cnn.com/2003/ALLPOLITICS/11/19/elec04.prez.dems.gay.marriage/> (last updated Jan. 13, 2004) (reporting that, according to Democratic politician Ray Flynn, "[gay marriage] now has become a major political issue in the presidential election"); CNN, *Bush: States Shouldn't Change Marriage*, <http://www.cnn.com/2004/ALLPOLITICS/01/20/same.sex.marriage/index.html> (last updated Jan. 21, 2004) (stating that the 2004 Democratic presidential candidates "are united in opposing a constitutional amendment, and they have expressed varying degrees of support for creating civil unions, which would provide legal rights and recognition to same-sex couples that are similar to marriage").

recognition of same-sex marriage,<sup>64</sup> and there is a decisive split among the American public whether to legally recognize same-sex marriage.<sup>65</sup> There is, however, “an overwhelming majority [supporting] equal access to the specific obligations, responsibilities and recognitions of marriage . . . .”<sup>66</sup> Specifically, a recent poll revealed that the nation is essentially split in half over whether to accept gay and lesbian marriage.<sup>67</sup> “A majority of Americans support equal access to the specific benefits of marriage.”<sup>68</sup> Most people feel that same-sex couples should be entitled to certain rights, including inheritance rights and health care benefits.<sup>69</sup> Further, as evidenced by recent events across the nation, it is important to be aware of the social attitude toward same-sex couples, because extending too many benefits, or recognizing same-sex marriage before its time, can cause a revolutionary reaction that unnaturally forces the evolutionary progression backwards. For example, as couples race to their county clerks’ offices to obtain marriage licenses in San Francisco and Seattle, where the mayors have decided to recognize same-sex marriage in their cities, opponents to such declarations have caused a potentially detrimental backlash in the fight for the legal recognition of same-sex couples.<sup>70</sup> In particular, a number of attorney generals are more empowered to have their state supreme courts declare same-sex marriage unconstitutional under their states’ constitutions.<sup>71</sup> Therefore, as the American public is still shaping its opinion as to the legal recognition of same-sex couples, this is a crucial time for legislatures, activists, and judges not to go too far too soon, because the backlash may be detrimental to the progress achieved thus far.

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<sup>64</sup> See National Gay & Lesbian Task Force: Specific Anti-Same-Sex Marriage Laws in the U.S. - May 2004, <http://www.thetaskforce.org/downloads/marriagemap.pdf> (accessed Sept. 15, 2004) (charting individualized states’ enactment of anti-gay marriage laws).

<sup>65</sup> Recent National Polls on Same-Sex Marriage, Civil Unions, <http://www.thetaskforce.org/downloads/RecentNationalMarch2004.pdf> (last updated Mar. 20, 2004) (analyzing various polls of the American public and its views on the legalization of same-sex marriage and civil unions).

<sup>66</sup> *Id.* (citing Kaiser Family Foundation, *Inside-OUT: A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public’s Views on Issues and Policies Related to Sexual Orientation*, [http://www.kff.org/kaiserpolls/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13875](http://www.kff.org/kaiserpolls/loader.cfm?url=/commonsspot/security/getfile.cfm&PageID=13875) (last updated Nov. 2001)).

<sup>67</sup> *Id.* at 8 (stating that “48% of those surveyed say allowing gay unions ‘will change our society for the worse,’ [and] 50% say [gay unions] would be an improvement or have no effect”).

<sup>68</sup> See Cahill & Slater, *supra* n. 13, at 4 (stating that civil unions are “extremely valuable measures that remedy some of the problems that same-sex couples face”).

<sup>69</sup> *Id.*

<sup>70</sup> See CNN, *California Gay Weddings to Go On*, <http://www.cnn.com/2004/LAW/02/28/samesex.marriages/index.html> (last updated Feb. 28, 2004).

<sup>71</sup> *Id.* (noting that “[i]n California, Attorney General Bill Lockyer on Friday [Feb. 27, 2004.] asked the Supreme Court to rule on the legality of same-sex marriages. He also requested an immediate injunction to stop them from being licensed in the meantime.”).

C. *Individual State Laws Dictate the Extent to Which a State May Enact a Viable Solution to the Legal Recognition of Same-Sex Couples*

Although the American population is slowly becoming more accepting of same-sex couples and the legal recognition of their relationships, states are in disarray because of significant splits in their positions over how to legally recognize these couples. Currently, 38 states have active laws prohibiting the legal recognition of same-sex marriage.<sup>72</sup> The remaining twelve states vary greatly in the rights and recognition legally offered to same-sex couples.<sup>73</sup> “Courts in Vermont and Hawaii have forced states to recognize same-sex unions, but the legislatures have danced around the word ‘marriage.’”<sup>74</sup> Therefore, although states must be cognizant of a sister state’s position in the state’s decision to enact laws that legally recognize same-sex couples,<sup>75</sup> “majority rule, unchecked, can lapse into majority tyranny.”<sup>76</sup>

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<sup>72</sup>See CNN, *States Play Defense on Gay Marriage*, <http://www.cnn.com/2004/ALLPOLITICS/01/23/gay.marriage.states.ap/index.html> (last updated Jan. 23, 2004) (stating further that currently six states, Arizona, Georgia, Virginia, Oklahoma, Kentucky and Michigan, have “[p]roposed constitutional amendments that would ban gay marriage”).

<sup>73</sup> It is important to remember that same-sex marriage is only one state, Massachusetts. Demian, *Massachusetts Offers Legal Marriage*, <http://www.buddybuddy.com/toc.html> (Dec. 18, 2004) (“Massachusetts became the first American state — and the sixth government in the world — to offer legal marriage to same-sex couples on May 17, 2004.”). Vermont recognizes same-sex civil unions. Vt. Stat. Ann. tit. 15, §§ 1201-1207. Hawaii grants certain rights to same sex “reciprocal beneficiaries.” Haw. Rev. Stat. Ann. §§ 572C-1-572C-7 (LEXIS current through 2003 Reg. Sess.). California grants registered domestic partners certain decision making authority typically reserved for spouses, as well as standing to sue for wrongful death. Cal. Civ. Pro. Code Ann, § 377.60 (LEXIS current through 2004 Reg. Sess.); see also Partners Task Force for Gay and Lesbian Couples, *State Legislative Reactions to Suits for Same-Sex Marriage*, <http://www.buddybuddy.com/t-line-2.html> (accessed Sept. 16, 2004) (offering an extensive analysis of anti-marriage laws passed, proposed bills that would recognize same-sex couples, and state laws that recognize same-sex couples); see *Goodridge*, 798 N.E.2d 941 (ruling that a ban on same-sex marriage violates the Massachusetts Constitution’s guarantees of equality and due process); see *States Play Defense on Gay Marriage*, *supra* n. 72, at <http://www.cnn.com/2004/ALLPOLITICS/01/23/gay.marriage.states.Seeap/index.html> (stating that only twelve states do not have a state version of DOMA).

<sup>74</sup> Benjamin Smith, *Gay Marriages to be Recognized: City Council is ‘Going as Far as It Possibly Can,’ Quinn Says*, N.Y. Sun (Aug. 13, 2002) (noting that “[t]hose decisions have followed public opinion polls that suggest more Americans support granting the rights associated with marriage – inheritance and medical decision-making, for example - to same sex partners, than support opening the marriage rite to gays and lesbians”).

<sup>75</sup> See Cahill & Slater, *supra* n. 14 (stating “[w]e are hopeful that, with time and public education, a majority of Americans will understand and support equal treatment of same-sex couple families. However, the rights of members of a stigmatized minority should not be determined by the prejudices of the majority.”).

<sup>76</sup> *Id.* at 7 (citing James Madison, *Federalist 10*, in *The Federalist Papers*. (Penguin Books 1987) (stating that “[p]rejudice should never determine public policy”).

1. Proposed Solutions Offered by States that Do Not Explicitly Prohibit Same-Sex Marriage Create a Foundation Upon Which a Viable Solution May Exist

State proposed solutions to the issue of whether and how to legally recognize same-sex relationships provide a basis upon which a better solution may endure. Currently, two main functional recognitions of same-sex couples have emerged, the registered domestic partnership and the civil union. Although neither of these solutions confer a “marital status” upon same-sex couples, each recognizes various rights and obligations attendant to a legally valid marriage as applicable to same-sex couples. Domestic partnerships, however, may cause uncertainty because there are a variety of enacted versions, which confer some rights in some areas, and other rights in another area. Alternatively, civil unions essentially mirror the rights and obligations of a legally valid marriage, producing a more consistent approach to the legal recognition of same-sex couples. Though potentially more consistent, civil unions are not “marriage,” and do not confer any federal rights and obligations attendant to a legally valid marriage. Despite their disadvantages, however, domestic partnerships and civil unions each offer same-sex couples legal recognition of their relationship and, more importantly, offer some of the rights and obligations attendant to a legally valid marriage. Therefore, these solutions currently provided by the states create a foundation upon which a better solution may exist.

a. Registered Domestic Partnerships

One “functional recognition” of same-sex couples is the registered domestic partnership. These partnerships have developed over the past few decades. In 1982, the first domestic partnership was created by a private entity, the *Village Voice* newspaper.<sup>77</sup> Following the *Village Voice*, in 1984, the City of Berkley became the first municipality to offer a registered domestic partnership.<sup>78</sup> “In 1995, Vermont became the first state to extend domestic partnership benefits to its public employees[,] [and] [i]n 1997, Hawaii became the first state to extend domestic partnership benefits to all same-sex couples throughout the state” via its “reciprocal beneficiary” law.<sup>79</sup> Consequently, domestic partnerships offered a great advance in the area of gay rights and recognition.

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<sup>77</sup> See *Domestic Partnership Benefits*, *supra* n. 7 (discussing domestic partnerships).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* Although the premise is essentially the same as a domestic partnership registry, the Hawaiian legislature characterized their “domestic registry” as a “reciprocal beneficiary” act. See Haw. Rev. Stat. §§ 572C-1-572C-7 (LEXIS current through 2003 Reg. Sess.). Characterized as “an effort by Hawaii legislators to circumvent providing full, legal marriage for all citizens[,] [i]t was a reaction to the then ongoing suit for legal marriage.” Partners Task Force for Gay & Lesbian Couples, *Reciprocal Beneficiaries: The Hawaiian Approach*, <http://www.buddybuddy.com/d-p-hawa.html>

Today, hundreds of municipalities, private companies, organizations, and universities offer domestic partnership benefits. For the first time, same-sex couples who register under these laws can claim a legal relationship.<sup>80</sup> The benefits conferred under this new legal status, however, are extremely inconsistent. When a state, municipality, or other entity contemplates offering domestic partnership benefits,

[I]t must address several important issues: [w]ho qualifies as a domestic partner . . . [h]ow will an employer identify the employee's domestic partner . . . [m]ust the couple be together a minimum number of years . . . live together . . . share expenses . . . be financially responsible for each other[,] . . . [and] [h]ow does a couple terminate their domestic partnership?<sup>81</sup>

As a result, after consideration of these fundamental questions, an inconsistent variety of domestic partnerships emerge.

The inconsistency among various jurisdictions and private entities generates unpredictability that is, perhaps, the greatest disadvantage of domestic partnerships. In some cases, only bereavement or sick leave is offered,<sup>82</sup> while others may confer the ability to make medical decisions for their partner.<sup>83</sup> Further, difficulties arise because no federal rights are covered by registration,<sup>84</sup> and no other state is

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(accessed Sept. 16, 2004) (discussing the history and implications of Hawaii's reciprocal beneficiary law); see also *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

<sup>80</sup> Partners Task Force for Gay & Lesbian Couples, *Domestic Partner Registration: The California Approach*, <http://www.buddybuddy.com/d-p-cali.html> (accessed Sept. 16, 2004) (discussing California's approach to domestic partner registration and the legal impacts of domestic partnerships); see also Boyd & Young, *supra* n. 47, at 769. New York and New York City are among those states and municipalities that have enacted domestic partnership registries. N.Y.C. Admin. Code (N.Y.) § 3-240; *Slattery v. City of New York*, 266 A.D.2d 24, 24 (N.Y. App. Div. 1st Dept. 1999) (stating that New York City did not impermissibly legislate in the area of marriage by enacting a city ordinance that established a registry for domestic partners and extended certain rights and benefits to domestic partners of city employees and city residents who become domestic partners); see Am. Law Inst., *Principles of the Law of Family Dissolution: Analysis and Recommendations*, § 6.03(1) (2002) (defining domestic partners as "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple").

<sup>81</sup> See *Domestic Partnership Benefits*, *supra* n. 7 (noting further that "even though most domestic partnership applications ask you to state that you are financially responsible for each other's needs, these applications are generally not considered binding contracts of support").

<sup>82</sup> *Id.* (stating that "[i]n other situations, the benefits offered are comprehensive - but also costly. Often, either the employee foots the bill for his or her partner, or the company pays (when it also pays for spouses), but the employee must pay taxes on the benefits. This is because the IRS considers benefits awarded to an unmarried partner as taxable compensation.").

<sup>83</sup> See Minn. Stat. Ann. § 145C.03(b) (LEXIS current through all 2003 legislation) (allowing a member of a registered domestic partnership to be eligible to act as a "health care agent" for their partner); N.J. Stat. Ann. § 26:2H-58 (LEXIS current through July 26, 2004) (designation of health care representatives).

<sup>84</sup> See *Domestic Partner Registration: The California Approach*, *supra* n. 80 (stating federal rights not covered by registration include immigration rights, i.e. the ability for a non-U.S. spouse to

obligated to recognize this status.<sup>85</sup> Finally, although some legal rights may be conferred, often no spousal or familial social status is bestowed.<sup>86</sup> Therefore, although a domestic partnership is a necessary step in the right direction, according to the evolutionary approach, with the ultimate goal of same-sex marriage, the domestic partnership is an insufficient system to fully grant same-sex couples every right and obligation attendant to a legally valid marriage.<sup>87</sup>

#### b. Civil Unions

Vermont's civil union, compared to the legal institution of marriage, offers citizens essentially all the rights and obligations attendant to a legal marriage.<sup>88</sup> For example, under Vermont law, "[p]arties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage."<sup>89</sup> Vermont's civil union law is a reaction by the state legislature to the state supreme court's decision, *Baker v. State*.<sup>90</sup> In response to that ruling, rather than

become a full citizen, social security rights, federal taxes and over 1,000 other laws that are triggered by legal marriage).

<sup>85</sup> *Id.* (stating that "registrations do not have any legal weight in the Federal sphere, and, to date, no other state has honored this status"); see also *supra* n. 24 and accompanying text (discussing DOMA and its implications).

<sup>86</sup> *Domestic Partner Registration: The California Approach*, *supra* n. 80 (discussing the key registration benefits, as well as the differences between domestic partner registration and legal marriage in California); see also *infra* n. 98 and accompanying text (discussing newly enacted domestic partnership laws by the California legislature, effective in 2005).

<sup>87</sup> Partners Task Force for Gay and Lesbian Couples, *Domestic Partnership Benefits: Philosophy and Provider List*, <http://www.buddybuddy.com/d-p-1.html> (accessed Sept. 14, 2004) (stating that "[w]hile domestic partnership benefits are a worthy goal, they don't assure full equality in the workplace. Also, they don't begin to address the many other aspects of inequality — child custody, hospital visitation, inheritance, immigration, etc. — that would be addressed by legal same-sex marriage. In fact, same-sex marriage legislation could in one stroke automatically assign to gay and lesbian couples not only workplace benefits, but all the equal rights and responsibilities guaranteed under all the state constitutions.").

<sup>88</sup> Vt. Stat. Ann. tit. 15, §§ 1201-1207 (LEXIS current through 2003 Reg. Sess.); see also Vermont Secretary of State, Deborah L. Markowitz, *The Vermont Guide to Civil Unions*, <http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html> (accessed Sept. 16, 2004) (offering a comprehensive look at the steps for obtaining a civil union, who may be joined in civil union, the legal consequences of a civil union and the process to dissolve a civil union); Vermont Civil Union, *The Vermont Civil Union Resource Guide: Vermont Civil Union FAQ's*, <http://www.vermontcivilunion.com/union/faq.html> (accessed Sept. 16, 2004) (offering a comprehensive look at who may establish a civil union, how to establish a civil union and the rights and obligations pursuant to a valid civil union). It is important to note that the Massachusetts Supreme Court recently rejected the state legislature's attempt to utilize civil unions as an appropriate response to a recent decision ruling that a ban on same-sex marriage is unconstitutional. See *Goodridge*, 798 N.E.2d 941 (majority). CNN, *Massachusetts High Court: Same-Sex Couples Entitled to Marry*,

<http://www.cnn.com/2004/LAW/02/04/gay.marriage.ap/index.html> (last updated Feb. 4, 2004).

<sup>89</sup> Vt. Stat. Ann. tit. 15, § 1204(a) (LEXIS current through 2003 Reg. Sess.).

<sup>90</sup> 744 A.2d 864 (Vt. 1999) (leading Vermont's legislature to enact the nation's first civil union statute in April 2000, which extends virtually all of the rights and responsibilities afforded to opposite sex couples under Vermont law to same-sex civil partners); see Partners Task Force for

offering legal marriage to same-sex couples, Vermont's legislature created the civil union statute, which offers "all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage."<sup>91</sup> Specifically, the statute includes a party to "a civil union in any definition or use of the terms 'spouse,' 'family,' 'dependent,' and 'next of kin,'" as well as explicit delegations of rights and duties concerning adoption, probate law and procedure, spousal abuse programs, worker's compensation benefits, and medical benefits.<sup>92</sup> Vermont's civil union essentially mirrors marriage in its prerequisites, which safeguards certain policy concerns behind marriage.<sup>93</sup> These prerequisites allow same-sex couples to enjoy the essential rights and obligations of a legally recognized marriage without the religious implications and political implications associated with recognizing a "same-sex marriage," and offers an emotional and legal commitment, which promotes safety and stability. Therefore, civil unions function as a stepping stone to the full legal recognition of same-sex marriage, because they perpetuate the evolutionary process theory by not granting same-sex marriage without the requisite judicial, legislative, and social acceptance.

Civil unions, however, are not "marriage." Often characterized as a "separate but equal" status, or "marrying apartheid,"<sup>94</sup> civil unions have significant limitations that are not applied to a true legal marriage. Specifically, civil unions do not grant federal rights,<sup>95</sup> including immigration rights, social security rights, and certain tax benefits. Further, there is constant uncertainty surrounding whether a sister state will recognize a civil union entered into in another state,<sup>96</sup> and, the dissolution requirements of a civil union are a constant source of problems, because a residency requirement is generally imposed by the

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Gay & Lesbian Couples, *Civil Unions: The Vermont Approach*, <http://www.buddybuddy.com/toc.html> (accessed Sept. 15, 2004) (stating that "[t]he ruling gave the [l]egislature two options – either provide legal marriage, or a nearly identical form of domestic partnership") [hereinafter *The Vermont Approach*].

<sup>91</sup> Vt. Stat. Ann. tit. 15, § 1204(a) (listing the "benefits, protections and responsibilities of parties to a civil union"); see also *The Vermont Approach*, *supra* n. 90 (listing the key civil union benefits, as well as a list of federal rights not covered by civil unions).

<sup>92</sup> Vt. Stat. Ann. tit. 15, § 1204(b), (e).

<sup>93</sup> See Wardle, *supra* n. 2, at 777; *Valid and Invalid Marriages*, *supra* n. 12.

<sup>94</sup> Partners Task Force for Gay & Lesbian Couples, *Marrying Apartheid: The Future of Domestic Partnership Status*, <http://www.buddybuddy.com/mar-apar.html> (accessed Sept. 16, 2004) (stating that "Civil Union [sic], or California's lesser-powered domestic partnership registration, at first appears to be an attractive alternative. It seems more winnable — even opponents of legal, same-sex marriage have rhetorically proposed it as a 'lesser evil.' It nonetheless represents a system of apartheid, less heinous than South Africa's, but similar in principle. It is plainly designed to treat one group of citizens in a separate and inferior manner despite their identical circumstances.").

<sup>95</sup> *The Vermont Approach*, *supra* n. 90 (analyzing the federal rights not covered by civil unions).

<sup>96</sup> *Id.*; see also Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: Sixteenth Annual Survey*, 51 Am. J. Comp. L. 1, 80-84 (2003) (discussing the choice of law issues and sister state recognition of marriages and civil unions).

legislature.<sup>97</sup> Therefore, civil unions are unlikely to be a permanent response in the fight for the legal recognition of same-sex couples.

### III. ANALYSIS

The United States struggles to establish how same-sex couples should be treated under the law. As states are slowly conferring legal recognition to same-sex couples, their approaches vary greatly and leave much to be desired. Domestic partnerships emerge as the first proposed solution by extending limited government recognition of same-sex couples via the conferral of various rights and obligations attendant to a legally valid marriage. Domestic partnerships, however, are an inadequate remedy to the legal recognition of same-sex couples, because they are inconsistent among cities and states, and do not provide the necessary stability under the law for which same-sex couples are searching. Alternatively, civil unions currently provide the most advantageous solution to the legal recognition of same-sex couples at this stage in the United States' evolutionary progression of gay rights. This is so because civil unions do not exceed the scope of what most Americans and courts find acceptable in recognizing same-sex couples under the law and civil unions promote both the private and public interests behind a legally valid marriage. Further, although identical legislation among the states need not be passed to best serve the public, consistent application of the rights and obligations attendant to a legally valid marriage is necessary. Finally, it is important to recognize that, pursuant to the evolutionary progression of the legal recognition of same-sex couples, marriage is the right next step beyond civil unions. Therefore, civil unions are the current optimal solution to the legal recognition of same-sex couples, and the requisite prelude to the legal recognition of same-sex marriage.

#### A. *Inconsistency Among States' Solutions to the Legal Recognition of Same-Sex Couples is the Basis for the Confusion and Volatility Surrounding this Issue*

The current state of law surrounding the legal recognition of same-sex couples is problematic because of the variety of ways in which states choose to handle the issue. As the United States grapples with which solution to the legal recognition of same-sex couples is most effective, the need for consistency among states' approaches to rectifying

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<sup>97</sup> Vt. Stat. Ann. tit. 15, § 1206; Janice G. Inman, *Dissolving a Same-Sex Marriage*, 4 no. 10 N.Y. Fam. L. Monthly 1 (July 2003) (noting that "[t]o date, no reported application for divorce has been made in New York by same-sex partners married in foreign countries, or by partners registered under Vermont's civil union laws. A handful of courts in other states have tackled the issue, however, and most of them have declared that between gay partners, there can be no such thing as marriage or marriage-like legal status, and therefore no divorce or dissolution will be granted."); *Id.* (discussing Hawaii, Texas, Connecticut, Georgia and West Virginia's attempts at tackling this issue).

the legal status of same-sex couples becomes more evident.<sup>98</sup> The legal recognition of same-sex couples is and should remain a state issue; however, it is necessary that a uniform application of the rights and obligations attendant to a legally valid marriage be a consistent premise behind states' enacted solutions. Currently, cities and states each have their version of a domestic partnership that grants a varying range of rights and obligations.<sup>99</sup> As a result, it is unclear which rights and obligations a couple actually possesses in their own area, and, more importantly, whether those rights and obligations will be recognized in another area.

Civil unions are best equipped to offer same-sex couples a majority of the rights and obligations attendant to a legally valid marriage. As a result, at this point in the United States' evolution of the legal recognition of same-sex couples, civil unions are the best solution. Currently, however, Vermont is the only state to recognize same-sex civil unions.<sup>100</sup> Despite the recent confusion over civil unions and same-sex marriage, civil unions remain the most viable solution, because they

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<sup>98</sup> See Jes Kraus, *Monkey See, Monkey Do: On Baker, Goodridge, and the Need for Consistency in Same-Sex Alternatives to Marriage*, 26 Vt. L. Rev. 959, 963-64 (2002) (illustrating a scenario where two women, who took every possible step to ensure recognition of their relationship and protect themselves and their daughter, including having a commitment ceremony, merged finances, changed their surnames to be identical, executed healthcare proxies, enabled a power of attorney, and executed a set of wills, were faced with a situation in which one of the partners could not obtain unobstructed access to see her daughter, and worried that if something were to happen to the birth mother of their daughter, she would not be recognized as legal guardian).

<sup>99</sup> See Haw Rev. Stat. Ann. §§ 572C-1-572C-7 (stating that the "purpose of this chapter is to extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under [Hawaii's reciprocal beneficiary laws]"); N.Y.C. Admin. Code (N.Y.) §§ 3-240-3-244 (LEXIS current through Dec. 2003) (New York City's domestic partnership laws); see also Lambda Legal, *Partial Summary of Domestic Partner Benefits Listings*, <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=21> (accessed Sept. 15, 2004) [hereinafter *Partial Summary of Domestic Partner Benefits Listings*] (offering a list of employers, cities, and states that offer domestic partner benefits). Some states incorporate "domestic partners" into the definition of "spouse" or "dependant" to confer certain rights upon such qualifying partners. See R.I. Gen. Laws § 36-12-1(3) (LEXIS current through Jan. 2003 session) (including domestic partners under the definition for "dependants").

<sup>100</sup> Vt. Stat. Ann. tit. 15 §§ 1201-1207; see *supra* nn. 88, 91 and accompanying text (discussing Vermont's civil union and the rights and obligations conferred the state's civil union statutes). California's current domestic partnership is an example of the inadequacy of domestic partnerships. On January 1, 2005, however, California expanded the scope of its domestic partnership laws to essentially mirror the rights and obligations of a legally valid heterosexual marriage, similar to Vermont's civil union statutes. Cal. Fam. Code Ann. § 297.5 (LEXIS 2004); Cal. Assembly 205, 2003-2004 Reg. Sess. 1(a) (Sept. 19, 2003) (stating that "[t]his act is intended to help California move closer to fulfilling the promises of inalienable rights, liberty, and equality contained in . . . the California Constitution by providing all caring and committed couples, regardless of their gender or sexual orientation, the opportunity to obtain essential rights, protections, and benefits and to assume corresponding responsibilities, obligations, and duties and to further the state's interests in promoting stable and lasting family relationships, and protecting Californians from the economic and social consequences of abandonment, separation, the death of loved ones, and other life crises"); see also *supra* n. 88 and accompanying text (discussing the potential enactment of civil union legislation in Massachusetts).

confer nearly all the rights and obligations attendant to a legally valid marriage, offer a legal recognition to same-sex couples' relationships, and do not impose the symbolic aversion by society as does same-sex marriage.<sup>101</sup> Therefore, civil unions are currently the best solution for states to adopt in their legal recognition of same-sex couples.

1. Domestic Partnerships Are an Inadequate Remedy to the Lack of Legal Recognition of Same-Sex Couples

Despite the domestic partnership's emergence as the most accepted approach to the legal recognition of same-sex couples, it produces significant shortcomings.<sup>102</sup> Specifically, domestic partnerships offer only a fraction of the rights and obligations attendant to a legally valid marriage, as they are not portable, and fail to provide any federal protections.<sup>103</sup> Therefore, the domestic partnership is an inadequate vehicle for granting rights and obligations attendant to a legally valid marriage to same-sex couples.

First, at the state level, domestic partnerships provide only a fraction of the rights and obligations attendant to a legally valid marriage. Various states, municipalities and employers "grant same-sex couples benefits ranging from symbolic recognition to limited economic rights."<sup>104</sup> Currently, no domestic partnership offers the full extent of rights and obligations attendant to a legally valid marriage.<sup>105</sup> Further, the fact that same-sex couples are still strongly advised to execute certain legal documents, including wills, living wills, power of attorney instruments, and living trusts, to protect themselves and their families, is a strong indication of how few rights are conferred by domestic partnerships.<sup>106</sup> Therefore, the partiality of rights and duties conferred by

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<sup>101</sup> See *supra* nn. 88, 91 and accompanying text (discussing Vermont's civil union and the rights and obligations conferred the state's civil union statutes).

<sup>102</sup> See Cahill & Slater, *supra* n. 14 (charting the similarities and differences between marriage, civil unions and domestic partnerships).

<sup>103</sup> *Id.*; see also *supra* pt. II(C)(1)(a) (discussing the disadvantages of registered domestic partnerships).

<sup>104</sup> See *Differing Paths*, *supra* n. 1, at 2015; see also *supra* n. 83 and accompanying text (describing Minnesota and New Jersey's domestic partnership legislation, which grants certain medical rights for registered partners); *Partial Summary of Domestic Partner Benefits Listing*, *supra* n. 99 (offering a list of the states, cities and public and private employers who offer domestic partnerships); Partners Task Force for Gay & Lesbian Couples, *Benefit Roadblocks: Issues Raised by Employers*, <http://www.buddybuddy.com/d-p-road.html> (accessed Sept. 15, 2004) (analyzing various concerns employers have over offering benefits to domestic partners).

<sup>105</sup> See *supra* n. 100 and accompanying text (discussing California's domestic partnership laws effective January 2005).

<sup>106</sup> Partners Task Force for Gay & Lesbian Couples, *Legal Precautions to Protect Your Relationship: What to Do Until Legal Marriage Becomes Available to All Citizens*, <http://www.buddybuddy.com/protect.html> (accessed Sept.15, 2004) (listing such documents as power of attorney, living wills, wills, funeral arrangements, living trusts, and legal precautions for partners who parent).

domestic partnerships render them a disadvantageous solution to the legal recognition of same-sex couples.

Another disadvantage of domestic partnerships is that they are not portable.<sup>107</sup> Domestic partnerships are offered at various levels of government, and each confers different rights and obligations.<sup>108</sup> Moving from one state that recognizes a domestic partnership to another state that does not, or that may recognize a narrower version of the domestic partnership, causes confusion and angst over which rights and obligations, if any, will be recognized.<sup>109</sup> Further, because of the federal Defense of Marriage Act, a state or municipality may confer any right or obligation it desires upon same-sex couples, but a sister state and the federal government are not required to recognize those rights and obligations.<sup>110</sup> Consequently, the inconsistencies among various states' and cities' domestic partnerships render them unreliable.

Finally, domestic partnerships fail to provide federal protections to same-sex couples.<sup>111</sup> The federal government offers benefits and policies covering taxes, health care, social security, and retirement, to opposite sex married couples that help these American families deal with everyday issues, "or 'kitchen table' issues - concerns that make up a huge part of everyone's daily lives and are often discussed around the

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<sup>107</sup> It is important to note that the issue of portability is not confined to domestic partnerships. Currently, Vermont's civil unions are not recognized in their entirety by any other state in the union. The current trend is to slowly incorporate certain benefits of the civil union and recognize the union for those benefits. It is foreseeable that a state may eventually recognize the union in its entirety once enough rights or certain "key" rights are recognized. See *Langan*, 196 N.Y. Misc. 2d 440 (recognizing Vermont's civil union for the purpose of allowing a surviving spouse of a same-sex civil union to bring suit for wrongful death of his spouse). The issue of portability, as applied to civil unions, will not be addressed in this article, however, because this article attempts to argue that all states should legally recognize same-sex couples under a civil union statute. Therefore, the issue of portability would be inapplicable. The current explosion of cities and counties granting same-sex couples marriage licenses has also come across this issue of portability. See *infra* n. 111 and accompanying text (discussing the states and counties issuing marriage licenses to same-sex couples and the implications of such a decision). As these couples obtain their license to be married, the effective reach of these licenses outside the county or state is uncertain. See *California Gay Weddings to Go On*, *supra* n. 70 (reporting that the attorney general of California asked the state Supreme Court to rule on the legality of same-sex marriages and requested an immediate injunction to stop the licenses from being issued, because he wanted "to clear up the confusion same-sex marriage licenses have caused in the state's 57 other counties").

<sup>108</sup> See *supra* pt. II(C)(1)(a), nn. 77-87 and accompanying text (describing the various benefits conferred by domestic partnerships and the disadvantage of their inconsistencies among the states).

<sup>109</sup> See *supra* n. 97.

<sup>110</sup> See *supra* n. 24 and accompanying text (discussing DOMA and its implications).

<sup>111</sup> See Human Rights Campaign, *Domestic Partners Benefits and Obligations Act*, [http://www.hrc.org/Template.cfm?Section=Domestic\\_Partnership\\_Benefits\\_and\\_Obligations\\_Act1](http://www.hrc.org/Template.cfm?Section=Domestic_Partnership_Benefits_and_Obligations_Act1) (accessed Sept. 16, 2004) (offering an analysis of the Domestic Partners Benefits and Obligations Act, currently under review in the Senate, which "would grant same- and opposite-sex domestic partners of federal employees the benefits currently only available to legal spouses of federal employees. The bill would bring employment practices in the federal government in line with those of America's largest and most successful corporations.").

kitchen table.”<sup>112</sup> These benefits, however, are not offered to same-sex couples. Therefore, domestic partnerships, although offering a few rights and obligations for same-sex couples if they remain in a specific state or municipality, do not provide sufficient legal rights and obligations, nor the reliability and security same-sex couples desire.

B. *Civil Unions Currently Provide the Optimal Solution to the Legal Recognition of Same-Sex Couples at this Stage in the United States’ Evolutionary Progression of Gay Rights*

Civil unions produce the most advantageous solution to the current unstable state of law struggling to legally recognize same-sex couples. Pursuant to the evolutionary process of recognizing same-sex couples, civil unions do not offer too much too soon in the eyes of those who oppose same-sex relationships, and most importantly, civil unions promote both the private and public interests in marriage. As states and cities are currently contending for a solution to the legalization of same-sex couples,<sup>113</sup> and, simultaneously, the federal government contemplates an amendment to the federal Constitution that would affirmatively ban same-sex marriage,<sup>114</sup> the need for a consistent and applicable solution is extremely evident. Therefore, as the state and federal governments debate whether and how same-sex couples should be recognized, and search for a resolution to leave citizens in a state of certainty and equality under the law, civil unions emerge as the best solution at this point in the United States’ evolutionary process.

1. *Civil Unions Do Not Exceed the Scope of What is Acceptable in Recognizing a Legal Relationship Between Same-Sex Couples*

Despite an overwhelming opposition to same-sex *marriage*, there is support, socially, politically, and legally, for the rights and obligations attendant to a legally valid marriage to be applicable to same-sex couples.<sup>115</sup> Same-sex couples deserve the same rights and

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<sup>112</sup>Human Rights Campaign Foundation, *Federal Benefits*, <http://www.hrc.org/Template.cfm?Section=Partners&CONTENTID=14362&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (accessed Sept. 16, 2004) (stating that “[a]lthough the federal government has taken the lead in protecting many minority groups from discrimination, it has not only failed to do so for lesbian and gay families, but actually penalizes same-sex couples for being unable to marry”); *see also* Partners Task Force for Gay and Lesbian Couples, *U.S. Federal Laws for the Legally Married*, <http://www.buddybuddy.com/mar-fed.html> (accessed Sept. 16, 2004) (stating that “[a]lthough the marriage contract is governed by state law, the federal government uses marital status as the qualification for more than 1,049 federally regulated rights and responsibilities”).

<sup>113</sup>*See* CNN, *Second Oregon County Says Gay Couples Can Marry*, <http://www.cnn.com/2004/LAW/03/16/oregon.same.sex/index.html> (accessed Sept. 16, 2004) (stating that Benton County “agreed to follow in the footsteps of Multnomah County” and will issue marriage licenses to same-sex couples beginning on March 24, 2004).

<sup>114</sup>*See supra* pt. II(A) nn. 25-30 and accompanying text (discussing the proposed federal amendment, which would ban same-sex marriages).

<sup>115</sup>*See* CNN, *Democrats Slam Bush on Same-Sex Marriage Ban*, <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.dems.marriage/index.html> (accessed Sept. 16, 2004) (noting that “[t]he

responsibilities that opposite-sex couples receive attendant to a legally valid marriage. The contention arises, however, when the word “marriage” labels the relationship. Unlike the controversy surrounding the legal recognition of same-sex *marriage*, civil unions have not produced such an intense reaction, because the social inference of morality issues and the uprooting of traditional martial images remain unthreatened.<sup>116</sup>

In addition to the social acceptance of same-sex relationships, the legal recognition of civil unions does not present the intense reaction by governments and courts as does same-sex *marriage*.<sup>117</sup> Implicit in the evolutionary theory behind the legal recognition of same-sex couples, is a warning not to grant too much too soon to same-sex couples, because the reactions to such legal advancement may produce undesirable setbacks. Recently, evidence of the validity of this warning has emerged in a number of states and cities across the United States.<sup>118</sup> Therefore, the fact that civil unions are not met with such strong resistance is vital to their becoming a foundation to the legal recognition of same-sex marriage.

## 2. Civil Unions Promote Both the Private and Public Policies Behind a Legally Valid Marriage

When arguing for the legal recognition of same-sex couples, it is important to understand the basic private and public policies behind marriage, because the proposed solution must follow a similar pattern. The private interests of marriage are as diverse as the couples who enter into the union. The public interests behind marriage, however, are more limited and generally revolve around safe and natural sexual relations and procreation. Over the centuries, though, these public interests have

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Senator from Massachusetts [John Kerry,] has said he supports civil unions and equal protections for gays and lesbians but that he opposes marriage for them”).

<sup>116</sup>See *Bush Amendment Proposal Prompts Strong Reaction*, *supra* n. 29, at <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.marriage.react/index.html> (quoting Republican Sen. Rick Santorum of Pennsylvania as saying, “We’re in the process right now of judges and vigilantes - - people taking justice into their own hands and deciding to change the law without either the courts or the legislature acting.”).

<sup>117</sup>A current example of this tendency towards civil unions over same-sex marriages is prevalent in Massachusetts. Currently, the Massachusetts legislature is scrambling to comply with the state Supreme Court’s decision set forth in *Goodridge*, 798 N.E.2d at 969 (holding that “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution”). The legislature attempted to comply with the decision by proposing a civil union statute, similar to the one enacted in Vermont, but its proposal was rejected by the court as insufficient. Recently, however, in reaction to this debate, the “Massachusetts Legislature adopted a new version of a state constitutional amendment . . . that would ban gay marriage and legalize civil unions, eliminating consideration of any other proposed changes.” See Jennifer Peter, *Mass. Lawmakers Agree on Gay Marriage Ban*, <http://apnews.myway.com/article/20040329/D81K7PDO0.html> (last updated Mar. 29, 2004).

<sup>118</sup>See *supra* n. 117 and accompanying text (discussing Massachusetts’ current situation).

taken on new meaning under the law and now encompass a broader range of interests, including safety and stability of the family unit. Similar to opposite-sex couples, same-sex couples share essentially the same broad range of personal reasons for desiring to marry. Further, and more importantly, civil unions also promote the same public interests as traditional, opposite-sex marriage, because they confer essentially every right and obligation attendant to a legally valid marriage. Therefore, because civil unions promote the private and public interests of marriage, they are the legally correct means to recognizing same-sex couples under the law.

a. The Private and Public Policies Behind Marriage

Recently described as an “anchor[] [to] an ordered society,”<sup>119</sup> marriage promotes both private and public state interests. The private interests encouraged through marriage are as numerous and diverse as the couples entering into the institution.<sup>120</sup> For example, couples may enter into marriage for the symbolic and tangible acknowledgment of their love for one another, as well as for convenience and economic safety. The public purpose of marriage, however, is not as easily defined because of the religious and moral implications that may affect one’s definition. Therefore, it is important, for the purpose of debating whether same-sex couples should have their relationships legally recognized, to refrain from allowing such implications to influence the recognized definition of the public purpose of marriage.

The public interest served by the legal institution of marriage has historically been defined as safe and natural procreation.<sup>121</sup> Courts, however, have recently and accurately declined to recognize the inability to naturally procreate as a viable reason to deny same-sex couples the right to marry, or at a minimum, to be recognized under the law.<sup>122</sup> Although natural procreation may traditionally have been the recognized

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<sup>119</sup> *Goodridge*, 798 N.E.2d at 954.

<sup>120</sup> Peter Sprigg, Family Research Council, *What is the Public Purpose of Marriage?*, <http://www.frc.org/get.cfm?i=PD04B01> (accessed Sept. 16, 2004) (noting that “[t]he *private* purposes for which people enter into marriage may be as diverse as the people themselves”) (emphasis in original).

<sup>121</sup> See Wardle, *supra* n. 2, at 779-80 (listing, however, eight social interests for marriage, “(1) safe sexual relations; (2) responsible procreation; (3) optimal child rearing; (4) healthy human development; (5) protecting those who undertake the most vulnerable family roles for the benefit of society, especially wives and mothers; (6) securing the stability and integrity of the basic unit of society; (7) fostering civic virtue, democracy, and social order; and (8) facilitating interjurisdictional compatibility”).

<sup>122</sup> See *Goodridge*, 798 N.E.2d at 962 (stating that “[i]f procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of non-marital child bearing and the creation of families by noncoital means. The attempt to isolate procreation as ‘the source of a fundamental right to marry,’ . . . (Cordy, J., dissenting), overlooks the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing.”).

public interest, as time progresses, procreation no longer represents the only, nor the most important, public interest served by marriage.<sup>123</sup>

The modern public interests served by the legal institution of marriage are stability,<sup>124</sup> secure relationships, and economic safety,<sup>125</sup> because the institution of marriage strives to promote healthy families and protect the economic and emotional interdependence of family members.<sup>126</sup> Further, the “[l]egal protection of partner relationships can increase a couple’s ability to care for each other,” as well as provide security and peace of mind.<sup>127</sup> Therefore, the public interest behind marriage is the promotion of safe, stable, and secure relationships, which promotes a healthy and productive society.

i. The Private Interests of Marriage are Promoted Through Civil Unions

Civil unions contribute to promoting the private, individual interests behind marriage. Just as diverse as opposite sex couples, same-sex couples also offer a variety of motivations for wanting to marry. Specifically, same-sex couples desire the rights and obligations attendant to a legally valid marriage, as well as a legal commitment, which offers a “tangible” validation of their emotional commitment to one another. Civil unions encourage all of these interests, because they provide nearly all the rights and obligations attendant to a legally valid marriage,<sup>128</sup> as well as offer a legal commitment for same-sex couples.<sup>129</sup> Therefore,

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<sup>123</sup> See *supra* n. 121 and accompanying text (listing eight examples of public interests served by the institution of marriage).

<sup>124</sup> See Partners Task Force for Gay and Lesbian Couples, *Most Compelling Reasons for Legal Marriage*, <http://www.buddybuddy.com/demian01.html> (accessed Sept. 16, 2004) (noting that “[the rights and obligations attendant to a legally valid marriage] are often designed to support the family unit in times of catastrophe, such as a health crisis when only next of kin are allowed to make health care decisions”).

<sup>125</sup> See Wardle, *supra* n. 2, at 780 (listing “securing the stability and integrity of the basic unit of society[,] [and] fostering civic virtue, democracy, and social order” among the public interests of marriage, despite focusing only on natural procreation). “Making a safe and mutually-supportive family is not inherent to any particular sexuality. In fact, long before modern state marriage laws were devised, the very first European church marriages were conducted between men.” See *Most Compelling Reasons for Legal Marriage*, *supra* n. 124 (citing John Boswell, *Same-Sex Unions in Premodern Europe* (Villard Books 1994); Goodridge, 798 N.E.2d at 962 (noting that “[i]f procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means. The attempt to isolate procreation as ‘the source of a fundamental right to marry,’ post at (Cordy, J. dissenting), overlooks the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing.”); see *supra* n. 100 and accompanying text (discussing California’s domestic partnership registry legislation effective January 1, 2005).

<sup>126</sup> See Cahill & Slater, *supra* n. 14 (discussing the benefits of marriage).

<sup>127</sup> *Id.*

<sup>128</sup> Vermont is currently the only state to provide for civil unions. Therefore, this article will use Vermont’s civil union statutes to supply the legal basis for what is provided by a civil union. Vt. Stat. Ann. tit. 15, §§ 1201-1207.

<sup>129</sup> See Vt. Stat. Ann. tit. 15, § 1206 (detailing the “dissolution of civil unions”).

civil unions promote the same private interests as promoted through a legally valid marriage.

ii. The Public Interests of Marriage are Promoted Through Civil Unions

Civil unions promote the public interests in marriage and achieve the social policy purposes for which the laws establishing marriage have been enacted.<sup>130</sup> Stability, security, and economic safety are encouraged expressly and implicitly via the rights and obligations attendant to a legally valid marriage.<sup>131</sup> Extending same-sex couples every right, protection, and obligation attendant to a legally valid marriage, including the rights to hospital visitation and notification and the right to make medical decisions for one's partner, as well as including a partner to a civil union "in any definition or use of the terms 'spouse,' 'family,' 'immediate family,' 'dependent,' and 'next of kin,'" <sup>132</sup> civil unions allow same-sex couples the security of knowing that their relationship is legally acknowledged. Further, because civil unions apply the laws relating to "descent and distribution [and] intestate succession" to same-sex couples, economic safety is ensured.<sup>133</sup> Therefore, because civil unions confer the same rights, protections, and obligations attendant to a legally valid marriage, civil unions promote the public interests of a legally valid marriage.

C. *Marriage is the Right Next Step Under the Law*

Although civil unions are appropriate at this stage in the evolution of rights applicable to same-sex couples, "marriage continues to be the only means of creating full and complete equality for same-sex couples and their children."<sup>134</sup> "Even if there were no substantive

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<sup>130</sup> One of the major arguments in opposition to the legalization of same-sex marriages is that gay marriage does not advance public social interests. See Wardle, *supra* n. 2, at 779 (establishing that the public interests of marriage are advanced by civil unions combats one of the "major flaw[s] in most arguments for legalizing same-sex marriage . . ."); *id.* at 779-80 (listing eight "social interests of marriage," including procreation and procreative health); see also Committee on Psychological Aspects of Child and Family Health, American Academy of Pediatrics, *Coparent or Second-Parent Adoption by Same Sex Partners*, 109 *Pediatrics* 339-40 (Feb. 2002) (stating that "[d]enying legal parent status through adoption to coparents or second parents prevents these children from enjoying the psychologic and legal security that comes from having 2 willing, capable, and loving parents"). The Massachusetts Supreme Court has also rejected the arguments of procreation and child care, which States and anti-gay advocates offer in support of legislation banning same-sex marriage. See *Goodridge*, 798 N.E.2d 941 (rejecting the State's arguments in support of a ban on same-sex marriage, including procreation, optimal child rearing, and preservation of scarce public and private resources); see also CNN, *Two States Offer Different Legal Paths on Same-Sex Marriage*, <http://www.cnn.com/2003/LAW/11/20/fl.grossman.samesex/index.html> (accessed Sept. 16, 2004).

<sup>131</sup> See *supra* n. 100 and accompanying text (discussing California's domestic partnership registry legislation effective January 1, 2005).

<sup>132</sup> Vt. Stat. Ann. tit. 15 §1204(b).

<sup>133</sup> *Id.* at § 1204(e)(1).

<sup>134</sup> See Cahill & Slater, *supra* n. 14 (stating that civil unions are "extremely valuable measures that remedy some of the problems that same-sex couples face"); see also *Most Compelling Reasons for*

differences in the way the law treats marriages and civil unions, the fact that a civil union remains a separate status just for gay people represents real and powerful inequality.”<sup>135</sup> Once fully integrated into the legal system and society, civil unions will ease the aversion to the legal recognition of same-sex couples. In turn, its “separate but equal” status will likely become more apparent and give more force to the argument that same-sex couples deserve to be treated *truly* equally under the law, regardless of the title bestowed to their legal relationship. Therefore, although civil unions currently provide the necessary advancement for the legal recognition of same-sex couples, the “separate but equal” nature of civil unions may ultimately lead to its ineffectiveness and require additional protection for same-sex couples under the law.<sup>136</sup>

#### IV. CONCLUSION

Civil unions are the next requisite step in the evolutionary process toward the legalization of same-sex marriage. Although the United States is currently not prepared to recognize same-sex *marriage*, the legal foundation is laid and society is willing to embrace the legal recognition of same-sex couples via consistent application of the marital rights, protections, and obligations to same-sex couples. Civil unions, which essentially mirror the rights and obligations attendant to a legally valid marriage, bring the United States one step closer to marital equality, because these rights and obligations not only legally validate same-sex relationships, but also encourage the private and public policies behind marriage, specifically familial stability and security. Therefore, civil unions are presently the best solution to the

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*Legal Marriage*, *supra* n. 124 (noting that “[t]o deny access to marriage is to keep lesbian and gay families in a perpetual state of childishness, one subject to the whims and controls of the ‘parental’ state. This denial refuses to recognize the legitimacy of a same-sex household as a genuine family.”).

<sup>135</sup> See Cahill & Slater, *supra* n. 14 (pointing out that “[o]ur state and federal constitutions require legal equality for all”); see also *supra* pt. II(B)(1)(a), nn. 47-54 and accompanying text (discussing Canada’s current debate over whether it is necessary to legalize same-sex marriage, despite recent efforts, which stop just short of marriage).

<sup>136</sup> Advocates of the legal recognition of same-sex couples should not, however, become placated by civil unions and other functional recognitions of their relationships, because it may lead to an unnecessary and potentially detrimental delay in full legal recognition. See *Differing Paths*, *supra* n. 1, at 2010 (citations omitted) (stating “[o]ne explanation for this failure to carry reform to completion may be that, having obtained many of the rights associated with marriage, same-sex couples are not as motivated to advocate for marriage rights as they were when the rights gap was greater. Within the gay rights movement, some factions argue that gay men and lesbians should not seek formal marriage rights at all, because claiming such rights legitimates state paternalism and the ‘hegemonic’ history of marriage. Among opposite-sex couples, too, there is considerable evidence that the attractiveness of formalized marriage has waned as more limited forms of recognition, ranging from legalized cohabitation to registered partnerships, have become available.”).

insufficient legal recognition of same-sex couples, and a necessary prelude to the legal recognition of same-sex marriage.