7-1-2013

Same-Sex Divorce In The United States: Protecting The Interests Of The Children

Joan Catherine Bohl

Same-Sex Divorce in the United States: Protecting the Interests of the Children

JOAN CATHERINE BOHL*

ABSTRACT

In light of recent political, legal, and legislative developments, the status of same-sex couples across the United States has become increasingly complex. This article focuses on the issue of same-sex divorce in a mobile society. When a same-sex couple moves from a state recognizing same-sex marriage—or from Canada—to a state that does not expressly recognize same-sex marriage, dissolution of that

* Professor Bohl teaches Children and the Law and Legal Research and Writing at Stetson University College of Law, Gulfport, Florida. She would like to thank Stetson student Matt Newton for his research help. His skillful research, efficiency, and professionalism brought the article to life. A short precursor of this piece appeared in the United Kingdom as part of The International Family Law Journal in May 2009.

marriage can become a byzantine problem much more complex than a state's "official" position on same-sex marriage. Relevant factors can range from the state's legislative and executive pronouncements affecting homosexual citizens in areas such as pension benefits and health plans to seemingly unrelated judicial decisions concerning other aspects of family law. This article examines this patchwork of factors and their implications. It ultimately concludes that the presence or absence of children may be the key factor, whether articulated or not, in judicial decisions regarding whether to open the courthouse doors to a same-sex couple.

I. INTRODUCTION: MARRIAGE AND THE INVISIBLE GROUNDSWELL OF SAME-SEX COUPLES

As recently as 1997, no state in the United States gave any legal recognition to same-sex relationships, much less allowed same-sex couples to marry.[1] Now, twelve states permit same-sex marriage.[2] Though same-sex marriage was once condemned as a trend that could

1. Edward Stein, *Eulogy for 'Marriage Evasion' In Massachusetts: 1913-2008*, HUFFINGTON POST (Aug. 1, 2008), http://www.huffingtonpost.com/edward-stein/eulogy-for-marriage-evasi_b_116243.html. *See also Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws,* NAT'L CONF. OF ST. LEGISLATURES http://www.ncsl.org/programs/cyf/samesex.htm (last updated Nov. 2012).

2. *Defining Marriage*, *supra* note 2 (Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington, and the District of Columbia); Some valid, same-sex marriages exist in California, created during the window of time between the repeal of California's DOMA and the passage of Proposition 8. *See infra* p. 10-11. Same-sex unions are also permitted in Washington, D.C. *Marriage Equality and Other Relationship Recognition Laws,* HUM. RTS. CAMPAIGN, http://www.hrc.org/files/assets/resources/marriage_equality_laws_062013.pdf (last visited June 12, 2013). The California Supreme Court ruled on May 15, 2008 that same-sex couples have the right to marry under the state constitution, In re Marriage Cases, 183 P.3d 384 (Cal. 2008), and approximately 18,000 same-sex couples took advantage of this opportunity to wed. Proposition 8, which limits marriage to one man and one woman, was passed on November 4th, 2008. The California Supreme Court subsequently ruled that Proposition 8 was a valid amendment to the California Constitution, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), but affirmed the validity of the same-sex marriages solemnized prior to the passage of Proposition 8. Later with a recent decision, *Perry v. Brown*, the United State's Ninth Circuit has determined that Proposition 8 is unconstitutional. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012). The court declined to rehear the case on June 5, 2012. *Id*. A stay has been ordered on the judgment until further notice; presumably precluding same-sex marriages until the appeals process has been exhausted. *Id*.

destabilize the entire institution of marriage,[3] this view is in the minority today.[4] Some commentators consider the opportunity for same-sex couples to enter into marriage as a stabilizing influence in American society.[5] Indeed, anecdotal data suggests that lesbians and gay men now entering adulthood have had the opportunity to be more open about their sexuality, and are correspondingly more interested in participating in traditional social institutions, such as marriage.[6]

Certainly allowing same-sex couples to marry provides benefits and rights unavailable to them as an unmarried couple.[7] Under typical state laws, marital benefits can include a range of property rights, including the right to own property as tenants by the entirety. Other rights include evidentiary rights, such as the right to prohibit one spouse from testifying against the other, and the right to bring suit for an injury to the relationship, such as a wrongful death claim or a loss of consortium claim.[8] Marriage also confers intimate rights relating to end of life decisions.[9] For example, a hospice patient's "family" includes the spouse.[10] A patient's spouse determines whether life sustaining

---

3. *See, e.g.,* Lynne D. Wardle, *The Curious Case of the Missing Legal Analysis*, 18 BYU J. PUB. L. 309 (2004); Steven W. Fitschen, *Marriage Matters: A Case for A Get-the-Job-Done-Right Federal Marriage Amendment*, 83 N.D. L. REV. 1301 (2007).

4. Lydia Saad, *Americans' Acceptance of Gay Relations Crosses 50% Threshold,* GALLUP (June 1, 2013), *available at* http://www.gallup.com/poll/135764/americans-acceptance-gay-relations-crosses-threshold.aspx; *Most Say Homosexuality Should Be Accepted By Society*, PEW RESEARCH CENTER (May 13, 2011), *available at* http://pewresearch.org/pubs/1994/poll-support-for-acceptance-of-homosexuality-gay-parenting-marriage; Ben Brumfield, *Voters approve same-sex marriage for the first time,* CNN (Nov. 7, 2012, 2:24 PM) http://www.cnn.com/2012/11/07/politics/pol-same-sex-marriage/index.html.

5. Port v. Cowan, 44 A.3d 970, 976 (Md. 2012).

6. Amin Ghaziani, *Post-Gay Collective Identity Construction*, 58 SOC. PROBS. 99 (2011).

7. One thousand, one hundred, thirty-eight federal statutory provisions exist where marital status is a determinative factor. These rights and responsibilities apply only to married heterosexual couples. *An Overview of Federal Rights and Protections Granted to Married Couples*, HUM. RTS. CAMPAIGN (last accessed June 1, 2013), http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples.

8. *See, e.g.,* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955-56 (Mass. 2003); Lisa Bennett & Gary J. Gates, *The Cost of Marriage Inequality to Children and Their Same-Sex Parents,* HUM. RTS. CAMPAIGN (Apr. 13, 2004), http://www.hrc.org/files/assets/resources/costkids.pdf.

9. Varnum v. Brien, 763 N.W.2d 862, 903 n.28 (Iowa 2009).

10. *Id.*

medical procedures will be used when the patient has no living will.[11] In many states, spouses have the power to decide when anatomical gifts will be made.[12] Same-sex couples in this position, are not entitled to these spousal benefits. While in theory, a same-sex couple could enter into private agreements regarding property division, end of life decisions and, generally, each person's responsibilities in the event of separation. In practice, however, these agreements might resemble decisions made in a divorce proceeding, and any court unwilling to entertain a same-sex divorce could be equally unwilling to allow litigation of "divorce-like" matters.[13]

Furthermore, rights flowing from marriage are uniquely valuable in the context of family life, and many cannot be reduced to a private agreement at all. It seems axiomatic that divorcing parents may not enter into custody or visitation agreements concerning their minor children without judicial oversight, and the assurance that the children's best interests are truly being served. Even when familial rights can be secured through private agreements, the process may be expensive, time consuming, and problematic. When same-sex partners are allowed to legally marry, for example, each automatically acquires parental rights to children born or adopted into the relationship. Although a second-parent adoption[14] could conceivably achieve the same result in a jurisdiction where the same couple is not allowed to marry, many states do not permit second-parent adoptions.[15] Even when they are permitted, a second-parent adoption can be a fairly complicated legal proceeding and if either partner has second thoughts about it, the whole process can be manipulated and delayed.[16]

---

11. *Id*.

12. *Id*.

13. Louis Thorson, *Same-Sex Divorce and Wisconsin Courts: Imperfect Harmony*?, 92 MARQ. L. REV. 617, 635 (2009).

14. *See* Christine Metteer Lorillard, *Placing Second-Parent Adoption Along the 'Rational Continuum' of Constitutionally Protected Family Rights*, 30 RUTGERS WOMEN'S RTS L. RPTR 1 (2008) (comprehensively discussing the expense and challenges involved).

15. *Id*.

16. *See, e.g.,* C.M. v. C.C., 867 N.Y.S.2d 884 (N.Y. Sup. Ct. 2008) (describing one partner's unsuccessful attempts to adopt children she had helped to parent, and the many ways the biological parent hindered, delayed, and ultimately blocked the adoption.); *see also* Miranda Leitsinger, *Despite Marriage Progress, Gay Couples Face Big Hurdles to Parenthood*; NBCNEWS.COM (Aug. 5, 2012), http://usnews.nbcnews.com/_news/2012/08/05/13037230-despite-marriage-progress-gay-couples-face-big-hurdles-to-parenthood?lite.

Beyond the obvious and often celebrated affirmative rights to marriage, "the single most important benefit of marriage [may well be] divorce . . . a predictable process by which property is divided, debt is apportioned and custodial arrangements are made for children."[17] For a same-sex couple in a mobile society, that "single most important benefit," may easily go unnoticed[18] until it is too late—and then it may prove to be extremely elusive. The most recent statistics reveal the failure rate for same-sex marriages is slightly lower than that of opposite-sex marriages.[19] Members of younger same-sex couples may tend to entertain the belief that their relationships will be different—and more enduring—than the relationships of their opposite-sex counterparts. Thus, the optimistic and unsuspecting American same-sex couple who marries in Canada and returns to the United States, or moves from a state that recognizes same-sex marriage to a state that does not, may find the precious bonds of matrimony transformed into shackles that cannot be easily shed.[20]

The scope of this invisible social issue is enormous and growing.

---

17. Sue Horton, *The Next Same-Sex Challenge: Divorce,* L.A. TIMES (July 25, 2008), http://articles.latimes.com/2008/jul/25/local/me-gaydivorce25.

18. Todd Brower, *It's Not Just Shopping, Urban Lofts, and the Lesbian Gay-By Boom: How Sexual Orientation Demographics Can Inform Family Courts,* 17 AM. U.J. GENDER SOC. POL'Y & L. 1, 10 (citing a recent New York Times article profiling young same-sex couples who overwhelmingly believed that "divorce statistics only apply to others").

19. *See* M.V. Lee Badgett & Jody L. Herman, *Patterns of Relationship Recognition by Same-Sex Couples in the United States;* THE WILLIAMS INST. 1 (2011), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Herman-Marriage-Dissolution-Nov-2011.pdf. Same-sex marriage has not been legalized long enough to establish comprehensive divorce statistics, but the current numbers do not reflect a wide disparity with opposite-sex marriage. *Id*. ("In the states with available data, dissolution rates for same-sex couples are slightly lower on average than divorce rates of different-sex couples"); *cf*. A study on same-sex marriages in Norway and Sweden found that divorce rates were higher in same-sex marriages than in opposite-sex marriages Gunnar Andersson et al., *The Demographics of Same-Sex Marriages in Norway and Sweden*, 43 DEMOGRAPHY 79 (2006), *available at* http://www.demogr.mpg.de/papers/working/wp-2004-018.pdf (finding that divorce rates were higher in same-sex marriages than in opposite-sex marriages); *but see* Marian Jones, *Lessons from a Gay Marriage*: *Despite Stereotypes of Gay Relationships as Short-Lived, Gay Unions Highlight the Keys to Success,* PSYCHOL. TODAY *(*May 1, 1997*)*, http://www.psychologytoday.com/articles/199705/lessons-gay-marriage ("In Denmark, where homosexuals have been legally able to get [married and divorced] since 1989, it's a modern reality . . . the divorce rate among Danish homosexuals is only 17 percent, compared to 46 percent for heterosexuals.").

20. *See* Chambers v. Ormiston, 935 A.2d 956 (R.I. 2007).

In 2010, The United States Census Bureau estimated that approximately 594,000 unmarried same-sex couples reside in the country and 115,000 of those couples are raising children.[21] Since an openly gay same-sex couple is a fairly recent phenomenon, younger lesbians' and gay men's expectations is that divorce is an issue more for the heterosexual community than for the gay community.[22] This article explores the nuances of the same-sex divorce issue and examines a selection of the disparate judicial responses. It also attempts to identify a pattern that makes sense of those decisions, particularly as they affect the interests of children.

II. FACTORS AFFECTING RECOGNITION OF SAME-SEX MARRIAGE

It is beyond cavil that in order to obtain a divorce, a couple must first have entered into a valid marriage.[23] In the United States, variations in the legal landscape of individual states may affect a state's response to a couple's efforts to enter into—and, therefore, dissolve—a same-sex marriage. Just over half of all states have constitutional amendments limiting marriage to the legal union of one man and one woman.[24] For many years, these amendments withstood

---

21. Daphne Lofquist, *Same-Sex Couple Households*, *American Community Survey Briefs*, U.S. CENSUS BUREAU, Sept. 2011, at 2, *available at* http://www.census.gov/prod/2011pubs/acsbr10-03.pdf.

22. *See, e.g,* Erica C. Barnett et al., *Four Weddings and a Lawsuit*, THE STRANGER (Seattle, WA.), Mar. 11, 2004, http://www.thestranger.com/seattle/four-weddings-and-a-lawsuit/content?oid=17393 (tracking the wedding plans of some young gay men and chronicling their belief that they will defy societal odds and live happily ever after).

23. *See, e.g.,* Gromeeko v. Gromeeko, 110 Cal. App. 2d 117, 123 (Cal. Dist. Ct. App. 1952); Roseberry v. Roseberry, 17 Ga. 139, 140 (Ga. 1855); Franklin v. Franklin, 365 Mo. 442, 445 (Mo. 1955); Fagan v. Fagan, 11 N.Y.S. 748, 753 (N.Y. Gen. Term 1890).

24. The thirty states that have "constitutionalized" a prohibition against same-sex marriage are Alabama, Alaska, Arizona**,** Arkansas, Colorado, Florida, Georgia, Hawai'i**,** Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin. *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. OF ST. LEGISLATURES (May 3, 2013), http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx. California's constitutional ban on same sex marriage has been ruled unconstitutional in the federal courts, *Perry v. Brown,* 671 F.3d 1052 (9th Cir. 2012), and is currently before the United States Supreme Court, *United States v. Windsor*, No. 12-307 (U.S. argued Mar. 27, 2013).

judicial challenge.[25] By enshrining a ban on same-sex marriage in the state constitution, citizens in these states hoped to provide a nearly complete barrier to a same-sex couple seeking a divorce after entering into a valid marriage elsewhere.[26] In addition to limiting those who may marry under state law through state constitutional amendments, most states also have legislation that seeks to impose the same restrictions on marriage.[27] These laws, called Defense of Marriage Acts (DOMA), have not proved to be a complete barrier to gay marriage and hence they are not a clear indication of whether a validly married same-sex couple from another jurisdiction would be granted a divorce in a "DOMA state."[28] Additionally, the executive branches of some states have promulgated rules and regulations that confer rights on homosexuals or on same-sex couples; similarly, some states have enacted legislation protecting homosexuals in various contexts unrelated to marriage. These administrative regulations and statutes may play a factor in the outcome of a same-sex divorce action, even though they do not mention same-sex marriage at all, and even if the state does not permit same-sex marriage as a matter of affirmative law. Finally, an important additional variable in a given state's law that may affect the outcome of a same-sex divorce petition is whether that state's courts have been confronted with legal issues involving the children of same-sex parents, or the rights of same-sex parents as *parents*.

A. State Constitutional Amendments: The (Almost) Airtight Lockdown

Originally, state constitutional amendments banning same-sex marriage appeared absolutely airtight. For example, in *O'Darling v.*

---

25. *But cf.* Perry v. Brown, 671 F.3d 1052, 1063 (9th Cir. 2012) (finding unconstitutional a California state constitutional amendment barring marriages between same-sex couples).

26. *See, e.g.*, O'Darling v. O'Darling, 188 P.3d 137 (Okla. 2008). In *O'Darling*, a judge entered a divorce decree for a same-sex couple who had entered into a valid marriage elsewhere because he did not realize they were a same-sex couple. Upon discovering the true situation, he vacated the decree and openly reprimanded the lawyer for violating the Oklahoma Rules of Professional Responsibility.

27. *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. OF ST. LEGISLATURES (June 2012), http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx.

28. *See* Christiansen v. Christiansen, 253 P.3d 153 (Wyo. 2011); Port v. Cowan, 44 A.3d 970 (Md. 2012).

O'Darling, a same-sex couple "purportedly married in Toronto, Canada" sought a divorce in an Oklahoma court.[29] The Oklahoma state constitution includes an amendment limiting marriage to the union of one man and one woman.[30] Only one of the two women seeking a divorce appeared in court, no one mentioned that the marriage was between two women, and the caption on the case did not indicate the parties' genders.[31] The trial court granted the petition for dissolution of marriage.[32] Days later, a reporter contacted the judge to inquire about the purported divorce of a same-sex couple; the judge promptly rescinded the divorce decree.[33] When the parties appealed to the Oklahoma Supreme Court, the court affirmed rescission of the decree. It then sanctioned the lawyer for the woman who had appeared in court.[34] The court averred that the lawyer had perpetrated a fraud on the court by failing to mention the couple's gender. In light of Oklahoma's constitutional ban on same-sex marriage, the lawyer had "knowingly . . . fail[ed] to disclose legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client."[35]

Indeed, constitutional amendments are still steamrolling across the country. A recently proposed amendment to Minnesota's Constitution read: "Only a union of one man and one woman shall be valid or recognized in Minnesota."[36] Michigan voters amended their

---

29. O'Darling, 188 P.3d 137, at 138.

30. OKLA. CONST. art. II, §35.

31. O'Darling, 188 P.3d at 138.

32. *Id*.

33. *Id*.

34. *Id*. at 140 (finding that the women were entitled to personal notice and should be given a hearing on the dismissal).

35. OKLA. STAT. ANN. tit. 5, §1 (West); *cf*. Christiansen v. Christiansen, 253 P.3d 153 (Wyo. 2011) (The court found that persons subject to a valid foreign same-sex marriage may be party to divorce proceedings without violating Wyoming statutes against same-sex marriage. Unlike Oklahoma, Wyoming does not have a constitutional amendment forbidding same-sex marriages.).

36. *S.F. No. 1308*, MINN. SENATE, *available at* https://www.revisor.mn.gov/bin/bldbill.php?bill=S1308.1.html&session=ls87; *cf*. MINN. STAT. ANN. § 517.03 (West 2009) (currently prohibiting marriage between persons of the same-sex). This proposed amendment was denied by the Minnesota citizenry during the 2012 Presidential Election. *See Voters in Minnesota Reject Discriminatory Amendment Denying Marriage for Same-Sex Couples,* ACLU (Nov. 7, 2012), http://www.aclu.org/lgbt-rights/voters-minnesota-reject-discriminatory-amendment-denying-marriage-same-sex-couples.

constitution in 2004 with what might be judged as a mean-spirited condemnation of same-sex marriage:

> To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.[37]

In North Carolina, voters supplemented the state's statutory prohibition on same-sex marriage with a constitutional amendment, effective May 9, 2012. The amendment became so publicized and vehemently debated that President Barack Obama was driven to weigh in on same-sex marriage.[38] Furthermore, North Carolina's attempt to limit marriage to the union of one man and one woman may give rise to unintended—and negative—consequences for a diverse cross-section of the state's citizens. The amendment is particularly broad stating: "Marriage between a man and a woman is the only domestic legal union that shall be valid or recognized in this state."[39] The untested term "domestic legal union" may invalidate rights of the 86,366 cohabitating unmarried couples in North Carolina, ninety-one percent of whom are heterosexual.[40] Thus, it may prevent enforcement of custody and visitation orders, and potentially eliminate the health benefits some municipalities currently offer to same-sex partners and their children.

In 2008, the California Supreme Court concluded that the state's DOMA, passed in 1996, unconstitutionally limited marriage to opposite-sex couples. The law resembled the federal DOMA,[41] granddaddy of them all, and both were created as a panicked reaction

---

37. MICH. CONST. art. I, § 25 (West, Westlaw through Nov. 2010 amendments).

38. Josh Earnest, *President Obama Supports Same-Sex Marriage*, THE WHITE HOUSE BLOG (May 10, 2012, 7:31 PM), http://www.whitehouse.gov/blog/2012/05/10/obama-supports-same-sex-marriage; Jackie Calmes & Peter Baker, *Obama Says Same-Sex Marriage Should Be Legal*, N.Y. TIMES (May 9, 2012), http://www.nytimes.com/2012/05/10/us/politics/obama-says-same-sex-marriage-should-be-legal.html?pagewanted=all.

39. N.C. CONST. art. XIV, § 6.

40. Maxine Eichner et al., *Potential Legal Impact of the Proposed Same-Sex Marriage Amendment to the North Carolina Constitution* (June 6, 2011) (unpublished manuscript) (on file with the ACLU of North Carolina), *available at* http://www.acluofnc.org/files/Final%20Marriage%20Amendment%20Report%202.pdf.

41. The federal DOMA was signed into law by President Clinton in 1997. Defense of Marriage Act, Pub. L. No. 104-199 (Sept. 21, 1996).

to the possibility of Hawaii recognizing same-sex marriage.[42] Both DOMAs had two effects. First, they provided for purposes of state law, the word "marriage" encompasses only legal unions between one man and one woman. Additionally, a 'spouse' is only a person of the opposite sex who is either a husband or a wife.[43] A second substantive effect, relieved states from recognizing same-sex marriages solemnized in a different jurisdiction.

In the wake of this decision,[44] opponents of same-sex marriage rallied to get Proposition 8 on the ballot in California's next statewide election. Proposition 8 provided that it would: "ELIMINATE[] RIGHT OF SAME-SEX COUPLES TO MARRY. INITIATIVE CONSTITUTIONAL AMENDMENT."[45] It passed by a fifty-two to forty-eight percent margin,[46] thus adding the sentence: "Only marriage between a man and a woman is valid or recognized in California."[47] Opponents of the newly enacted constitutional amendment argued that it was invalid—such a radical change to the California constitution could not be accomplished through the amendment process and required, instead a considerably more restrictive legislative process.[48]

The California Supreme Court confronted the newly amended

---

42. Massachusetts v. U.S. Dep't of Health and Human Servs., Nos. 10–2204, 10–2207, 10–2214.
2012 WL 1948017 (1st Cir. May 31, 2012).

43. *See* 1 U.S.C. §7.

44. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

45. *General Election Official Voter Information Guide: Prop 8 Official Title and Summary*, ATT'Y GEN. OF CAL. (Nov. 4, 2008),
http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop8-title-sum.htm.

46. CAL. SEC'Y OF STATE, STATEMENT OF VOTE: NOVEMBER 4, 2008, GENERAL ELECTION, at 7 (Nov. 4, 2008),
www.sos.ca.gov/elections/sov/2008-general/sov_complete.pdf.

47. CAL. CONST. art. 1 §7.5.

48. Bruce E. Cain, Constitutional Revision in California: The Triumph of Amendment Over Revision, *available at* camlaw.rutgers.edu/statecon/cain.pdf. The challenge asked whether the initiative represented an amendment or a revision of the state Constitution. It was presented to voters as an amendment, which can change the Constitution through the initiative process with a simple-majority vote of the people. A revision, however, would need to be placed on the ballot with a two-thirds vote of the Legislature. The only other potential avenue for a revision would be for it to arise during a state constitutional convention. The distinction, in simple terms, is between the tinkering of the constitution (amendment) and an overhaul of its fundamental underpinnings (revision). *Rights in the Balance,* S.F. CHRONICLE: SFGATE (Mar. 5, 2009, 4:00 AM),
http://www.sfgate.com/opinion/article/Rights-in-the-balance-3169292.php.

state constitution in an opinion that, at least on the surface, appeared to wholeheartedly defend traditional marriage.[49] By affirming the validity of the amendment, the decision demonstrated the effectiveness of constitutional amendments as tools for preventing same-sex marriage.[50] The court stressed, however, the limitations inherent in its opinion. In California, the word "marriage" could now refer only to the union of one man and one woman.[51] The other conclusions the court had reached in rejecting the state DOMA, however remained perfectly valid.[52] Thus, although their relationships could not be called "marriage," committed same-sex couples would continue to fall within "the constitutionally protected right of intimate association"[53] and sexual orientation would still be considered a suspect classification; any governmental intrusions would still have to withstand the strictest scrutiny.[54] The power of a constitutional amendment to ban same-sex marriage appeared weakened already.

Thus, the California Supreme Court delivered the opponents of gay marriage an incomplete victory, and it was a temporary victory at that. Less than a year after the California Supreme Court's ruling, two same-sex couples filed suit in the Federal District Court for the Northern District of California, alleging a violation of their due process and equal protection rights guaranteed by the federal constitution. In a meticulous decision, replete with findings of fact, the court ruled that Proposition 8 was unconstitutional under the Fourteenth Amendment to the United States Constitution on both due process and equal protection grounds. First, Proposition 8 denied same-sex couples the fundamental right to marry. Second, Proposition 8 impermissibly created a distinction between opposite-sex couples and same-sex couples with no legally cognizable justification. Although the appropriate public officials refused to appeal, and the California Attorney General simply agreed with the District Court's ruling, the original proponents of Proposition 8 were granted standing to appeal.[55] The case thus made its

---

49. *See* ProtectMarriage.com. *Traditional Marriage Upheld in California,* AM. CENTER FOR L. & JUST. (May 29, 2009),
http://media.aclj.org/pdf/traditionalmarriageupheld_ca_052909.pdf.

50. Strauss v. Horton, 207 P.3d 48 (Cal. 2009).

51. Maura Dolan, *California High Court Upholds Prop. 8*, L.A. TIMES (May 27, 2009), http://articles.latimes.com/2009/may/27/local/me-gay-marriage27.

52. *Id.*

53. *In re* Marriage Cases, 183 P.3d 384, 423 (Cal. 2008).

54. *Id.* at 401.

55. Perry v. Brown, 671 F.3d 1052, 1096 (9th Cir. 2012).

way to the Ninth Circuit, less than a year after the federal district court's decision. The efficacy of constitutional amendments as a means of banning gay marriage and gay divorce now seemed to be hanging by a mere thread.

A divided panel of the Ninth Circuit severed that thread in a surgical strike. The court deftly sidestepped the federal district court's detailed articulation of the fundamental right to marry the partner of one's choice, and the equal protection violation inherent in Proposition 8. The panel held that Proposition 8 singled out same-sex couples for unequal treatment "by *taking away* from them alone the right to marry." [56] The court concluded that the Equal Protection Clause protects minority groups from government action that takes away an existing right.[57] In other words, in a state that had never recognized same-sex marriage, a constitutional amendment might constitute a formidable barrier. However, if same-sex marriage had been recognized, all bets are off. And it remains to be seen what level of "recognition" will suffice.[58]

B. "Defense of Marriage" Legislation: The Fabulous Facade

Despite their enormous popularity,[59] states' defense of marriage laws have consistently proved vulnerable to legal challenges based on the right to privacy enshrined in each state constitution. California state law provides a particularly dramatic example of this phenomenon. In 2000, California voters overwhelming approved a defense of marriage law[60] placed on the ballot as Proposition 22.[61] Proposition 22 amended the state statutory scheme governing marriage to define marriage as "a

---

56. *Id*. at 1077.

57. *Id*. at 1096.

58. Proponents of Proposition 8, currently seeking certiorari from the Supreme Court, conversely assert the Ninth Circuit's ruling was broader than represented, since it generally found no rational purpose to a law limiting marriage to opposite-sex couples. *See* Bob Egelko, *Prop. 8 Backers Seek Top Court's Support,* S.F. CHRONICLE: SFGATE (July 31, 2012, 10:43 PM), http://www.sfgate.com/nation/article/Prop-8-backers-seek-top-court-s-support-3751623.php; *see also* Petition for Writ of Certiorari, *Hollingsworth v. Perry* at 6, 25-6 (July 31, 2012), *available at* http://www.adfmedia.org/files/BrownCertPetition.pdf.

59. *See Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws, supra* note 29.

60. That year, 4,618,673 votes were cast for Proposition 22 versus 2,909,370 against. www.census.gov/census2000/states/ca.html.

61. *Prop 22 Official Title and Summary*, ATT'Y GEN. OF CAL. (Mar. 7, 2000), http://primary2000.sos.ca.gov/VoterGuide/Propositions/22.htm.

personal relation arising out of a civil contract between a man and a woman to which the consent of the parties capable of making that contract is necessary."[62] Eight years later, the California Supreme Court held that the California marriage statute, as amended by Proposition 22, violated both the substantive and equal protection provisions of the state constitution.[63] Sexual orientation, it held, was a protected classification, and a law that used sexual orientation, as a means of classification or denied rights based on sexual orientation could not withstand constitutional scrutiny.[64] Same-sex marriage became the law of the land, DOMA or no DOMA—at least until voters inserted identical language into the state constitution less than a year later.[65]

Similarly, in Iowa, a district court judge ruled that the state's DOMA was unconstitutional.[66] Although the judge suspended his own decision less than twenty-four hours after issuing it, two enterprising college students acted quickly, obtained a marriage license, and, at least for a short time, had the distinction of being Iowa's first—and only—same-sex couple with a valid Iowan marriage license.[67] A unanimous Iowa Supreme Court laid the matter to rest four months later in a decision holding that the state statute limiting marriage to one man and one woman violated the state constitution.[68] Devotees of the state DOMA might well heed the Court's explanation of the responsibilities of the three branches of government. While the legislature might enact a statute consistent with popular opinion, the executive branch would then enforce it, but that the courts must "protect the supremacy of the constitution"[69] and, when necessary, "withdraw certain subjects from the vicissitudes of political controversy."[70] This court applied an intermediate level of scrutiny to

62. CAL. FAM. CODE § 300 (Deering 2012).

63. *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

64. *Id*. at 423.

65. CAL. CONST. art. I, § 7.5.

66. Lynda Waddington, *Iowa Becomes A Battleground In The Same-Sex Marriage Wars*, THE IOWA INDEP. (Dec. 4, 2008, 1:48 PM), http://iowaindependent.com/9241/iowa-becomes-a-battleground-in-the-same-sex-marriage-wars.

67. *Id*.

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

69. *Id*. at 875.

70. *Id*. Those who read the opinion and cheered for Iowa were somewhat taken aback when Iowans voted out the three justices who were up for reelection "post

conclude that the state marriage statute violated equal protection.[71]

Later, the whole concept of a DOMA received a body blow in a new venue—the First Circuit Court of Appeals.[72] The First Circuit initially determined that it needed no new category of suspect classification to test the constitutionality of the federal DOMA.[73] Instead, it reviewed the specific nature of the federal DOMA and the discrepancies it created, the burdens it imposed, and finally, "the infirmities of the justifications offered."[74] Although the court noted that the federal government must determine who is married to whom in various specific circumstances,[75] setting the general parameters of a valid marriage is a task entrusted to the states under principles of federalism.[76] Since the federal DOMA imposed a sweeping and unprecedented restriction on a matter traditionally within state control, it required special scrutiny.[77]

Three government interests were advanced in support of the challenged section of the federal DOMA.[78] First, it was necessary to "defend[] and nurtur[e][] the institution of traditional heterosexual marriage. Second, it would "defend[] traditional notions of morality."[79]

---

opinion." A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench,* N.Y. TIMES (Nov. 3, 2010), http://www.nytimes.com/2010/11/04/us/politics/04judges.html?_r=0.

71. *Id*. at 896. It was unnecessary, the court observed, to consider whether stricter scrutiny was appropriate, since the statute could not be justified at even an intermediate level. *Id*.

72. In the underlying case, the District Court found that *Gill v. Office of Pers. Mgmt*., violated the Equal Protection clause. Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 397 (D. Mass. 2010). In a companion case, the District Court concluded that section 3 of 1 U.S.C. §7 violated the Tenth Amendment and the Spending Clause. Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010), *aff'd*, 682 F.3d 1 (1st Cir. 2012).

73. Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d at 8.

74. *Id*. at 10.

75. *Id*. at 12. Medical benefits for federal workers, for example, would require the federal government to have some means of defining marriage.

76. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (quoting *In re* Burris, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child belongs to the laws of the states and not to the laws of the United States.").

77. Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d at 13; *But see* Windsor v. United States, 699 F.3d 169 (2012).

78. A fourth justification was included in the record but was inapplicable to the court's analysis. 682 F.3d at 14 (referencing "protecting state sovereignty and democratic self-governance" as a fourth reason that was included in the House Committee Report).

79. *Id*.

Third, it would "preserv[e][] scarce government resources."[80] Turning to what it denominated as the most "concrete" of the rationales, the court noted that it might or might not be true, but in any event the First Circuit created an equal protection problem by singling out a disfavored minority.[81] The court made swift work of the final two rationales, noting, with a touch of impatience, that DOMA did not increase any benefit to opposite-sex couples and that moral disapproval was insufficient justification to uphold the law.[82] The DOMA as a barrier to same-sex marriage, and therefore same-sex divorce, had grounded on rocky shoals indeed.

C. Legislation, Rules, and Regulations: The Roundabout Route to Recognition of Same-Sex Relationships

DOMA legislation may have proved to be an ineffective weapon in the culture wars,[83] but other legislation, unrelated to marriage or divorce, has occasionally been a key ingredient in decisions recognizing same-sex marriage or same-sex divorce. For example, although Iowa's DOMA had been in force for over a decade,[84] prior to the law's inception, Iowa's General Assembly had taken steps to protect homosexual Iowans. The Assembly had defined hate crimes to include offenses committed because of the victim's sexual orientation,[85] and had taken steps to define and prohibit schoolyard bullying that was based on a perception of sexual orientation.[86] Iowa laws relating to housing,[87] employment,[88] and public accommoda-

80. H.R. REP. NO. 104-664 at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916.

81. Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d at 14.

82. The brevity of the dismissal of these last two rationales will resonate with anyone who has been in the trenches – judicial or otherwise – for the last few decades. They seem be very tired old saws indeed.

83. The phrase "culture war" may be related to the German term "Kulturkamp" ("culture struggle" or "struggle between cultures;" literally "battle of cultures."). *See* Perry v. Brown, 671 F.3d 1052, 1095 (9th Cir. 2012) (finding Prop. 8 did not result from a legitimate "Kulturkampf" as it operates with no purpose but to impose the majority's private disapproval upon the homosexual community).

84. The Iowa legislature amended the marriage laws in 1998 to provide "[o]nly a marriage between a male and female is valid." Varnum v. Brien, 763 N.W.2d at 873.

85. *Id*. at 889-90.

86. *Id*.

87. *Id*. at 891, citing IOWA CODE 216.8.

88. *Id*. citing IOWA CODE 216.6.

tions,[89] among many others, had also been enacted to protect homosexual Iowans. In its 2009 decision invalidating the state DOMA and affirmatively recognizing a right to same-sex marriage, the Iowa court used these types of legislation in two ways. First, it noted that the legislation was evidence that Iowans realized it was necessary to "remedy historical sexual-orientation-based discrimination"[90] and protect homosexual Iowans from baseless prejudice. Second, the court found that, taken as a whole, Iowa's legislative scheme demonstrated that sexual orientation is not considered an impediment to participating fully in society.[91]

In *Port v. Cowan*,[92] the Maryland Supreme Court parsed even more closely the diverse threads of its state's statutes in concluding that although the same-sex couple could not have married in Maryland, the couple could be granted a divorce. The starting point for the court was to acknowledge Maryland's own DOMA[93] defining marriage as between a man and a woman, and the fact that it had withstood a constitutional challenge.[94] This was not, however, the linchpin of the court's conclusion. The court noted that the Maryland legislature had passed a long list of enactments protecting gay people and same-sex couples from discrimination because of sexual orientation in employment,[95] health care,[96] estate planning,[97] and other areas. This extensive catalogue of enactments convinced the court that recognizing a same-sex marriage for a limited purpose was actually consistent with Maryland public policy.[98] Thus, the court ruled that the couple's application for divorce did not even implicate Maryland's DOMA. Instead, it held that, under a theory of comity,[99] a valid, same-sex marriage had to be recognized for the limited purpose of divorce.

Similarly, New York state amassed a considerable body of executive branch pronouncements and statutory law protecting its homosexual citizens in a variety of contexts. In 2009, although same-

89. *Id*. citing IOWA CODE 216.7.
90. *Id*. at 890.
91. *Id*.
92. A.3d 970 (Md. 2012).
93. MD. CODE ANN., Fam. Law § 2-201.
94. Conaway v. Deane, 932 A.2d 571, 635 (Md. 2007).
95. Md. Code Ann. State Gov't §2-606.
96. *See, e.g*., Md. Code Ann., Health-Gen §6-101.
97. *See, e.g*., Md. Code Ann., Tax-Prop §§12-101(e-2).
98. Port v. Cowan, A.3d at 980.
99. *Id*. at 982.

sex marriages could not yet be solemnized under New York law,[100] New York courts had granted same-sex divorces, and had explicitly recognized the validity of the underlying marriage, in part because to do so was consistent with this body of protective memoranda, opinion letters, and administrative rulings. Furthermore, the Office of the State Attorney General issued an opinion acknowledging that although a same-sex marriage could not be solemnized under New York law, parties to valid same-sex marriages must be treated as spouses for purposes of state law.[101] New York City reached the same conclusion with respect to certain benefits pursuant to its pension system.[102] Additionally, in 2007, New York's Civil Service Department issued a memorandum stating it would recognize valid out-of-state same-sex marriages for a variety of department-administered benefit programs, such as the state health insurance program.

The persuasive value of legislation protecting same-sex couples, as evidence of favorable public policy, is uniquely shown by comparing a 1991 New York case concerning a same-sex partner's visitation rights, and a 2007 New York same-sex divorce case also concerning visitation rights. In 1991, when adjudicating the *Matter of Allison D. v. Virginia M.*,[103] the court refused to award visitation rights to a non-biological same-sex partner, despite the couple's planning for the conception and birth of the child, as well as their agreement to share all rights and responsibilities of child-rearing.[104] A blistering, often cited dissent noted that the purpose of the visitation law was to promote "the welfare and happiness of the child," not to create restrictions not found in the statute itself.[105]

In 2007, with a backdrop of same-sex couples receiving newfound legal recognition, another same-sex couple took their marital dispute to New York Family Court.[106] One member of the couple, Beth R., sought a divorce, including a custody determination for the minor children born to her partner. The partner, Donna M., argued that the couple's marriage, entered into in Canada, was not valid in New York,

---

100. Beth R. v. Donna M., 853 N.Y.S.2d 501, 505 (Sup. Ct. 2008).

101. *Id. at* 505 (Sup. Ct. 2008) (citing 2004 N.Y. Op. (Inf.) Att'y Gen. 1, at 34-5).

102. *Id.* at 506 (citing Letter of Corporation Counsel [*5] Michael A. Cardozo to Hon. Michael R. Bloomberg, dated Nov. 17, 2004.).

103. 572 N.E.2d 27 (N.Y. 1991).

104. *Id.* at 655.

105. Beth R., 853 N.Y.S.2d at 506-07 (quoting Alison D., 77 N.Y.2d 651, 659 (N.Y. 1991) (Kaye, C.J., dissenting)).

106. *Id.* at 503-04.

since they could not have entered into a valid marriage under New York law. With no marriage there could be no divorce, and Beth would be a legal stranger to the minor children. The New York Family Court concluded that the marriage was valid.[107] The bulk of the opinion addressed the formation of the familial relationship and the parties' relationships to the children. The court bolstered its decision that the marriage must be considered valid, however, by noting that the protections lavished on same-sex couples by state law militate against a ruling that the marriage is void,[108] and inveighs against the constriction resulting from *Alison D*.[109]

So, finally, after crafting eloquent constructs to protect the children of gay couples, espousing gay-friendly policies, and creating remedies against discrimination, the inevitable happened. New York reached a tipping point. The New York Legislature passed a bill granting same-sex couples the right to marry, effective July 24, 2011.[110]

D. And (In Some States) Little Children Shall Lead Them

In New York, the impetus to protect children played a significant role; indeed, this aspect of same-sex relationships may be the most powerful factor causing any state to recognize same-sex marriage and same-sex divorce. In its landmark decision recognizing same-sex marriage, for example, the Supreme Judicial Court of Massachusetts emphasized the role marriage has in protecting and nurturing children.[111] The *Goodridge* complaint paints detailed pictures of home life within same-sex families: children who play violin, take karate lessons, and excel in sports.[112] The majority also cited precedent establishing that the best interests of a child have no relationship to the sexual orientation of the parent.[113] The majority noted, further, that the state affirmatively facilitates bringing children into a family unit

107. *Id*. at 505. Other aspects of this opinion are discussed in Section D, *infra* p. 79.

108. *Id*. at 505-06.

109. *Id*. at 507.

110. N.Y. DOM. REL. LAW § 13 (McKinney 2012) ("No application for a marriage license shall be denied on the ground that the parties are of the same, or a different, sex.").

111. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

112. Verified Complaint at 6:65, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (No. 01-1647 A).

113. Goodridge, 798 N.E.2d at 963 (noting that the state readily conceded that same-sex parents may be "excellent parents.").

regardless of whether the intended parents are heterosexual, homosexual or bisexual but that the task of parenting is made infinitely more difficult by preventing some parents from marrying.[114] In its concurring opinion, the court takes a conciliatory tone when describing same-sex couples as an active and productive part of their communities. In short, the decision to allow valid, same-sex marriages, and so to allow same-sex divorce, was intimately connected to the interests of children.

Although the Rhode Island Supreme Court was not required to discuss same-sex marriage in its decision *Rubano v. DiCenzo*,[115] it similarly used the case to demonstrate the same overarching concern for children regardless of the parents' gender. *Rubano* involved a lesbian couple who had arranged for a child to be born through artificial insemination.[116] The couple lived together "as domestic partners in the same household"[117] until the child, a boy, was four. At that point, differences arose between the women and they separated.[118] The boy continued to live with Ms. DiCenzo, his biological mother, and had informal visitation with Ms. Rubano, his "heart mom."[119] After this informal arrangement broke down, Ms. Rubano filed a miscellaneous petition in Rhode Island Family Court to establish *de facto* parental status and visitation.[120] The parties settled the matter prior to trial through a "private agreement," which the Chief Justice of the Family Court reviewed, approved, and entered as an order of the court.[121] The agreement included provisions for visitation to promote "the best interests of the minor child,"[122] as an agreement might have in attempting to resolve a dispute between opposite-sex parents. It was only after this agreement broke down that anyone thought to contest the Family Court's jurisdiction by questioning whether both women could qualify as one child's parents.[123] At that point, three questions were certified to the Rhode Island Supreme Court, all asking, in

114. *Id.*
115. 759 A.2d 959 (R.I. 2000).
116. *Id.* at 961.
117. *Id.*
118. *Id.*
119. *Id.* at 971.
120. *Id.* at 962.
121. *Id.*; *see also id.* at n.2 (explaining the legal significance of a consent order or private agreement under Rhode Island law).
122. *Id.* at 962.
123. *Id.* at 963.

essence, the same question: did Ms. Rubano qualify as a parent?[124]

The Rhode Island Supreme Court's resolution appears to validate a same-sex configuration of family life.[125] The court held that Ms. Rubano had a statutory right[126] to ask the Family Court to determine "the existence or nonexistence" of a mother and child relationship between herself and the child.[127] The court noted that any "interested party" could bring an action seeking such a determination under the Uniform Law on Paternity.[128] The terms of this law specified that provisions applicable to the father and child relationship would apply to the mother and child relationship "insofar as practicable."[129] Further, the court noted, Rhode Island case law had established that a putative parent could seek redress under this provision without alleging a

---

124. The questions were:

> Question I: Does a child, biological mother, and same sex partner, who have been involved in a committed relationship constitute a 'family relationship' within the meaning of G.L. 8-10-3, such that the Family Court has jurisdiction to entertain a miscellaneous petition for visitation by the former same sex partner when the same sex partner is no longer engaged in the committed relationship? *Id*. at 963;

Question II: "If the answer to the above question is in the negative, does such a conclusion violate Article I, Section 5 of the Rhode Island Constitution?" *Id*. at 965; Question III: "If the answer to question I is in the affirmative, then does a non-biological partner, who has been a same sex partner with a biological mother have standing to petition the Rhode Island Family Court for visitation pursuant to G.L. 15-5-1 et al. [sic]?" *Id*. at 976-77.

125. The court found it unnecessary to rule directly on the first question, which asked whether a child, mother and same-sex partner constituted a "family relationship" for purposes of family court jurisdiction. *Id*. at 965. The court noted that the key term for purposes of determining jurisdiction was not simply "family relationship," but rather was "'equitable matters arising out of the family relationship, *wherein jurisdiction is acquired by the court by the filing of [a] petition[] for divorce"' or related action*." *Id*. at 964. Since Rubano and DiCenzo had obviously filed no such petition, the first needed no answer. The second certified question was linked to the first. If the court concluded that the family court did not have jurisdiction by virtue of a family relationship, did this conclusion violate the state constitutional guarantee that every person "hav[e] recourse to the laws . . . for all injuries or wrongs . . .?" *Id*. at 966. The court concluded that the constitutional guarantee was satisfied because Ms. Rubano actually had several possible remedies for the "injury or wrong" of being denied visitation. *Id*.

126. *See* R.I. GEN. LAWS ANN. §15-8-26 (West 2012).

127. Rubano, 759 A.2d at 966.

128. *Id*. (Rhode Island adopted a hybrid version of the Uniform Law on Paternity (citing P.L. 1979, ch. 185 § 2)).

129. *Id*. (quoting R.I. GEN. LAWS § 15-8-26).

biological relationship with the child in question.[130] Thus, Ms. Rubano's "close involvement with the child's conception,"[131] her participation in his upbringing, and the parties' alleged visitation agreement, taken together, constituted a parent-like relationship.[132] This parent-like relationship gave Ms. Rubano standing to bring a parental rights claim.[133]

The court identified another remedy available to Ms. Rubano arising out of the Rhode Island Uniform Law on Paternity.[134] This remedy further emphasized its willingness to recognize and support same-sex family relationships. Although Ms. Rubano was not a biological father, she was "involved" in the joint decision with DiCenzo to have DiCenzo conceive a child through artificial insemination.[135] She also assumed primary financial responsibility for the procedure and was included on the child's birth announcement and baptismal certificate.[136] The court explained that Ms. Rubano had a right to seek a visitation order in the Family Court pursuant to its jurisdiction over "those matters relating to adults who shall be involved with paternity of children born out of wedlock."[137] The court conceded that the term "paternity" ordinarily suggests "fatherhood," but noted that the legislature has specifically rejected such a rigid limitation.[138] Rhode Island General Laws § 43-3-3 provides that "[e]very word importing the masculine gender only may be construed to extend to and to include females as well as males."[139] Thus, if Ms. Rubano's basic factual allegations proved true, she would have been able to establish that she had been "'involved with [the] paternity of this child born out of wedlock"[140] and thus could qualify as a *de facto* parent, entitled to visitation.[141]

---

130. *Id*. at 967 (citing Pettinato v. Pettinato, 582 A.2d 909 (R.I. 1990).

131. *Id*.

132. *Id*.

133. *Id*.

134. *Id*. at 970.

135. *Id*. at 971.

136. *Id*.

137. *Id*. (citing R.I. GEN. LAWS § 8-10-3(a) (West 1996)).

138. *Id*. at 970 n.13.

139. *Id*. (citing R.I. GEN. LAWS §43-3-3 (1956)).

140. *Id*. at 971 (noting that the Family Court thus had jurisdiction pursuant to the jurisdictional provision of § 8-10-3).

141. *Id*. at 972 (noting that Rubano was also entitled to seek a remedy in the superior court pursuant to its general equitable powers, but that the superior court would have

The *Rubano* court further supported this position by noting that the idea that parental rights could exist in the absence of either adoption or the traditional biological relationship found support in other authorities.[142] In *Troxel v. Granville*,[143] the United States Supreme Court affirmed the principle that a child's parent has a fundamental right to make decisions regarding visitation. The *Rubano* court noted, however, that *Troxel* recognized that "persons outside the nuclear family" may become involved in childrearing.[144] Further, the *Rubano* court noted that the High Court's own precedent has described familial rights as relational—arising out of the intimacies of daily association as well as from a blood relationship.[145] Indeed, the High Court has noted the "clear distinction between a mere biological relationship and an actual relationship of parental responsibility."[146] Moreover, the United States Supreme Court considered the relational rights formed through life shared in a common home so crucial that they may sometimes trump the rights of a biological parent whose only relationship with the child is formed outside the family unit.[147]

The *Rubano* court also voiced its agreement with states that have looked beyond biological ties to find that some caregiving adults may become psychological parents. In *V.C. v. M.J.B.*,[148] the New Jersey Supreme Court found that the same-sex partner of a child's biological mother had become a psychological parent with legally cognizable rights, when four criteria were met.[149] First, the legal parent must consent to the relationship between the third party and the child. Second, the third party must have lived with the child.[150] Third, the third party must have performed parental functions for the child "to a significant degree."[151] Fourth, "a parent-child bond must be formed."[152] The *Rubano* court noted that these criteria underlie its own analysis.[153]

---

abstained, as a matter of comity, since suit was initiated in the Family Court).

142. *See id.* at 973-74.

143. 530 U.S. 57 (2000).

144. Rubano, 759 A.2d at 973 (quoting Troxel v. Granville, 530 U.S. 57, 64 (2000)).

145. *Id.*

146. *Id.* (quoting Lehr v. Robertson, 463 U.S. 248, 261 (1983)).

147. *Id.* at 974 (citing Michael H. v. Gerald D., 491 U.S. 110, 123 (1989)).

148. 748 A.2d 539 (N.J. 2000).

149. *Id.* at 551.

150. *Id.*

151. *Id.*

152. *Id.*

153. Rubano v. DiCenzo, 759 A.2d 959, 974 (R.I. 2000). It also commented on the

In its majority opinion, the Court applied provisions of Rhode Island's Uniform Law on Paternity,[154] circumventing the fact that both parents were female by noting that the woman with no biological ties to the child qualified as an "interested party" under the statute.[155] Since it did not have to contend with the political hot button issue of gay marriage, the court felt free to focus on the child's needs, and his relationship with the adults who had raised him—even if it meant equating one woman to a father.[156] By validating familial rights regardless of parental gender, cases like these often lay the groundwork for allowing a same-sex couple to marry—or to divorce.

Seven years after *Rubano*, in *Chambers v. Ormiston*,[157] the Rhode Island Supreme Court concluded that a childless lesbian couple could not use the Rhode Island Family Court to obtain a divorce; a reader reflecting on the thoughtful policy arguments of the *Rubano* majority might be puzzled by this conclusion. On the surface, Rhode Island seemed a promising venue for seeking a same-sex divorce, even though it did not recognize same-sex marriage itself. Rhode Island has no constitutional amendment banning gay marriage and no DOMA. Located as it is next to Massachusetts,[158] it could hardly be a surprise to anyone that same-sex Rhode Island couples were regularly crossing state lines to enter into valid same-sex marriages. A Massachusetts court even opined that Rhode Island couples could be validly married in Massachusetts because Rhode Island law did not include any direct impediments.[159]

Rhode Island's apparently welcoming environment was exactly the opportunity that Ms. Chambers and Ms. Ormiston seized. They were Rhode Island residents who had entered into a valid marriage in

---

connection between these criteria and the principles underlying the American Law Institute's most recent statement on the law of family dissolution. *Id*. at 974-75. The bonds children form with the adults who care for them are important, and must be protected under the limited circumstances all authorities seem to embrace. *Id*. at 975.

154. *Id*. at 966. Rhode Island adopted a hybrid version of the Uniform Law on Paternity. *Id*. (citing P.L. 1979, ch. 185 §2).

155. *Id*.

156. *Id*. at 977.

157. 935 A.2d 956 (R.I. 2007).

157.935 A.2d 956 (R.I. 2007).

158. *Rhode Island*, NATIONALATLAS.GOV, http://www.nationalatlas.gov/printable/images/pdf/reference/pagegen_ri.pdf (last accessed June 12, 2013).

159. Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623, 659 (Mass. 2006).

Massachusetts.[160] When their relationship soured, they sought a divorce in the Rhode Island Family Court.[161] Neither of them contested the validity of the marriage itself;[162] nevertheless, the Chief Judge of the Family Court certified a question to the Rhode Island Supreme Court asking if the Family Court, a statutorily created court of limited jurisdiction, had subject matter jurisdiction to divorce a same-sex couple.[163] A majority on the Rhode Island Supreme Court responded by framing the question as what "marriage" meant in 1961, the year that legislation creating the Family Court was enacted.[164] With the question thus framed, it obviously answered itself—same-sex marriage had certainly not been within the legislature's contemplation in 1961.

The majority provided support for this unremarkable conclusion by first citing dictionary definitions from the early 1960s.[165] All defined "marriage" as the union of one man and one woman.[166] Then, in what might be considered punctilious overkill, the court cited authority for the use of dictionary definitions and distinguished judicial criticism of such an approach. It also pointed out that other statutes used "gendered terms" when referring to different "aspects of marriage."[167] Finally, like a judicial version of "the lady who doth protest too much,"[168] the court noted at some length that its conclusion would be the same even if the statutory authority for the Family Court were ambiguous.[169] Thus, the majority washed its hands of the matter; there was no marriage, so the Family Court could grant no divorce.

The dissenting justices first pointed out that, dictionary definitions notwithstanding, the lesbian couple had gone to the Family Court with a valid marriage license issued by a sister state.[170] The court did not need to recognize same-sex marriages *generally*, the dissent opined, in order to grant a divorce.[171] After all, a bigamous couple or an

160. Chambers, 935 A.2d at 958.
161. *Id*. at 959.
162. *Id*. at 967.
163. *Id*. at 959.
164. *Id*. at 963.
165. *Id*. at 962.
166. *Id*.
167. *Id*. at 962 n.13.
168. WILLIAM SHAKESPEARE, HAMLET, act 3, sc.3 (with apologies to William Shakespeare).
169. Chambers, 935 A.2d at 963.
170. *Id*. at 967.
171. *Id*. at 968.

incestuous couple was entitled to a divorce in the Family Court even though both types of marriages were explicitly rendered void by statute in Rhode Island.[172] Finally, the dissent attempted to move the conversation beyond the majority's narrow focus. The majority's conclusion, it notes, is contrary to the court's own precedent set in *Rubano v. DiCenzo*.[173] *Rubano* extended the definition of a "family" for purposes of family court jurisdiction to the same-sex parents of a child by examining the bond between each adult and the child,[174] rather than by focusing on the adults' gender. Furthermore, the dissenters noted, to rule as the majority had ruled was to leave "people"—the dissent does not say "same-sex couples"—in limbo, "unable to extricate themselves from a legal relationship they no longer find congenial."[175] The missing linchpin seems to be the absence of a child.

This linchpin was present in the 2007 *Beth R.* ruling, which permitted the divorce of a same-sex couple in New York before same-sex marriage was legalized in 2011. Despite the similarities between the legal zeitgeist in Rhode Island and in New York at that point in time, and the similarities between the cases themselves, *Beth R.* was strikingly different from *Chambers* on a pivotal point; *Beth R.* involved not only the legal status of two adults, but the welfare of two young children who regarded both women as their parents. Analogizing to cases involving separate opposite-sex couples, the court noted that a man who has functioned as a parent could not escape parental obligations if he belatedly discovers he is not the biological father of the children in question.[176] Indeed, once the man has assumed a parental role, he is estopped from raising the issue of paternity at all. To allow him to do so would risk pervasive "damage to the child's psyche,"[177] as well as specific emotional and financial harm. Logically, then, if a man who has functioned as a parent cannot use an estoppel theory to *avoid* support obligations, he *should* be able to use estoppel theory to prevent the children's mother from cutting off his relationship with children who have considered him their parent.[178] The same risk

172. Chamber*s*, 935 A.2d at 972.

173. 759 A.2d 959 (R.I. 2000); *see also supra* notes 20-23 and accompanying text.

174. *Id.* at 975.

175. Chambers, 935 A.2d at 973.

176. Beth R. v. Donna M., 853 N.Y.S.2d 501, 507 (N.Y. Sup. Ct. 2008) (comparing Matter of Shondel J. v. Mark D., 7 N.Y.3d 320 (2006)).

177. *Id.*

178. *Id.* at 508.

of harm to the children would result. In short, in defining a parent, the best interests of the child must control. Applying this theory to the case at hand, the court easily concluded that Beth R. has been one of the children's parents, since they were born and will continue to be so after a divorce.[179] The court stressed that this conclusion was consistent with the overarching social purpose of marriage, and so compelled recognition of the couple's marriage and thus same-sex divorce.[180] The need to protect the welfare of children has invoked the highest purpose of marriage and divorce, and moved the conversation well beyond the gender of the adults involved.

A recent New Jersey case underscores the impact precedent focusing on the welfare of children with same-sex parents can have on recognition of same-sex marriage and, by implication, divorce. In *In re Parentage of Robinson,*[181] a child was born to a lesbian couple as a result of artificial insemination. Prior to the child's birth, the couple filed a complaint in an effort to establish joint maternity. The plaintiff couple argued that the benefits of having two legal parents were consistent with the security and best interests of any child.[182] The plaintiffs also pointed out that their position was entirely consistent with New Jersey public policy.[183] In response, the state simply asserted that the New Jersey Artificial Insemination Statute[184] used the word "paternity," which, it claimed, obviously excluded "maternity."[185]

The state's simplistic response was simply fodder for the court. It reviewed thirty years of precedent to pinpoint a "revolution" in the laws determining parentage and then traced key steps in the movement toward the present.[186] The current "dynamic times," the court concluded, required sensitivity to the creation of new and changing family structures.[187] Both women were mothers to the child, declared so in order made *nunc pro tunc*, effective on the date of the child's birth.[188]

---

179. *Id*. at 509.
180. *Id*.
181. *In re* Parentage of Robinson, 890 A.2d 1036 (N.J. 2005).
182. *Id*.
183. *Id*.
184. N.J. STAT. ANN. § 9:17-44 (West 1983).
185. *Id*.
186. *In re* Parentage of Robinson, 890 A.2d at 1039.
187. *Id*. at 1040.
188. *Id*. at 1042.

Seven years later, in *Garden State Equality v. Dow,*[189] New Jersey law took a definitive step down the evolutionary road New York had followed.[190] The court was called upon to address the wider and more nuanced question of the impact of New Jersey's civil union law on same-sex parents and their children. In *Garden State Equality*, seven same-sex couples and ten of their children argued that although the civil union act was intended to provide rights to same-sex families and, in fact did inherently disadvantaged those same families.[191] It failed to provide *all* the rights of marriage by depriving same-sex couples the designation of marriage, and the societal respect marriage implies.[192] Although New Jersey's civil union law purports to provide equal rights to same-sex couples, permitting the title of "civil union," rather than "marriage," evokes the separate-but-equal injustice born from Jim Crow America. The state countered by simply relying on the argument that heterosexual marriage represented tradition.[193]

The court made quick work of the tradition argument. It traced societal developments over the last forty years to show the changes in society's views of marriage, and particularly of the roles of men and women. It noted, further, that "in the not too distant past" marriages between members of different races were banned, and that although society once viewed the limited opportunities afforded to women as appropriate and traditional, neither view would be acceptable today.[194] Analogizing to these outdated limitations on marriage, the court concluded that the separate system of civil union and the exclusion of same-sex couples violated equal protection.[195]

---

189. No. MER-L-1729-11, 2012 WL 540608 (N.J. Super. Ct. Law Div. Feb. 21, 2012).

190. This was in spite of Governor Chris Christie's veto of a bill on Feb. 17, 2012, which would have legalized same-sex marriage in New Jersey. Kate Zernike, *Christie Keeps His Promise to Veto Gay Marriage Bill,* N.Y. TIMES, Feb. 17, 2012, at A19, *available at*

http://www.nytimes.com/2012/02/18/nyregion/christie-vetoes-gay-marriage-bill.html.

191. *Id*.

192. Garden State Equality, 2012 WL 540608 at 8-9.

193. *Id*. at 9. The plaintiffs lost a summary judgment motion filed by the court, but their motion for reconsideration was granted. *Id*. at 2.

194. *Id*. at 5.

195. *See* Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281 (2011) (an interesting and comprehensive analysis on the use of "tradition" as reason for suspicion when justifying laws being challenged on equal protection grounds).

IV. CONCLUSION

If the process of writing this article has demonstrated anything to me, it is that the train—figuratively speaking—has left the station. Same-sex couples are increasingly able to avail themselves of the social respect of entering a true marriage. Should circumstances require, they can, increasingly, protect themselves and their children through divorce. These social changes are being implemented at a rate, and with a nuanced sophistication, that was inconceivable as recently as 2009. Furthermore, for those who may mourn the loss of "tradition," it is well to remember that political entities are fickle. Individuals in power may find themselves out of power, disrespected, and disfavored in the blink of an eye. It is simply good sense to distribute rights and privileges among all men and women of good will.