

Marriage Equality for Same-Sex Couples: Where We Are and Where We Are Going

by
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I. Introduction

The legal landscape for same-sex couples seeking to marry has shifted dramatically over the last five years. On October 10, 2008, the Connecticut Supreme Court became the third state high court to rule that its state constitution could not sustain a statutory framework that excludes same-sex couples from marrying,¹ following the Massachusetts Supreme Judicial Court on November 18, 2003,² and the California Supreme Court on May

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Perhaps the greatest challenge of writing about the marriage equality movement is keeping up with the pace of legal developments. Since the time this article was submitted for publication, two major changes have occurred, again significantly reforming the legal landscape. On April 3, 2009, the Iowa Supreme Court held that excluding same-sex couples from marrying violated that state's constitutional equality guarantees. *Varnum v. Brien*, ___ N.W.2d ___, 2009 WL 874044 (Iowa 2009). As a result of that opinion, same-sex couples may marry in Iowa beginning on April 27, 2009. In addition, during the 2009 legislative session in Vermont, state legislators passed a marriage equality law. S. 115, "An Act Relating to Civil Marriage," 2009 Leg., Reg. Sess. (Vt. 2009) (enacted). Although vetoed by the governor, the legislators overrode the veto by the required supermajority ensuring that, as of September 1, 2009, same-sex couples may marry in Vermont. Similar legislation is pending in numerous states throughout the country including in Connecticut (to codify that state high court opinion) (S.B. 899, 2009 Leg., Reg. Sess. (Conn. 2009)), New Hampshire (H.B. 439, 2009 Leg., Reg. Sess. (N.H. 2009)), and Maine. (L.D. 1020, 2009 Leg., Reg. Sess. (Me. 2009)).

¹ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

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

15, 2008.³ Same-sex couples throughout the country have gotten married in Connecticut, Massachusetts, California, and in other countries throughout the world that provide full marriage equality, including in Canada.

This positive momentum for marriage equality has not proceeded uninterrupted, however. In between the implementation of the Massachusetts decision and the California decision, five state high courts rejected constitutional challenges to their states' exclusionary marriage statutes.⁴ In addition, with the national election on November 4, 2008, in which California, Florida, and Arizona banned marriage for same-sex couples, more than forty states have now amended their constitutions or enacted legislation to prohibit same-sex couples from marrying.⁵ The passage of Proposition 8 in California, which amended California's constitution to define marriage as only being between a man and a woman, overruled in practice that state's positive Supreme Court decision, and halted the issuance of marriage licenses to same-sex couples.⁶

The validity of Proposition 8 has been contested, so the status of marriage equality in California remains uncertain as this article goes to publication.⁷ In addition, the Iowa Supreme Court has not yet issued its decision about whether to uphold a lower court's determination that the state's discriminatory marriage statute is unconstitutional.⁸

At this point in time, same-sex couples throughout the country have married while political efforts continue to reverse the progress toward full equality that began in Massachusetts, existed for a time in California, and has continued in Connecticut.

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

⁴ *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. Sup. Ct. 2006); *Li & Kennedy v. Oregon*, 110 P.3d 91 (Or. 2005); *Andersen v. King County*, 138 P.3d 963 (Wash. 2005).

⁵ Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1.

⁶ CAL. CONST. art. 1, § 7.5 (*amended by* initiative measure Proposition 8, Nov. 4, 2008).

⁷ The date for oral argument of the case challenging the constitutionality of Proposition 8 was Mar. 5, 2009. The California Supreme Court will rule on the case within 90 days of the date of oral argument.

⁸ *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct., Polk County, 2007).

Given the success of efforts to adopt exclusionary state constitutional amendments and thus cut off the number of states where marriage equality could be pursued,⁹ marriage equality opponents are largely focused on defending Proposition 8 and in further isolating the two New England states that allow same-sex couples to marry as iconoclastic exceptions to otherwise exclusively heterosexual marriage regimes.

This article looks at developments in the marriage equality movement from the time that the Massachusetts case was finally decided by its high court, and assesses the viability of efforts to turn back the clock on equal marriage rights. Because much has been written about the Massachusetts case and its place in history,¹⁰ this analysis starts with the decision by Connecticut's Supreme Court, the consolidated cases that became the California decision and contemporary challenges to the constitutional amendment that has since undermined its strength, as well as the cases in which state high courts rejected challenges to discriminatory marriage laws.

Backtracking in time, the article then addresses the legal developments that took place between the time the Massachusetts and California decisions were issued, focusing in particular on the fact that, for a short time, same-sex couples could marry in Massachusetts regardless of residency despite the existence of a reverse evasion law.¹¹ The reverse evasion law, well-established in Massachusetts, until recently prohibited the issuance of marriage licenses in Massachusetts to non-residents who traveled to Massachusetts specifically for the purpose of evading their own states' marriage prohibitions. While Massachusetts has since repealed that reverse evasion law,¹² there remain serious questions about the legal significance of marriages entered into by out-of-state couples in the interim period and uncertainty whether, for many of those out-of-state couples, those licenses issued lawfully.

⁹ Thirty states currently have exclusionary constitutional amendments. See Human Rights Campaign, Statewide Marriage Prohibitions, www.hrc.org/documents/marriage_prohibitions.pdf (Nov. 17, 2008).

¹⁰ Mary L. Bonauto, Goodridge *in Context*, 40 HARV. C.R.-C.L. L. REV. 1 (2005).

¹¹ MASS. GEN. LAWS ch. 207 §§ 11, 12, 13, 50 (1913).

¹² An Act Relative to Certain Marriage Laws, ch. 216, 2008 Mass. Acts (repealing sections 11, 12, 13, & 50 of Mass. Gen. Laws ch. 207).

This article evaluates the validity of those marriages. The article concludes by predicting that efforts to reverse the course of history and shut down the ability of same-sex couples from across the country to marry will fail.

II. Connecticut's Road to Equality

A few months after the *Goodridge v. Department of Public Health* decision made it possible for same-sex couples to marry in Massachusetts,¹³ eight same-sex couples filed suit to challenge Connecticut's denial of their right to marry.¹⁴ The primary arguments in the Connecticut case, much like the other state cases, were equality and due process of law under the state constitution.

While this litigation was underway, Connecticut passed a law in 2005 that created civil unions as an alternative to marriage for same-sex couples while simultaneously defining marriage as exclusively between one man and one woman.¹⁵ Similar legislation had already passed in Vermont, California, and New Jersey, and has since been adopted in New Hampshire.¹⁶

Connecticut's civil union law provided many of the same substantive protections for same-sex couples as California's domestic partnership laws. Therefore, the Connecticut case was the second one to reach a high court in a jurisdiction which had in place a near marriage equivalent. It was because of this comprehensive protection under law that the Connecticut Superior Court rejected the plaintiffs' motion for summary judgment and granted that of the state defendants. The outcome of the lower court's resolution of the case could have been predicted from the opening line of the opinion (stating the existence of the civil union law) and the framing of the case.¹⁷ As framed by Judge Patty Pittman, the issue before the court was whether it should declare the distinction between civil unions and marriage, a dis-

¹³ *Goodridge*, 798 N.E.2d 941.

¹⁴ Jane Gordon, *Gay Marriage Case Now Before the Court*, N.Y. TIMES, Apr. 2, 2006, at 3.

¹⁵ An Act Concerning Civil Unions, CONN. GEN. STAT. §§ 46b-38aa - 46b-38pp (2005).

¹⁶ N.H. REV. STAT. § 457-A:1 (2008).

¹⁷ *Kerrigan v. State*, 909 A.2d 89 (Conn. Super. Ct. 2006).

tion the court viewed as being one of name only, to be one of constitutional magnitude.

In fairly pointed language, the Connecticut Superior Court analogized the case to one that might be brought by a woman offended by the incorporation of male gendered pronouns in the criminal law or by the statement in the state constitution that “all men . . . are equal in rights.” According to Judge Pittman, “While one may yet feel a pang at the historical injustice presented by this phrase, it is of no *legal* significance.”¹⁸ Moreover, explained Judge Pittman, “offensiveness is largely in the eye of the beholder.”¹⁹ As a result, she concluded that “the naming of legal matters [is] an area particularly suited to legislative rather than judicial policy-making.”²⁰

The plaintiff couples appealed the case, which was taken on direct appellate review by the state high court. Similar to the context in California, Connecticut’s comprehensive marriage equivalent forced the high court to analyze the statutory exclusion of same-sex couples from marriage in a jurisdiction where the legislature had already spoken to the importance of extending comprehensive family protections to families formed by same-sex couples. Contrary to the lower court’s reasoning, the Connecticut Supreme Court acknowledged that the distinction between civil unions and marriage is not “constitutionally insignificant”²¹ and that “because the institution of marriage carries with it a status and significance that the newly created classification of civil unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm.”²² Connecticut’s high court found that, although the civil union law purported to offer same-sex couples “all the same benefits, protections, and responsibilities under law” as marriage,²³ this statutory framework denied same-sex couples at least one fundamentally important right, “the freedom to marry.”²⁴

¹⁸ *Id.* at 98 (emphasis in original).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Kerrigan*, 957 A.2d at 415.

²² *Id.* at 412.

²³ CONN. GEN. STAT. §§ 46b-38nn; *Kerrigan*, 957 A.2d at 413.

²⁴ *Kerrigan*, 957 A.2d at 416.

In analyzing the plaintiff couples' equal protection challenge, Connecticut's high court deemed sexual orientation to be a "quasi-suspect" classification, like gender, and therefore applied heightened or intermediate scrutiny to assess the constitutionality of the state's discriminatory marriage law.²⁵ The court's conclusion that sexual orientation is a quasi-suspect classification deserving of heightened scrutiny was based on the historic and enduring "purposeful and invidious discrimination" against gays and lesbians and the fact that this minority group's defining characteristic (their sexual orientation) is of no meaningful consequence to their participation in society.²⁶ Moreover, the court determined that sexual orientation is "such an essential component of personhood" that it would be "wholly unacceptable" for the state to require modification.²⁷ As a result, the court applied intermediate scrutiny and held that the marriage statute violated the state's constitutional guarantee of equal protection because the state failed to demonstrate that denying the right to marry on the basis of sexual orientation was "substantially related to an important government interest."²⁸

Because the state failed to meet its burden under the intermediate scrutiny standard, the court declined to reach the issue of whether sexual orientation is a suspect classification deserving strict scrutiny.²⁹ Thus, Connecticut's high court diverged from both the high court in California that applied strict scrutiny, and high courts in Massachusetts and other states that applied some version of rational basis review to decide whether excluding same-sex couples from marriage violates state constitutional law.³⁰

On November 4, 2008, Connecticut voters rejected a referendum to hold a constitutional convention in which a state constitutional provision to undermine the *Kerrigan v. Commissioner*

²⁵ *Id.*

²⁶ *Id.* at 432.

²⁷ *Id.*

²⁸ *Id.* at 423 (citing *Ramos v. Vernon*, 353 F.3d 171, 175 (2d Cir. 2003)).

²⁹ *Id.*

³⁰ *Goodridge*, 798 N.E.2d at 961.

of *Public Health* ruling could have been introduced.³¹ No viable political threat to marriage equality remains in Connecticut.

III. California Takes a Step Forward, Then a Step Back

California was the second state to permit same-sex couples to marry. As the most populous state, one in which one out of nine Americans lives (just over 10 percent), its legal landscape has often served as a bellwether for the rest of the country. The passage of the Proposition 8 ballot initiative that defined marriage as only heterosexual marriage undermined the constitutional foundation of the decision coming out of the consolidated marriage cases. The outcome in the case challenging Proposition 8 has become, therefore, even that much more significant to the marriage equality movement. This section analyzes the history leading up to the marriage case, the case itself, the Proposition 8 ballot initiative, and the litigation challenging the validity of the process used to change California's constitution.

A. Pre-Case Marriage Activity

In re Marriage Cases have a somewhat long, and definitely complicated, procedural history.³² This history is worth describing in some detail to convey the depth and breadth of the political landscape on both sides of the “v” in the consolidated marriage cases. The consolidated cases date indirectly back to February, 2004, when the City of San Francisco, at the initiative of Mayor Gavin Newsom, began issuing marriage licenses to same-sex couples.³³ The relevant time period was the 180 day gap between when the Supreme Judicial Court of Massachusetts³⁴ issued its opinion in *Goodridge v. Department of Public Health*, holding that same-sex couples could not constitutionally

³¹ *Equality's Winding Path*, N.Y. TIMES, Nov. 6, 2008, at A32; *Kerrigan*, 957 A.2d at 413.

³² *In re Marriage Cases*, 183 P.3d 384.

³³ Carolyn Marshall, *Dozens of Gay Couples Marry in San Francisco Ceremonies*, N.Y. TIMES, Feb. 13, 2004, at A24.

³⁴ The issued date was Nov. 20, 2003. The opinion stated, “Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion.” *Goodridge* 798 N.E.2d at 970.

62 *Journal of the American Academy of Matrimonial Lawyers*

be excluded from the Commonwealth's marriage statutes, and the effective date of that opinion. During that gap period, a number of localities, including some in New York³⁵ and San Francisco in California began issuing marriage licenses in anticipation that the state courts in those jurisdictions would agree with the *Goodridge* Court.

Opponents of marriage equality in California and elsewhere sought to quickly shut down the availability of marriage licenses to same-sex couples. In California, the effort to shut down the issuance of such licenses was initiated by the Attorney General through a writ petition to the California Supreme Court and by a case brought by the Proposition 22 Legal Defense Fund.³⁶ The latter case relied on Family Section 308.5 (the initiative statute known as Proposition 22 adopted by California voters in March 2000),³⁷ while the former principally argued that the local officials lacked authority to issue licenses in the absence of a determinative court decision.³⁸ In response to the Attorney General's writ petition, the California Supreme Court issued a temporary injunction followed by a final decision, both of which ordered the City of San Francisco not to issue licenses and invalidated any licenses already issued.³⁹ In that final decision, *Lockyer v. San Francisco*, the California high court expressly reserved judgment on the substantive issue raised by the Proposition 22 Legal Defense Fund – that is, whether the state constitution could sustain

³⁵ Thomas Crampton, *Same-Sex Marriage: New Paltz; Despite Charges, Mayor Pledges to Keep Marrying Gay Couples*, N.Y. TIMES, Mar. 4, 2004 (New York/Region); Thomas Crampton & Christine Hauser, *Gay Marriage Debate Shifts to Small New York Village*, N.Y. TIMES, Feb. 27, 2004 (New York/Region); Lisa W. Foderaro, *Mayors Asked to Face the Music, as in a Same-Sex Wedding March*, N.Y. TIMES, Mar. 9, 2004 (New York/Region).

³⁶ *Lockyer v. San Francisco*, 95 P.3d 459, 465-66 (Cal. 2004).

³⁷ CAL. FAM. CODE § 308.5 (2004) states that “[o]nly marriage between a man and a woman is valid or recognized in California.” Plaintiffs in the *Marriage Cases* maintained that this initiative amendment only applied to marriages entered into outside of California and was not relevant to the determination of whether same-sex couples could marry in California. The Proposition 22 Legal Defense Fund disagreed arguing that it applied as a limiting principle both to marriages entered into in and outside of California. *In re Marriage Cases*, 183 P.3d at 409-410.

³⁸ *Id.* at 466-67.

³⁹ *Id.* at 467.

an exclusionary statutory framework for marriage.⁴⁰ That issue was squarely presented in cases filed (and eventually consolidated) both by the City of San Francisco and 20 same-sex couples in five different suits challenging their exclusion from the law. Those cases became the consolidated cases resolved by *In re Marriage Cases*.⁴¹

The other significant development that took place in between the issuance of the *Goodridge* opinion and the ultimate resolution of the consolidated cases was California's adoption of a comprehensive domestic partnership law.⁴² Unlike in Massachusetts where there had been scant or no protections for same-sex couples wishing to create families,⁴³ California had incrementally added benefits and protections within a structure it called domestic partnership to the point where when the marriage cases were finally resolved, the status was a near-equivalent to marriage.⁴⁴ It was a near-equivalent because there were differences between the benefits and protections associated with marriage and those associated with domestic partnerships but, as the California Supreme Court characterized them, they were

⁴⁰ *Id.* at 397 (“Our decision in *Lockyer* emphasized . . . that the substantive question of the constitutional validity of the California marriage statutes was not before this court in that proceeding, and that our decision was not intended to reflect any view on that issue.”).

⁴¹ *Id.*

⁴² California's domestic partnership law developed incrementally through at least 16 separate bills starting in 1999, each slowly adding benefits, protections, and responsibilities. See National Center for Lesbian Rights, *The Evolution of California Domestic Partnership Law*, Sept. 5, 2007, http://www.nclrights.org/site/DocServer/timeline-ab205_042307.pdf?docID=1265.

⁴³ In fact, unlike in California where there were affirmative developments in the form of growing domestic partnership benefits, the effort to add substantive domestic partnership benefits in the form of partner health insurance was shut down by the Supreme Judicial Court in a challenge initiated by a ten taxpayer suit challenging the authority of municipalities to do so. *Connors v. City of Boston*, 714 N.E.2d 335 (Mass. 1999).

⁴⁴ It bears mention to fully appreciate the political climate in California that predated the issuance of the *In re Marriage Cases* decision that the California legislature twice passed bills authorizing marriage for same-sex couples. Both times the legislation was vetoed by Governor Arnold Schwarzenegger. Jordan Rau & Nancy Vogel, *Governor Vetoes Same-Sex Marriage Bill*, L.A. TIMES, Sept. 30, 2005 at B3, available at <http://articles.latimes.com/2005/sep/30/local/me-gays30>; Jill Tucker, *Governor Cites Prop. 22 as He Vetoes Leno Bill*, S.F. CHRON., Oct. 13, 2007, at B2.

“relatively minor.”⁴⁵ Again by the California court’s characterization, the domestic partnership status could better be understood as one comparable to the near marriage-equivalent status of civil unions embraced by the states of Vermont, New Hampshire, New Jersey and Connecticut.⁴⁶ Of course, both domestic partnership status and civil union status are uniquely different than marriage in the characterization of the relationship. Just as in Connecticut, it was the magnitude and significance of this distinction that the California court had to evaluate.

B. *In re Marriage Cases*

The answer to the question of the extent to which domestic partnership and marriage are equivalent legal statuses is, in many ways, at the heart of the *In re Marriage Cases* opinion. The reason for that may be obvious, but given its significance is worth articulating. In California by the time the consolidated cases reached the high court, the legislature had spoken to the issue of the significance of families formed by same-sex couples. By creating the near equivalent status of domestic partnership, the legislative intent to treat comparably same-sex couples and different-sex ones was clear. As the high court agreed, the domestic partnership and marital statuses were at their essence equal in terms of benefits, obligations, and protections. The only difference was in the name. That difference was key to the high court’s fundamental constitutional rights analysis and is worth examining in some detail.

The starting point of the court’s analysis was the couples’ claim that their exclusion from marriage violated core liberty and autonomy rights guaranteed by the California constitution. As the court explained, California precedent well-established as a constitutional value the “right of two adults who share a loving

⁴⁵ There are nine enumerated in *In re Marriage Cases*, concerning mainly differences between domestic partnerships and marriages in eligibility requirements, the procedures for establishing or dissolving each, and a few provisions such as “confidential marriages” and a rarely-used veteran’s housing tax deduction that seem to have slipped through the cracks when creating legislation, or that would not apply to same-sex couples because they are provisions affected by federal law. 183 P.3d at 416 n.24.

⁴⁶ Connecticut: CONN. GEN. STAT. §§ 46b-38pp (2005); New Hampshire: N.H. REV. STAT. ANN. §§ 457-A:1-A:8 (2008); New Jersey: N.J. STAT. ANN. § 37:1-28 (2007); Vermont: 15 VT. STAT. ANN. tit. 15, §§ 1201 (1999).

relationship to join together to establish an officially recognized family of their own,”⁴⁷ a right generally understood as the right to marry. In response to this claim, the Attorney General of California agreed with the existence of such a right but maintained that the right protected was one that is defined by substance and not by form. In other words, argued the Attorney General, because same-sex couples were afforded all of the substantive protections of marriage through the domestic partnership law and denied only the status, designation, or name of marriage, no constitutional violation could be shown.⁴⁸

The California court disagreed. As it explained, the consolidated cases did not present the interesting (but irrelevant) question about whether the legislature could deny the denomination of marriage to all couples (“perhaps in order to emphasize and clarify that this civil institution is distinct from the religious institution of marriage”).⁴⁹ But, because the burden of being denied the demarcation of marriage fell exclusively to families formed by same-sex couples, the distinction could not survive constitutional scrutiny. At the core of the constitutionally guaranteed right to marry was the right to have the established “family relationship [be] accorded dignity and respect equal to that accorded other officially recognized families.”⁵⁰ Reserving the designation of the name “marriage” exclusively for different-sex couples posed a “serious risk of denying the family relationship of same-sex couples such equal dignity and respect.”⁵¹ As the California court recognized, none of the other marriage cases challenging state exclusionary marriage laws had presented the question that was before this high court because in none of the other marriage cases had an exclusionary marriage law been challenged in a jurisdiction that had created a near-marriage equivalent.⁵² As a

⁴⁷ *In re Marriage Cases*, 183 P.3d at 399.

⁴⁸ Brief of Cal. Att’y Gen., *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999).

⁴⁹ *In re Marriage Cases*, 183 P.3d at 399-400.

⁵⁰ *Id.* at 400.

⁵¹ *Id.*

⁵² As the court acknowledged, the same question had, however, been addressed in a case that was brought in Massachusetts after the *Goodridge* case was decided. In *Opinion of the Justices*, 802 N.E.2d 565 (Mass. 2004), the Massachusetts Senate propounded a question to the high court regarding whether in response to the *Goodridge* opinion, the legislature could adopt a comprehen-

result, this was the first high court to grapple with the question of what the word “marriage” means separate and apart from the substantive protections and obligations it imparts in the context of a case brought in a state where a legislature had already mandated marriage near-equivalence.⁵³ In striking down the exclusionary laws, the court acknowledged the significance of marriage for same-sex couples while at the same time appreciating the inequality that resulted from the differential licensing schemes.

As a result, the fundamental rights analysis was tightly interwoven with the equal protection claim. In pursuit of their equal protection claim, the plaintiffs argued that the exclusionary marriage statutes created classifications based on sex and sexual orientation. The high court disagreed that the statutes created a sex-based classification but agreed that the exclusionary scheme created a sexual orientation classification. In response to the defendants’ argument that the exclusion did not create a sexual orientation classification because gay people were free to marry, just not to marry someone of the same sex, the court found it “sophistic” because the argument would “require the negation of the person’s sexual orientation.”⁵⁴

Having found a classification, the court moved on to the applicable level of scrutiny. For the first time in California, and in a part of the opinion that will have far-reaching effects beyond the marriage issue, the court held that the applicable standard of review for a sexual orientation statutory classification is “strict

sive law based on the Vermont civil union model that would give same-sex couples all of the rights, responsibilities, and obligations of marriage but deny the status. In a 4-3 opinion, the Supreme Judicial Court said the legislature could not constitutionally do so. As that court said, “[T]he traditional, historic nature and meaning of civil marriage in Massachusetts is as a wholly secular and dynamic legal institution, the governmental aim of which is to encourage stable adult relationships for the good of the individual and of the community, especially its children. The very nature and purpose of civil marriage, the court concluded, renders unconstitutional any attempt to ban all same-sex couples, as same-sex couples, from entering into civil marriage.” *Id.* at 569.

⁵³ The Connecticut high court also grappled with the meaning of the word marriage in *Kerrigan*. 957 A.2d at 417-19.

⁵⁴ *In re Marriage Cases*, 183 P.3d at 441.

scrutiny.”⁵⁵ While the court of appeals had found that the sexual orientation classification could not be considered “suspect,” the high court disagreed. Both courts easily found that the classification met the requirements that, first, the characteristic bears no relation to a person’s ability to perform or contribute to society; and, second, the characteristic is associated with a stigma of inferiority and second class citizenship manifested by the group’s history of legal and social disabilities.⁵⁶

The point on which the California Supreme Court departed, however, from the court of appeals’ analysis was on the significance of the third requirement for suspect classifications, the immutability factor. As the California Supreme Court said, “immutability is not invariably required in order for a characteristic to be considered a suspect classification for equal protection purposes.”⁵⁷ By analogy, the court explained that religion is a suspect classification despite the fact that religion is a “matter over which an individual has control.”⁵⁸ Citing international law,⁵⁹ the California court found that sexual orientation, whether or not immutable, is such a “deeply personal characteristic that [it] is either unchangeable or changeable only at unacceptable personal costs.”⁶⁰ Rejecting the Attorney General’s argument that a fourth requirement should be demonstrated, that of “political powerlessness,” the high court concluded that sexual orientation is a suspect classification subject to strict scrutiny.

Having identified strict scrutiny as the applicable standard of review, the court acknowledged the state bears a heavy burden to justify the existing legal structure. Not only would the state have to advance a constitutionally compelling interest in “reserving the designation of marriage”⁶¹ only for different-sex couples

⁵⁵ *Id.* at 441. In a separate section, the court rejected the plaintiffs’ claim that the statute created a classification based on sex. To the contrary, the court found that the statute treated men and women the same with respect to the marriage conclusion. However, because it did create a classification that allowed different-sex but not same-sex couples to marry, the court proceeded with its sexual orientation classification analysis. *Id.* at 439-440.

⁵⁶ *Id.* at 442.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Egan v. Canada*, 2 S.C.R. 513 (1995).

⁶⁰ 183 P.3d at 442.

⁶¹ *Id.* at 446.

and excluding same-sex couples from that designation, but it would also have to demonstrate that the statutory framework was necessary to serve the compelling interest. Because the state could neither articulate a compelling state interest served by the differential treatment of gay, lesbian, or bisexual partners nor show that the differential treatment was necessary to serve the compelling state interest, the exclusionary system failed. In applying the standard of review, the court rejected the arguments that the constitutionally compelling interest behind the statutory scheme could be either preserving traditional marriage or encouraging responsible procreation.⁶² The court also rejected justifications for the exclusion offered by the non-state defendants that the state constitution had mandated it somehow by referring in earlier versions to gendered terms, like “wife” and “husband,” in including constitutional protection for separate property rights.⁶³

Turning to remedy, the court applied traditional remedy jurisprudence in its evaluation of whether the exclusionary scheme should be remedied by extending the exclusion to all or curing the exclusion by including the excluded class.⁶⁴ In a brief part of the opinion, the court determined that extending marriage equality to the excluded group would more closely approximate the likely intent of the legislature had it recognized the unconstitutionality of the exclusion.⁶⁵ As a technical matter, the court struck the provision of the family law statutes that designated marriage as the union between a man and a woman and found that the initiative statute that the court had found to apply to in-state and out-of-state marriages had no constitutional effect.⁶⁶

Risking no confusion about the effect of the order, the court found plaintiffs entitled to the issuance of the writ requested including directing relevant government officials administering the marriage laws to act consistently with the decision of the court. Immediately following the issuance of the *In re Marriage Cases* opinion, opponents of marriage equality filed an action seeking rehearing focusing in particular on the issue of remedy, arguing

⁶² *Id.* at 432.

⁶³ *Id.* at 447.

⁶⁴ *Id.* at 452-453.

⁶⁵ *Id.*

⁶⁶ *Id.* at 470-471.

that the opinion was unclear on that point. That action also called for a general stay of the effect of the opinion for a five month period after which the parties argued that the citizens of the state would have the opportunity to vote by initiative on a constitutional amendment that would, if passed, reverse the court. A motion filed by eleven state attorneys general asked for the same relief to stave off litigation that could result in their states as a result of the California marriage decision. The court rejected the efforts at delay of implementation. The state directed local officials to begin issuing marriage licenses and such licenses began to issue on June 16.⁶⁷ Between June 16, 2008, and when the change to the California constitution that defined marriage as between a man and a woman became effective on November 5, 2008, approximately 18,000 same-sex couples were married in California.⁶⁸

C. *Proposition 8 Writes Discrimination into California's Constitution*

On November 4, 2008, the day United States voters elected Barack Obama as president, Californians passed Proposition 8.⁶⁹ Passage of the Proposition 8 ballot initiative changed California's constitution by defining marriage as exclusively being between a man and a woman, effectively reversing the state high court's decision in *In re Marriage Cases* and reinstating California's prohibition of same-sex marriage.⁷⁰ Constitutional initiatives require only a majority of voters' support to pass in California,⁷¹ and Proposition 8 received over fifty-one percent of the vote.⁷² The

⁶⁷ *In re Marriage Cases*, 2008 WL 5507760 (June 19, 2008).

⁶⁸ Garance Burke, *Clerks Confused Over When Gay Marriage Ban Begins*, A.P., Nov. 13, 2008.

⁶⁹ Jesse McKinley, *With Same-Sex Marriage, a Court Takes on the People's Voice*, N.Y. TIMES, Nov. 21, 2008, at A18.

⁷⁰ CAL. CONST. art. 1 § 7.5. Proposition 8 added a new section (7.5) to Article I of California's constitution. *Id.* The text of the new section asserts that: "[o]nly marriage between a man and a woman is valid or recognized in California." *Id.*

⁷¹ CAL. CONST. art. 1 § 4.

⁷² McKinley, *supra* note 69, at A18.

constitutional change took effect immediately (on November 5, 2008).⁷³

D. *Current Litigation Challenging the Validity of Proposition 8*

On November 19, 2008, the California Supreme Court granted review of three cases challenging the validity of Proposition 8 and denied two petitioners' requests for a stay of the constitutional change.⁷⁴ The crux of the issue presented relates to the nature of the change Proposition 8 effected to the California constitution and the process by which it was carried out.

Proposition 8 was initiated by the electorate, not the legislature, and this raised significant procedural concerns prior and subsequent to its passage.⁷⁵ Article 18 of California's constitution distinguishes between the processes for amending and revising its text.⁷⁶ Whereas the electorate can propose an *amendment* to the constitution by initiative which then goes on the ballot, a proposed *revision* to the constitution must originate in the legislature and receive approval from two-thirds of both houses before either going to a popular vote or a constitutional convention.⁷⁷ Case law defines a constitutional revision, as distinct from a constitutional amendment, as an effort to change fundamental "underlying principles"⁷⁸ of the state's constitution, or as an effort that constitutes "far reaching changes in the nature of our basic government plan."⁷⁹ Therefore, deciding whether changing California's definition of marriage to categorically exclude same-sex

⁷³ CAL. CONST. art. 1 § 4 ("A proposed *amendment or revision* shall be submitted to the electors and if approved by a majority of votes thereon takes effect *the day after the election unless the measure provides otherwise.*").

⁷⁴ *Strauss v. Horton*, No. S168047 (Cal. order to show cause filed Nov. 19, 2008); *Tyler v. State of California*, No. S168066 (Cal. order to show cause filed Nov. 19, 2008); *City and County of San Francisco v. Horton*, No. S168078 (Cal. order to show cause filed Nov. 19, 2008).

⁷⁵ *Bennett v. Bowen*, No. S164520 (Cal. Sup. Ct., 2008); *Strauss v. Horton*, No. S168047 (Cal. Sup. Ct., 2008); *Tyler v. State of California*, No. S168066 (Cal. Sup. Ct., 2008); *City and County of San Francisco v. Horton*, No. S168078 (Cal. Sup. Ct., 2008); Maura Dolan, *California Supreme Court Keeps Anti-Gay Marriage Initiative on Ballot*, L.A. TIMES, July 17, 2008.

⁷⁶ See CAL. CONST. art. 18.

⁷⁷ See *id.* at §§ 1-3.

⁷⁸ *Livermore v. Waite*, 36 P. 424, 102 Cal. 113, 117-19, 123-24 (1894).

⁷⁹ *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 22 Cal. 3d 208, 223 (Cal. 1978).

couples is properly categorized as a constitutional amendment or a constitutional revision is central to determining the validity of Proposition 8.

In its order to show cause why relief sought by petitioners should not be granted, the court directed the State of California and its agents to brief the following questions:

- (1) Is Proposition 8 invalid because it constitutes a revision of, rather than an amendment to, the California Constitution?
- (2) Does Proposition 8 violate the separation of powers doctrine under the California Constitution?
- (3) If Proposition 8 is not unconstitutional, what is its effect, if any, on the marriages of same-sex couples performed before the adoption of Proposition 8?⁸⁰

In the respondent's brief, the Attorney General answered no to questions one and two and opined that, even if upheld as constitutional, Proposition 8 should have a prospective effect only.⁸¹ If the Attorney General is right in its effects argument, same-sex couples who married in the interim between when *In re Marriage Cases* took effect and the day after passage of Proposition 8 can be confident that their marriages are valid.

The final portion of the State's brief, including the Attorney General's ultimate conclusion, is perhaps the most significant. The Attorney General's response exceeded the scope of the court's questions and put the state firmly on record for supporting judicial invalidation of Proposition 8.⁸² After answering the court's enumerated questions, the Attorney General argued that even if Proposition 8 was procedurally appropriate as a properly initiated amendment, Proposition 8 should be "invalidated as violating the inalienable right of liberty found in article 1, section 1 of [California's] Constitution."⁸³ The Attorney General explained that marriage is a fundamental liberty and that as an inalienable right protected under Article 1 of California's constitution, it should not be abrogated in the absence of a compelling government interest.⁸⁴ Thus, the Attorney General "harmonize[d]" same-sex couples' constitutional right to marry with

⁸⁰ *Id.*

⁸¹ See Brief for Respondent at 61, 91, *City and County of San Francisco v. Horton*, No. S168078 (Cal. Feb. 3, 2009).

⁸² See *id.* at 91.

⁸³ *Id.*

⁸⁴ *Id.* at 76-77, 90,

the people's power to amend the constitution by initiative by subjecting Proposition 8 to strict scrutiny, which it must fail.⁸⁵ The court already held in *In re Marriage Cases* that there was no compelling reason to deny people's right to marry based on the suspect classification of sexual orientation, and the language of Proposition 8 is the same as the former language of Family Code 308.5 that the court struck down.⁸⁶ The California Supreme Court heard oral arguments for the cases challenging Proposition 8 on March 5, 2009.⁸⁷

IV. Cases Decided Between *Goodridge* and *In re Marriage Cases*

In many ways, the California case can be viewed as one that re-shifted the momentum behind the issue of marriage equality, coming as it did after five high courts departed from the Massachusetts outcome.

Between the time *Goodridge* was decided and when the California court considered the same issue, five other state supreme courts heard challenges to and sustained exclusionary state marriage laws.⁸⁸ In one of them, the New Jersey Supreme Court held unconstitutional the statutory framework but declined to remedy it by requiring that same-sex couples be allowed to marry.⁸⁹ In the other four states, Maryland, New York, Oregon, and Washington, the high courts fully sustained the exclusionary laws. In Maryland, Oregon, and Washington, the legislature passed domestic partnership laws subsequent to the courts' decisions that provided same-sex couples with limited rights and benefits.⁹⁰

⁸⁵ *See id.* at 89-90.

⁸⁶ *See id.* at 90.

⁸⁷ Press Release, Lynn Holton, Public Information Officer, Administrative Office of the Courts, Judicial Council of California (Feb. 3, 2009), available at <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR08-09.PDF>.

⁸⁸ *See* *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. Sup. Ct. 2006); *Li. & Kennedy v. Oregon*, 110 P.3d 91 (Or. 2005); *Andersen v. King County*, 138 P.3d 963 (Wash. 2005).

⁸⁹ *Lewis*, 908 A.2d 196.

⁹⁰ Oregon Family Fairness Act, ch. 99, 2007 Or. Laws (became effective July 22, 2007); 2008 Md. Laws 590 (passed May 22, 2008 and became effective July 1, 2008); Act of April 21, 2007, ch. 156, 2007 Wash. Sess. Laws (passed Apr. 21, 2007, and became effective July 22, 2007).

As in California and Massachusetts, plaintiffs in the other states challenged state marriage laws focusing principally on equality and due process protections under state constitutions. However, none of the plaintiffs in those cases could convince their state courts that classifications based on sexual orientation required a heightened level of scrutiny. Applying rational basis review, those courts had little problem accepting some state justification for the differential treatment of same and different-sex couples. In both New York and Washington, the courts concluded that the state anti-marriage laws⁹¹ were constitutional because they served the legitimate purpose of encouraging procreation and the well-being of children. The New York law was challenged under equal protection and due process.⁹² The Washington law was challenged under privileges and immunities and due process.⁹³ The courts spent very little time discussing equal protection, due process, or privileges and immunities after rationalizing the prohibitions on same-sex marriage, simply reiterating procreation and child welfare as legitimate purposes for the state exclusionary laws. Because marriage for same-sex couples could not, according to the courts, encourage procreation or child welfare, the state bans on same-sex marriage did not deny plaintiff couples their constitutional rights.⁹⁴ The *Hernandez* court went even further in rejecting the scientific legitimacy of the studies that suggest that children raised by same-sex children are no worse off than those raised by different-sex parents.⁹⁵

⁹¹ N.Y. DOM. REL. LAW § 12 (1999) (marriage-how solemnized), N.Y. DOM. REL. LAW § 15 (1999) (marriage- duty of town and city clerk), N.Y. DOM. REL. LAW § 5 (2008) (incestuous and void marriages), N.Y. DOM. REL. LAW § 50 (2008) (property of married woman); WASH. REV. CODE § 26.04.010 (1998) (marriage as a civil contract that is valid only if “between a male and a female”); WASH. REV. CODE § 26.04.020(1)(c) (1998) (marriage contract is prohibited for couples “other than a male and a female.”); WASH. REV. CODE § 26.04.020(3) (1998) (“[a] marriage between two persons that is recognized as valid in another jurisdiction is valid in this state only if the marriage is not prohibited or made unlawful under subsection . . . (1)(c) . . . of this section.”).

⁹² *Hernandez*, 855 N.E.2d 1.

⁹³ *Andersen*, 138 P.3d 963.

⁹⁴ *Hernandez*, 855 N.E.2d 1; *Andersen*, 138 P.3d 963.

⁹⁵ *Hernandez*, 855 N.E.2d at 8.

In Oregon and New Jersey, deference to the state legislature largely resolved the cases. In Oregon, plaintiffs brought a lawsuit against the state after the State Registrar refused to file marriage licenses that were issued by their county of residence, Multnomah County. The plaintiffs argued the refusal violated Oregon's privileges and immunities clause. However, before the Oregon Supreme Court could resolve that issue, the voters of Oregon passed a law defining marriage as being exclusively between a man and a woman. The Oregon Supreme Court ultimately said that its role was to enforce the voters' intent, and because the voters defined marriage heterosexually, the Oregon Supreme Court upheld that definition.⁹⁶ In New Jersey, plaintiffs filed a lawsuit against the state because of its refusal to grant licenses to same-sex couples. They argued this violated their privacy, equal protection and due process rights.⁹⁷ The New Jersey Supreme Court agreed that same-sex couples are entitled to equality, but disagreed that there was a fundamental right at stake in the case for the plaintiffs.⁹⁸ Ultimately, the court determined that the issue raised a legislative question. In response to the decision, the New Jersey legislature passed a civil union law.⁹⁹

V. Viability of Marriages of Out-of-State Couples Married in Massachusetts

Notwithstanding the setbacks in some states where same-sex couples sought marriage equality and the slow progress to equality across the country, the fact of Massachusetts allowing same-sex couples to marry impacted marriage equality nationwide. While there remain some questions about the validity of certain marriages entered into in Massachusetts by non-resident couples, there is also certainty about the validity of others.

The Massachusetts marriage case was significant for setting a precedent, allowing same-sex couples, for the first time in this

⁹⁶ *Li v. State*, 110 P.3d 91 (Or. 2005).

⁹⁷ *Lewis*, 908 A.2d 196.

⁹⁸ *Id.* at 205.

⁹⁹ A recent study commissioned by the legislature concluded that civil unions are inadequate to protect same-sex couples. What steps the legislature will take in response to this study is unclear. The first interim report of the New Jersey Civil Union Review Commission, Feb. 19, 2008, is available at: <http://www.state.nj.us/lps/dcr/downloads/1st-InterimReport-CURC.pdf>.

country, to marry. In seeming acknowledgement of the weight of this fact, the Supreme Judicial Court did not issue an immediate remedy to the plaintiffs. Rather, it concluded that, “[e]ntry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion.”¹⁰⁰ While there was some initial question whether this meant that the court would allow the legislature to create a marriage equivalent, the likes of which had been created by Vermont’s adoption of a civil union law,¹⁰¹ any confusion about the matter was cleared up in response to a question put to the Supreme Judicial Court by the Massachusetts Senate President. In *Opinion of the Justices*, the high court put to rest any suggestion that the court had left open such a possibility. As the court made clear, “[the bill] would deny to same-sex ‘spouses’ only a status that is specially recognized in society and has significant social and other advantages. The Massachusetts Constitution, as the *Goodridge* opinion explained, does not permit such invidious discrimination, no matter how well intentioned.”¹⁰²

Nevertheless, because of the time permitted for enforcement of the *Goodridge* decision to allow the legislature to take some action—the substance of which was never clear and which was never taken—same-sex couples were not permitted to marry in Massachusetts until May 17, 2004. On that day, however, hundreds of couples flocked to local city and town halls to marry, many seeking and securing court orders allowing bypass of the usual waiting period between the filing of paperwork to marry and the issuance of the licenses themselves.¹⁰³ Among those who married included individuals from throughout the country who came to Massachusetts to marry their loved ones despite not being residents of the Commonwealth.

For a short period of time, many town clerks issued licenses freely to out-of-state couples. Former Massachusetts Governor Mitt Romney stopped that practice shortly after it began through a directive issued by then-Attorney General Tom Reilly. The directive called to the towns’ attention the criminal enforcement

¹⁰⁰ *Goodridge*, 798 N.E.2d at 970.

¹⁰¹ VT. STAT. ANN. tit. 15, §§ 1201-1207 (1999).

¹⁰² *Opinion of the Justices*, 802 N.E.2d 565, 570 (Mass. 2004).

¹⁰³ Thomas Caywood, *Same-Sex Marriage*” *Mass. Gay Couples Wedded to History*, BOSTON HERALD, May 18, 2004, at 6.

76 *Journal of the American Academy of Matrimonial Lawyers*

statute for issuing licenses to non-residents in violation of the Massachusetts reverse evasion law.¹⁰⁴ The Governor instructed the Attorney General to take this action after an investigation that involved a review of the records from several towns that the news media had reported were marrying out-of-state same-sex couples.

The Governor's view of the enforceability of the law was not immediately obvious given that the statute had been a dead letter for many years. In addition, similar reverse evasion laws had only ever been adopted in five other jurisdictions and it is somewhat unclear the extent to which they had ever been enforced either.¹⁰⁵ However, in at least one of those jurisdictions, Vermont, the reverse evasion law had not been enforced¹⁰⁶ to exclude out-of-state same-sex couples from traveling to Vermont and entering into civil unions notwithstanding the legal challenges that has created for some couples.¹⁰⁷ Nonetheless, the borders to Massachusetts were effectively shut down to out-of-state same-sex couples wishing to marry for nearly four years after the *Goodridge* case was decided. It was not until July, 2008, that the Massachusetts legislature repealed the reverse evasion law, finally fully opening the Massachusetts borders to same-sex couples from throughout the country to enjoy Massachusetts' non-discriminatory laws.¹⁰⁸

Six couples hailing from Rhode Island, Vermont, New York, Connecticut, New Hampshire, and Maine brought a constitutional challenge to the Massachusetts reverse evasion law arguing that the law violated the basic guarantees the Massachusetts high court had just found protected Massachusetts couples as well as guarantees of equality for out-of-state couples otherwise pro-

¹⁰⁴ MASS. GEN. LAWS ANN. ch. 207, § 10.

¹⁰⁵ Illinois, 750 ILL. COMP. STAT. 5/27 (1915); New Hampshire, N.H. REV. STAT. §457:44 (1979); Vermont, 15 VT. STAT. ANN. § 6 (1912); Wisconsin, WIS. STAT. ANN. § 765.04 (1915); Wyoming, WYO, STAT. ANN. 1977 § 20-1-103 (1912).

¹⁰⁶ Indeed, the Vermont Supreme Court has since said that the reverse evasion law may not be enforced to either deny or invalidate civil unions entered into by out-of-state couples. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, ¶¶ 37-40(Vt. 2006)

¹⁰⁷ See, e.g., *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951(Vt. 2006); *Miller-Jenkins v. Miller-Jenkins*, 661 S.E.2d 822 (Va. 2008).

¹⁰⁸ MASS. GEN. LAWS c. 216 of the Acts of 2008.

tected under the privileges and immunities clause of the U.S. Constitution.¹⁰⁹ The Supreme Judicial Court disagreed with the Massachusetts governor's restrictive interpretation of the reverse evasion law although the challenge was only partially successful.¹¹⁰

In March of 2006, the high court remanded the case and issued guidance regarding both which out-of-state couples could marry and what the marital status was of those non-residents who had come to Massachusetts to marry in the intervening period.¹¹¹ Following that guidance, the trial court on remand determined that in the absence of any express prohibition against same-sex couples marrying in Rhode Island, the Rhode Island couple plaintiffs (and other Rhode Island residents) could marry in Massachusetts. To the contrary, in light of the intervening New York high court decision prohibiting same-sex couples from marrying in that state,¹¹² the New Yorkers could not. However, the same judge held New York residents who had married between May 17, 2004 and July 6, 2006—the date of the New York high court decision sustaining the New York exclusionary marriage laws—had done so lawfully.¹¹³

As a result of the *Cote-Whitacre v. Department of Public Health* case, the law was clear on the point that some out-of-state couples could lawfully marry and others could not. Of course, as a factual matter, many out-of-state couples had come to Massachusetts and married despite the later issued opinion suggesting that at least some of those licenses had not issued lawfully. The question for those couples is what the issuance of that license legally means to them. The question has greater significance than its personal import to the individuals and couples today because of what it may mean about the political efforts to reverse the road to equality paved by the issuance of the *Goodridge* opinion (and its implementation) and furthered by the *In re Marriage Cases* decided by the California Supreme Court. The legal

¹⁰⁹ *Cote-Whitacre v. Dept. of Pub. Health*, 844 N.E.2d 623 (Mass. 2006).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Hernandez*, 7 N.Y.3d 338.

¹¹³ *Cote-Whitacre v. Dep't of Pub. Health*, 2006 WL 3208758, Memorandum of Decision on Whether Same-Sex Marriage Is Prohibited in N.Y. and R.I. (Mass. Super. Ct. Sept. 29, 2006).

analysis of the meaning of those Massachusetts marriage licenses issued when Massachusetts still had a reverse evasion law bears greatly on the political efforts to stop the evolution from nationwide marriage exclusion for same-sex couples to full nationwide equality.¹¹⁴

As a result of the combined legal landscape created by the Romney border closing to out-of-state same-sex couples, the challenge to his broad interpretation of the reverse evasion law, and its ultimate repeal, significant questions exist for out-of-state couples about the validity of their marriages. In sorting through the validity of those marriages entered into by non-resident couples before the repeal of Massachusetts' reverse evasion law, there are two key questions to ask. First, in what state did the couple reside when they married? Second, did the couple honestly represent their intention to either reside or not reside in Massachusetts in filling out their marriage license application?¹¹⁵

For out-of-state couples who neither resided in nor intended to reside in Massachusetts, the validity of their relationship turns on what their home state said (or did not say) about the permissibility of marriage between same sex-couples. According to the Massachusetts Supreme Judicial Court, home states can fall into one of three categories with regard to the permissibility of a same-sex couple entering into a marriage. It can either be a "void home state,"¹¹⁶ a prohibited home state,¹¹⁷ or a "silent or

¹¹⁴ In July of 2008, the Massachusetts legislature repealed the reverse evasion law and the new gubernatorial administration lead by Deval Patrick has since directed the local city and town clerks to issue marriage license to couples regardless of residency. See Katie Zezima, *Massachusetts: Same-Sex Couples from Other States May Now Marry*, N.Y. TIMES, Aug. 1, 2008, at A13.

¹¹⁵ The Massachusetts marriage application asks out-of-state couples whether they reside or intend to reside in Massachusetts. It is this residency or intended residency qualification that satisfies the residency requirement created by the now-repealed reverse evasion law.

¹¹⁶ A void home state is one whose marriage licensing laws explicitly state that a marriage entered into by a same-sex couple is "void." The *Cote-Whitacre* court offered Maine as an example of such a state, but many others exist as well.

¹¹⁷ A prohibited home state is one whose laws prohibit same-sex couples from marrying but which don't explicitly designate such relationships as "void." See *Cote-Whitacre*, 844 N.E.2d at 636-637 n.9. The *Cote-Whitacre* court identified Connecticut, Vermont and New Hampshire as examples. *Id.* at 637 n.9. Each state has incorporated a statement of the prohibition of marriages for

ambiguous home state.”¹¹⁸ Marriage licenses issued to persons residing in a void home state with no intention to reside in Massachusetts are not valid. That is to say, the marriage licenses were unauthorized from their issuance and the resulting marriage is therefore void from the date of its inception. At least according to the Massachusetts Supreme Judicial Court, such marriages are “an absolute nullity and [are] not entitled to any recognition or legal status” in Massachusetts.¹¹⁹ The good news is that there is absolute clarity; the bad news is that such marriages have no legal significance.

For couples who came to Massachusetts from home states that prohibited same-sex marriage and stated that they have no intention to reside in Massachusetts, there is somewhat less clarity about the legal validity of their relationships. Although the Supreme Judicial Court made clear that before the repeal of the reverse evasion law, couples from prohibited home states could not come to Massachusetts and marry, it did not state that such licenses are void but rather that they are voidable.¹²⁰ As a result, the marriage is a valid marriage until declared void by a court. More specifically, the marriage is “presumptively valid” and “should for all legal purposes be treated as a valid marriage” unless and until a court says otherwise.¹²¹ At least in Massachusetts, only a party to the marriage itself can seek dissolution or annulment of a voidable marriage. Typically death of one of the parties to the marriage would terminate the opportunity of either of the parties to seek dissolution or annulment and, again typically, third parties could not challenge the status of the relationship.¹²² Of course, this analysis only reveals what Massachusetts’ view of the validity of the marriage is and does not answer how

same-sex couples as part of their adoption of a comprehensive non-marriage alternative, civil union.

¹¹⁸ Silent or ambiguous home states are one whose laws do not include a positive prohibition or a positive permission for same-sex couples to marry. Rhode Island and New Mexico are examples of silent or ambiguous home states. New York was a silent or ambiguous home state until the status of access to marriage was clarified by the state high court in the case of *Hernandez*, 7 N.Y.3d 338.

¹¹⁹ *Cote-Whitacre*, 844 N.E.2d at 636 n.8 (citations omitted).

¹²⁰ *Cote-Whitacre*, 844 N.E.2d 623.

¹²¹ *Id.* at 637 n.10, 638 n.11.

¹²² *Id.* at 636-37.

the couples' home state, or any other state for that matter, will regard the permissibility of the marriage. Unlike the out-of-state residents who married from void home states, couples who married from prohibited home states will need to individually assess the likely recognition of that marriage in other jurisdictions when considering questions such as (1) what legal steps should I take to care for my family; (2) must I get divorced to marry again; (3) how can I (and do I need to) lift the cloud over the validity of my marital status?

As for out-of-state couples who married from silent or ambiguous home states, those marriage licenses properly issued are, at least from the Massachusetts perspective, perfectly valid. Massachusetts courts and state agencies have clarified that with respect to couples who came to Massachusetts to marry from Rhode Island and New Mexico, those marriage licenses were validly issued.¹²³ As to couples who came from New York, marriage licenses issued prior to July 6, 2006, the date of the *Hernandez* decision, were valid.¹²⁴

All in all, what this analysis suggests is that there are many couples from around the country who traveled to Massachusetts during the four years when it was the only state to allow marriages for same-sex couples whose marriages were validly issued. Moreover, until and unless some future political events transpire, Massachusetts borders are open, just as they are for different-sex couples, for non-resident same-sex couples to come to the Commonwealth and marry. While questions remain about the extent to which other states will recognize those marriages,¹²⁵ there are

¹²³ *Cote-Whitacre*, 844 N.E.2d 623.

¹²⁴ There is another category of people who may have lied on their license applications about their intent to reside in Massachusetts. Although Massachusetts has typically allowed non-residents to marry regardless of where they resided as long as they intended to relocate to Massachusetts, this loophole will likely not ensure the validity of an otherwise issued license if the couple filling out the application cannot prove the truth of the assertion. There are no reported decisions in this area of the law but the *Cote-Whitacre* court reminded the plaintiffs that "fraud that goes to the essence of a marriage contract renders a marriage 'voidable.'" *Id.* at 637 n.10. In assessing the validity of these marriages, a court may consider both the nature of the misrepresentation and, again, who it is that is challenging the validity of the marriage.

¹²⁵ Although much predictive scholarship exists about the extent to which marriages will be recognized by other states when (at a time when the question

no remaining questions about the validity of the licenses that issue.

VI. Iowa on the Horizon

A challenge to Iowa's exclusionary marriage laws was resolved on summary judgment by the District Court for Polk County in August, 2007, and then appealed and argued to the Iowa Supreme Court on December 9, 2008. A decision by the state high court is currently pending.¹²⁶ The outcome of this case may affect the trajectory of marriage equality in this country depending particularly on what happens in California.

Six same-sex couples with established relationships that ranged between 5 and 16 years (at the time the case was brought) challenged Iowa's exclusionary marriage laws in a case pursued in the District Court for Polk County that was heard on cross-motions for summary judgment in May, 2007. In a slightly different procedural maneuver than that used in any of the other recent marriage cases, the parties filed extensive supporting submissions that detailed the facts that would be demonstrated upon a trial should the court reject both of the motions for summary judgment. The Iowa court looked closely at the proposed experts and topics and statements that the parties expected to establish at trial, rejecting many of those proposed by the defendants as inadmissible. Moreover, the court accepted as material facts as to which there is no genuine dispute "all those facts" contained in the statement of materials facts submitted in support of the plaintiffs' summary judgment motion which were denied in the defendant's response. These facts include those that

was more hypothetical) a state allows same-sex couples to marry, very little has been written since Massachusetts and now California began issuing valid licenses. Barbara Cox, *Interstate Validation of Marriages and Civil Unions*, 30 HUM. RTS. Q. 5 (Summer 2003); Barbara Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Get Home?*, 1994 WIS. L. REV. 1033-1118; Barbara Cox, *Using an 'Incidents of Marriage' Analysis When Considering Interstate Recognition of Same-Sex Couples' Marriages, Civil Unions, and Domestic Partnerships*, 13 WIDENER L.J. 699 (2004); Joseph William Singer, *Same-Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 1 (Apr. 2005).

¹²⁶ Varnum v. Brien, No. CV5965 (Iowa Dist. Ct., Polk County, 2007).

turned out to be central to the district court's evaluation of the application of the standard of review to the challenge.

In particular, for example, the court found as a material fact that "[t]here is consensus within the mainstream scientific community that parental sexual orientation has no effect on children's adjustment."¹²⁷ The court also determined that "[n]othing about a parent's sex or sexual orientation affects either that parent's capacity to be a good parent or a child's health development. . . . Lesbian and gay persons have the capacity to raise healthy and well-adjusted children."¹²⁸ In no small part based on the court's evaluation of the factual issues before it, the district court granted summary judgment to the plaintiffs and against the defendant deciding the case on fundamental rights and equal protection. The court rejected all of the justifications offered by the defendant including all those resting on child-related grounds as well as that of conserving state and private resources and promoting traditional marriage.

As of the date of publication of this Article, the Iowa Supreme Court had heard oral arguments and a decision was pending.

VII. Conclusion

The last five years have seen both successes and defeats in the struggle for marriage equality for same sex couples. No doubt, the landmark decision of *Goodridge v. Dep't of Public Health*, in which the Massachusetts Supreme Judicial Court held that same-sex couples could not constitutionally be excluded from marriage equality, irreversibly changed the legal landscape for committed, loving same-sex couples. What could not have been predicted at that time and what cannot be predicted still is what the course of progress toward full marriage equality nationwide (indeed, internationally)¹²⁹ will ultimately look like.

However, what is known at this time clearly is that thousands of couples across this country are legally and validly married. This includes couples who have lawfully married in

¹²⁷ *Id.* at 30.

¹²⁸ *Id.* at 31.

¹²⁹ The international dimensions of this issue are well beyond the scope of this article.

Massachusetts, California, and most recently in Connecticut. While the future ability to marry in California remains an unknown, despite legal efforts there and in other parts of the country to reverse the course of history and shut down the possibility of same-sex couples being able to marry, there is no turning back. Progress toward full marriage equality has begun in earnest. The next several years may determine the pace at which full equality is achieved but there can be no real doubt of its attainment.

