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## **Same-Sex Marriages: Legal Issues**

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# Same-Sex Marriages: Legal Issues

## Summary

Massachusetts became the first state to legalize marriage between same-sex couples on May 17, 2004, as a result of a November 2003 decision by the state's highest court that denying gay and lesbian couples the right to marry violated the state's constitution. Currently, federal law does not recognize same-sex marriages. This report discusses the Defense of Marriage Act (DOMA), P.L. 104-199, which prohibits federal recognition of same-sex marriages and allows individual states to refuse to recognize such marriages performed in other states, and discusses the potential legal challenges to DOMA. Moreover, this report summarizes the legal principles applied in determining the validity of a marriage contracted in another state, surveys the various approaches employed by states to prevent same-sex marriage, and examines the recent House and Senate Resolutions introduced in the 109<sup>th</sup> Congress proposing a constitutional amendment (H.J.Res. 39, S.J.Res. 1, and S.J.Res. 13) and limiting Federal courts' jurisdiction to hear or determine any question pertaining to the interpretation of DOMA (H.R. 1100).

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# Same-Sex Marriages: Legal Issues

Massachusetts became the first state to legalize marriage between same-sex couples on May 17, 2004, as a result of a November 2003 decision by the state's highest court that denying gay and lesbian couples the right to marry violated the state's constitution.<sup>1</sup> Currently neither federal law nor any state law affirmatively allows gay or lesbian couples to marry. On the federal level, Congress enacted the Defense of Marriage Act (DOMA) to prohibit recognition of same-sex marriages for purposes of federal enactments. States, such as Arkansas,<sup>2</sup> Alaska, Georgia,<sup>3</sup> Hawaii, Kansas,<sup>4</sup> Kentucky,<sup>5</sup> Louisiana,<sup>6</sup> Michigan,<sup>7</sup> Mississippi,<sup>8</sup> Missouri,<sup>9</sup> Montana,<sup>10</sup> Nebraska,<sup>11</sup> Nevada, North Dakota,<sup>12</sup> Ohio,<sup>13</sup> Oklahoma,<sup>14</sup> Oregon,<sup>15</sup> Texas,<sup>16</sup> and

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<sup>1</sup> *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>2</sup> Voters approved the constitutional ban on November 2, 2004.

<sup>3</sup> Voters approved the constitutional ban on November 2, 2004.

<sup>4</sup> Voters approved the constitutional ban on April 5, 2005.

<sup>5</sup> Voters approved the constitutional ban on November 2, 2004.

<sup>6</sup> Voters approved the constitutional ban on September 18, 2004. The Louisiana Supreme Court reversed a state district judge's ruling striking down the amendment on the grounds that it violated a provision of the state constitution requiring that an amendment cover only one subject. The Court found that each provision of the amendment is germane to the single object of defense of marriage and constitutes an element of the plan advanced to achieve this object. *Forum for Equality PAC v. McKeithen*, 893 So.3d 715 (La. 2005). Three other states that also have single-subject requirements, Georgia, Ohio and Oklahoma, may face legal challenges similar to the one in Louisiana.

<sup>7</sup> Voters approved the constitutional ban on November 2, 2004.

<sup>8</sup> Voters approved the constitutional ban on November 2, 2004.

<sup>9</sup> Voters approved the constitutional ban on August 3, 2004.

<sup>10</sup> Voters approved the constitutional ban on November 2, 2004.

<sup>11</sup> A U.S. district court judge struck down Nebraska's ban on gay marriage, saying that the ban "imposes significant burdens on both the expressive and intimate associational rights" of gays "and creates a significant barrier to the plaintiffs' right to petition or to participate in the political process." *Citizens for Equal Protection Inc., v. Bruning*, 368 F.Supp.2d 980 (D. NE May 12, 2005).

<sup>12</sup> Voters approved the constitutional ban on November 2, 2004.

<sup>13</sup> Voters approved the constitutional ban on November 2, 2004.

<sup>14</sup> Voters approved the constitutional ban on November 2, 2004.

<sup>15</sup> Voters approved the constitutional ban on November 2, 2004. On April 4, 2005, the  
(continued...)

Utah have enacted state constitutional amendments limiting marriage to one man and one woman. Twenty-six other states have enacted statutes limiting marriage in some manner.<sup>17</sup> Table 1 summarizes these various approaches.

### **Defense of Marriage Act (DOMA)<sup>18</sup>**

In 1996, Congress enacted the DOMA “[t]o define and protect the institution of marriage.” It allows all states, territories, possessions, and Indian tribes to refuse to recognize an act of any other jurisdiction that designates a relationship between individuals of the same sex as a marriage. In part, DOMA states:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>19</sup>

Furthermore, DOMA goes on to declare that the terms “marriage” and “spouse,” as used in federal enactments, exclude homosexual marriage.

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.<sup>20</sup>

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<sup>15</sup> (...continued)

Oregon Supreme Court invalidated Multnomah County same-sex marriages, stating that the marriage licenses were issued to same-sex couples without authority and were void at the time they were issued. *Li v. State*, 110 P.3d 91 (Or. 2005).

<sup>16</sup> Voters approved the constitutional ban on November 8, 2005.

<sup>17</sup> These states are: Alabama, Arizona, California, Colorado, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Minnesota, New Hampshire, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wyoming.

<sup>18</sup> P.L. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

<sup>19</sup> 28 U.S.C. §1738C.

<sup>20</sup> 1 U.S.C. § 7.

## Potential Constitutional Challenges to DOMA<sup>21</sup>

**Full Faith and Credit Clause.** Some argue that DOMA is an unconstitutional exercise of Congress' authority under the full faith and credit clause of the U.S. Constitution.<sup>22</sup> Article IV, section 1 of the Constitution, the Full Faith and Credit Clause states:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general

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<sup>21</sup> It should be noted that a federal bankruptcy court in the Western District of Washington found DOMA constitutional. Two American women, married in British Columbia, Canada filed a joint bankruptcy petition in Tacoma, challenging the definitional part of DOMA. The court ruled that there was no fundamental constitutional right to marry someone of the same sex and that DOMA did not violate the Fourth, Fifth or Tenth amendments, nor the principles of comity. *In re Lee Kandu and Ann C. Kandu*, No. 03-51312 (Western District of Washington, Aug. 17, 2004). This decision is not binding on other courts.

In *Wilson v. Ake*, a same-sex couple sought a declaration that their marriage was valid for federal and Florida law purposes. To issue such a declaration, the court would have had to invalidate both the Federal DOMA and the Florida statutes defining marriage the same way and expressly forbidding courts to recognize same-sex marriages from other states. The *Wilson* court declined to invalidate any of the relevant statutes finding that (1) DOMA did not violate the Full Faith and Credit Clause; (2) the right to marry a person of the same sex was not a fundamental right guaranteed by the Due Process Clause; (3) homosexuals were not a suspect class warranting strict scrutiny of equal protection claim; (4) under a rational basis analysis, DOMA did not violate equal protection or due process guarantees; and (5) the Florida statute prohibiting same-sex marriage is constitutional. *Wilson v. Ake*, 354 F.Supp.3d 1298 (M.D. Florida, Jan. 19, 2005). Moreover, the *Wilson* court found that it was bound by the U.S. Supreme Court's decision in *Baker v. Nelson*, 191 N.W.2d 185 (1971), *appeal dismissed*, 409 U.S. 810 (1972).

In *Baker v. Nelson*, two adult males' application for a marriage license was denied by the County clerk because the petitioners were of the same sex. The plaintiffs appealed to the Minnesota Supreme Court. Plaintiffs argued that Minnesota Statute § 517.08, which did not authorize marriage between persons of the same sex, violated the First, Eighth, Ninth and Fourteenth Amendments of the U.S. Constitution. The Minnesota Supreme Court rejected plaintiffs' assertion that "the right to marry without regard to the sex of the parties is a fundamental right of all persons" and held that § 517.08 did not violate the Due Process Clause or Equal Protection Clause. 191 N.W.2d at 186-87.

The plaintiffs then appealed the Minnesota Supreme Court's ruling to the U.S. Supreme Court pursuant to 28 U.S.C. § 1257(2). Under 28 U.S.C. § 1257, the Supreme Court had no discretion to refuse to adjudicate the case on its merits. The Supreme Court ultimately dismissed the appeal "for want of a substantial federal question." *Baker*, 408 U.S. at 810.

The *Wilson* court, relying on *Hicks v. Miranda* (422 U.S. 332 (1975)), found that a dismissal for lack of a substantial federal question constitutes an adjudication on the merits that is binding on lower federal courts.

<sup>22</sup> U.S. Const. art. IV, § 1.

Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Opponents argue that, while Congress has authority to pass laws that enable acts, judgments and the like to be given effect in other States, it has no constitutional power to pass a law permitting States to deny full faith and credit to another State's laws and judgments.<sup>23</sup> Conversely, some argue that DOMA does nothing more than simply restate the power granted to the States by the full faith and credit clause.<sup>24</sup> While there is no judicial precedent on this issue, it would appear that Congress' general authority to "prescribe...the effect" of public acts arguably gives it discretion to define the "effect" so that a particular public act is not due full faith and credit. It would appear that the plain reading of the clause would encompass both expansion and contraction.<sup>25</sup>

**Equal Protection.** Congress' authority to legislate in this manner under the full faith and credit clause, if the analysis set out above is accepted, does not conclude the matter. There are constitutional constraints upon federal legislation. One that is relevant is the equal protection clause and the effect of the Supreme Court's decision in *Romer v. Evans*,<sup>26</sup> which struck down under the equal protection clause a referendum-adopted provision of the Colorado Constitution, which repealed local ordinances that provided civil-rights protections for gay persons and which prohibited all governmental action designed to protect homosexuals from discrimination. The Court held that, under the equal protection clause, legislation adverse to homosexuals was to be scrutinized under a "rational basis" standard of review.<sup>27</sup> The classification failed to pass even this deferential standard of review, because it imposed a special disability on homosexuals not visited on any other class of people and it could not be justified by any of the arguments made by the State. The State argued that its purpose for the amendment was two-fold: (1) to respect the freedom of association rights of other citizens, such as landlords and employers) who objected to homosexuality; and (2) to serve the state's interest in conserving resources to fight discrimination against other protected groups.

DOMA can be distinguished from the Colorado amendment. DOMA's legislative history indicates that it was intended to protect federalism interests and state sovereignty in the area of domestic relations, historically a subject of almost exclusive state concern. Moreover, it permits but does not require States to deny recognition to same-sex marriages in other States, affording States with strong public

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<sup>23</sup> See 142 Cong. Rec. S5931-33 (June 6, 1996) (statement introducing Professor Laurence H. Tribe's letter into the record concluding that DOMA "would be an unconstitutional attempt by Congress to limit the full faith and credit clause of the Constitution.").

<sup>24</sup> See Paige E. Chabora, Congress' Power Under the Full Faith and Credit Clause and the Defense of Marriage Act of 1996, 76 Neb. L. Rev. 604, 621-35 (1997).

<sup>25</sup> See e.g., *Wilson v. Ake*, 354 F.Supp.2d at 1302 (finding that DOMA was an appropriate exercise of Congress' power to regulate conflicts between the laws of different States, and holding otherwise would create "a license for a single State to create national policy.").

<sup>26</sup> 517 U.S. 620 (1996).

<sup>27</sup> *Id.*

policy concerns the discretion to effectuate that policy. Thus, it can be argued that DOMA is grounded not in hostility to homosexuals but in an intent to afford the States the discretion to act as their public policy on same-sex marriage dictates.

**Substantive Due Process (Right to Privacy).** Another possibly applicable constitutional constraint is the Due Process Clause of the Fourteenth Amendment and the effect of the Supreme Court’s decision in *Lawrence v. Texas*,<sup>28</sup> which struck down under the due process clause a state statute criminalizing certain private sexual acts between homosexuals. The Court held that the Fourteenth Amendment’s due process privacy guarantee extends to protect consensual sex between adult homosexuals. The Court noted that the Due Process right to privacy protects certain personal decisions from governmental interference. These personal decisions include issues regarding contraceptives, abortion, marriage, procreation, and family relations.<sup>29</sup> The Court extended this right to privacy to cover adult consensual homosexual sodomy.

It is currently unclear what impact, if any, the Court’s decision in *Lawrence* will have on legal challenges to laws prohibiting same-sex marriage. On the one hand, this decision can be viewed as affirming a broad constitutional right to sexual privacy. Conversely, the Court distinguished this case from cases involving minors and “whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>30</sup> Courts may seek to distinguish statutes prohibiting same-sex marriage from statutes criminalizing homosexual conduct. Courts may view the preservation of the institution of marriage as sufficient justification for statutes banning same-sex marriage. Moreover, courts may view the public recognition of marriage differently than the sexual conduct of homosexuals in the privacy of their own homes.

## Interstate Recognition of Marriage

DOMA opponents take the position that the Full Faith and Credit Clause would obligate States to recognize same-sex marriages contracted in States in which they are authorized. This conclusion is far from evident as this clause applies principally to the interstate recognition and enforcement of judgments.<sup>31</sup> It is settled law that final judgments are entitled to full faith and credit, regardless of other states’ public policies, provided the issuing state had jurisdiction over the parties and the subject

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<sup>28</sup> 539 U.S. 558 (2003). For a legal analysis of this decision, refer to CRS Report RL31681, *Homosexuality and the Constitution: A Legal Analysis of the Supreme Court Ruling in Lawrence v. Texas* by Jody Feder.

<sup>29</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>30</sup> *Id.* at 2484. See e.g., *Wilson v. Ake*, 354 F.Supp.2d at 1306 (declining to interpret *Lawrence* as creating a fundamental right to same-sex marriage).

<sup>31</sup> See H.Rept. 104-664, 1996 U.S.C.C.A.N. 2905 (stating that “marriage licensure is not a judgment.”). See also, 28 U.S.C. § 1738 (defining which acts, records and judicial proceeding are afforded full faith and credit).



matter.<sup>32</sup> The Full Faith and Credit Clause has rarely been used by courts to validate marriages because marriages are not “legal judgments.”

As such, questions concerning the validity of an out-of-state marriage are generally resolved without reference to the Full Faith and Credit Clause. In the legal sense, marriage is a “civil contract” created by the States which establishes certain duties and confers certain benefits.<sup>33</sup> Validly entering the contract creates the marital status; the duties and benefits attached by a State are incidents of that status. As such, the general tendency, based on comity rather than on compulsion under the Full Faith and Credit Clause, is to recognize marriages contracted in other States even if they could not have been celebrated in the recognizing State.

The general rule of validation for marriage is to look to the law of the place where the marriage was celebrated. A marriage satisfying the contracting State’s requirements will usually be held valid everywhere.<sup>34</sup> Many States provide by statute that a marriage that is valid where contracted is valid within the State. This “place of celebration” rule is then subject to a number of exceptions, most of which are narrowly construed. The most common exception to the “place of celebration” rule is for marriages deemed contrary to the forum’s strong public policy. Several States, such as Connecticut,<sup>35</sup> Idaho,<sup>36</sup> Illinois,<sup>37</sup> Kansas,<sup>38</sup> Missouri,<sup>39</sup> Pennsylvania,<sup>40</sup> South Carolina,<sup>41</sup> and Tennessee<sup>42</sup> provide an exception to this general rule by declaring out-of-state marriages void if against the State’s public policy or if entered into with the intent to evade the law of the State. This exception applies only where another State’s law violates “some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”<sup>43</sup>

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<sup>32</sup> *Restatement (Second) of Conflict of Laws* § 107.

<sup>33</sup> On the state level, common examples of nonnegotiable marital rights and obligations include distinct income tax filing status; public assistance such as health and welfare benefits; default rules concerning community property distribution and control; dower, curtesy and inheritance rights; child custody, child agreements; name change rights; spouse and marital communications privileges in legal proceedings; and the right to bring wrongful death, and certain other, legal actions.

<sup>34</sup> See 2 *Restatement (Second) of Conflict of Laws* § 283.

<sup>35</sup> Conn. Gen Stat. Ann. § 45a-803-4.

<sup>36</sup> Idaho Code § 32-209.

<sup>37</sup> 750 Ill. Comp. Stat. 5/201.

<sup>38</sup> Kan. Stat. Ann. § 23-101.

<sup>39</sup> Mo. Rev. Stat. § 451.022.

<sup>40</sup> Pa. Stat. Ann. tit. 23 § 1704.

<sup>41</sup> S.C. Code Ann. § 20-1-10.

<sup>42</sup> Tenn. Code Ann. § 36-3-113.

<sup>43</sup> *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918)(defining public policy as a valid reason for closing the forum to suit); see e.g. *Shea v. Shea*, 63 N.E.2d 113 (N.Y.

Section 283 of the Restatement (Second) of Law provides:

(1) The validity of marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.

(2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.

## States' Responses

**State Litigation.** Massachusetts, unlike twenty-six States and the federal government, has not adopted a “defense of marriage statute” defining marriage as a union between a man and woman.<sup>44</sup> On April 11, 2001, a Boston-based, homosexual rights group, Gay Lesbian Advocates and Defenders (GLAD) filed suit against the Massachusetts Department of Public Health on behalf of seven same-sex couples. The plaintiffs claimed that “refusing same-sex couples the opportunity to apply for a marriage license” violates Massachusetts’ law and various portions of the Massachusetts Constitution. GLAD’s brief argued the existence of a fundamental right to marry “the person of one’s choosing” in the due process provisions of the Massachusetts Constitution and asserted that the marriage laws, which allow both men and women to marry, violate equal protection provisions.<sup>45</sup>

The Superior Court rejected the plaintiffs’ arguments after exploring the application of the word marriage, the construction of marriage statutes and finally, the historical purpose of marriage. The trial court found that based on history and the actions of the people’s elected representatives, a right to same-sex marriage was not so rooted in tradition that a failure to recognize it violated fundamental liberty, nor was it implicit in ordered liberty.<sup>46</sup> Moreover, the court held that in excluding same-sex couples from marriage, the Commonwealth did not deprive them of substantive due process, liberty, or freedom of speech or association.<sup>47</sup> The court went on to find that limiting marriage to opposite-sex couples was rationally related to a legitimate state interest in encouraging procreation.<sup>48</sup>

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<sup>43</sup> (...continued)

1945)(finding that a common law marriage validly contracted in another state should not be recognized as common law marriage in New York as it was prohibited by statute).

<sup>44</sup> It should be noted that, prior to the *Goodridge* case, in *Adoption of Tammy*, 619 N.E. 2d 315 (Mass. 1993), the Supreme Judicial Court had interpreted “marriage” to mean “the union of one man and one woman.”

<sup>45</sup> *Hilary Goodridge v. Dept. of Public Health*, No. 01-1647-A, 2002 Mass. Super LEXIS 153 (Suffolk County, Super. Ct. May 7, 2002).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

On November 18, 2003, the Massachusetts Supreme Judicial Court overruled the lower court and held that under the Massachusetts Constitution, the Commonwealth could not deny the protections, benefits, and obligations attendant on marriage to two individuals of the same sex who wish to marry.<sup>49</sup> The court concluded that interpreting the statutory term “marriage” to apply only to male-female unions, lacked a rational basis for either due process or equal protection purposes under the state’s constitution. Moreover, the court found that such a limitation was not justified by the state’s interest in providing a favorable setting for procreation and had no rational relationship to the state’s interests in ensuring that children be raised in optimal settings and in conservation of state and private financial resources.<sup>50</sup> The court reasoned that the laws of civil marriage did not privilege procreative heterosexual intercourse, nor contain any requirement that applicants for marriage licenses attest to their ability or intention to conceive children by coitus. Moreover, the court reasoned that the state has no power to provide varying levels of protection to children based on the circumstances of birth. As for the state’s interest in conserving scarce state and private financial resources, the court found that the state failed to produce any evidence to support its assertion that same-sex couples were less financially interdependent than opposite-sex couples. In addition, Massachusetts marriage laws do not condition receipt of public and private financial benefits to married individuals on a demonstration of financial dependence on each other.<sup>51</sup> As this decision is based on the Commonwealth’s constitution, it is not reviewable by the U.S. Supreme Court. The court stayed its decision for 180 days to give the Legislature time to enact legislation “as it may deem appropriate in light of this opinion.”<sup>52</sup>

On February 3, 2004, the court ruled, in an advisory opinion to the state senate, that civil unions are not the constitutional equivalent of civil marriage.<sup>53</sup> The court reasoned that the establishment of civil unions for same-sex couples would create a separate class of citizens by status discrimination which would violate the equal protection and due process requirements of the Constitution of the Commonwealth.<sup>54</sup>

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<sup>49</sup> *Hillary Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

<sup>50</sup> *Id.* at \*14 (stating that it “cannot be rational under our laws, and indeed is not permitted, to penalize children by depriving them of state benefits because the state disapproves of their parents’ sexual orientation.”)

<sup>51</sup> *Id.* at 15.

<sup>52</sup> *Id.* at \*18.

<sup>53</sup> The state Senate asked the court whether it would be sufficient for the legislature to pass a law allowing same-sex civil unions that would confer “all of the benefits, protections, rights and responsibilities of marriage.”

<sup>54</sup> Opinions of the Justices to the Senate, SJC-01963, 802 N.E.2d 565 (Mass. 2004).

While the aforementioned opinions deal exclusively with a state constitution,<sup>55</sup> an Arizona Court of Appeals exercising its discretion to accept jurisdiction based on the issue of first impression, held that the fundamental right to marry protected by the Fourteenth Amendment as well as the Arizona Constitution did not encompass the right to marry a same-sex partner.<sup>56</sup> Moreover, the court found that the state had a legitimate interest in encouraging procreation and child rearing within the marital relationship and limiting that relationship to opposite-sex couples.

In light of the Supreme Court's recent decision in *Lawrence*, the petitioners argued that the Arizona statute prohibiting same-sex marriages violated their fundamental right to marry and their right to equal protection under the laws, both of which are guaranteed by the federal and state constitutions. The Arizona court rejected the petitioners' argument that the Supreme Court in *Lawrence* implicitly recognized that the fundamental right to marry includes the freedom to choose a same-sex spouse.<sup>57</sup> The court viewed the *Lawrence* language as acknowledging a homosexual person's "right to define his or her own existence, and achieve the type of individual fulfillment that is the hallmark of a free society, by entering a homosexual relationship."<sup>58</sup> However, the court declined to view the language as stating that such a right includes the choice to enter a state-sanctioned, same-sex marriage.<sup>59</sup>

As such, the court reviewed the constitutionality of the challenged statutes using a rational basis analysis and found that the state has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that limiting marriage to opposite-sex couples is rationally related to that interest. Moreover, the court said that while the state's reasoning is debatable, it is not arbitrary or irrational. Consequently, the court upheld the challenged statutes.

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<sup>55</sup> There are approximately 20 lawsuits filed which seek same-sex marriage rights under state constitutions. These states include California, Connecticut, Florida, Indiana, Maryland, Nebraska, New Jersey, New York, Oregon and Washington. Washington's Supreme Court is expected to hear appeals of two lower court rulings that struck down the state's DOMA (*Anderson v. King County*, 2004 WK 1738447, Wash. Super, Aug. 4, 2004 and *Castle v. State*, 20004 WL 1985215, Wash. Super., Sept. 7, 2004 ). A lawsuit pending in California has been appealed to the state's highest court.

<sup>56</sup> *Standhardt v. Superior Court of the State of Arizona*, 77 P.3d 451 (Ariz. Ct. App. 2003).

<sup>57</sup> *Id.* at 457.

<sup>58</sup> *Id.*

<sup>59</sup> See also, *Morrison v. Sadler*, 2003 WL 23119998 (Ind. Super. May 7, 2003)(holding that the state's law "promotes the state's interest in encouraging procreation to occur in a context where both biological parents are present to raise the child."); *Lewis v. Harris*, 2003 WL 23191114 (N.J. Super. L. Nov. 5, 2003)(holding that the right to marry does not include a fundamental right to same-sex marriage).

**State Constitutional Amendments.*****Arkansas.***

Marriage consists only of the union of one man and one woman. Legal status for unmarried persons which is identical or substantially similar to marital status shall not be valid or recognized in Arkansas, except that the Legislature may recognize a common law marriage from another state between a man and a woman. The Legislature has the power to determine the capacity of persons to marry, subject to this amendment, and the legal rights, obligations, privileges and immunities of marriage.<sup>60</sup>

***Georgia.***

This state shall recognize as marriage only the union of man and woman. Marriages between persons of the same sex are prohibited in this state. No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage. This state shall not give effect to any public act, record or judicial proceeding of any other state or jurisdiction respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state or jurisdiction. The courts of this state shall have no jurisdiction to grant a divorce or separate maintenance with respect to any such relationship or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such relationship.<sup>61</sup>

***Kansas.***

The marriage contract is to be considered in law as a civil contract. Marriage shall be constituted by one man and one woman only. All other marriages are declared to be contrary to the public policy of this state and are void.

No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.<sup>62</sup>

***Kentucky.***

Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.<sup>63</sup>

***Louisiana.***

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and

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<sup>60</sup> AR. CONST. Amend. 83, sec. 1.

<sup>61</sup> GA. CONST. Art. I., §IV.

<sup>62</sup> KS CONST. Art. 15, § 16.

<sup>63</sup> KY. CONST. § 233A.

one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman to the state constitution.<sup>64</sup>

### ***Michigan.***

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.<sup>65</sup>

### ***Missouri.***

That to be valid and recognized in this state, a marriage shall exist only between a man and a woman.<sup>66</sup>

### ***Montana.***

Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.

### ***Mississippi.***

Marriage may take place and may be valid under the laws of this state only between a man and a woman. A marriage in another state or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this state and is void and unenforceable under the laws of this state.<sup>67</sup>

### ***North Dakota.***

Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent effect.

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<sup>64</sup> LA. CONST. Art. XII, §15. The Louisiana Supreme Court reversed a state district judge's ruling striking down the amendment on the grounds that it violated a provision of the state constitution requiring that an amendment cover only one subject. The Court found that each provision of the amendment is germane to the single object of defense of marriage and constitutes an element of the plan advanced to achieve this object. *Forum for Equality PAC v. McKeithen*, 893 So. 2d 715 (La., 2005).

<sup>65</sup> MI. CONST., Art. 1, Sec. 25.

<sup>66</sup> MO. CONST., Art. I, Sect. 33.

<sup>67</sup> MISS. CONST. §263-A.

**Ohio.**

Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

**Oklahoma.**

Marriage in this state shall consist only of the union of one man and one woman. Neither this constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups. A marriage between persons of the same gender performed in another state shall not be recognized as valid and binding in this state as of the date of the marriage. Any person knowingly issuing a marriage license in violation of this section shall be guilty of a misdemeanor.<sup>68</sup>

**Oregon.**

It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.<sup>69</sup>

**Texas.**

Marriage in this state shall consist only of the union of one man and one woman. This state or a political subdivision of this state may not create or recognize any legal status identical or similar to marriage.<sup>70</sup>

**Utah.**

Marriage consists only of the legal union between a man and a woman. No other domestic status or union, however denominated, between persons is valid or recognized or may be authorized, sanctioned or given the same or substantially equivalent legal effect as a marriage.<sup>71</sup>

**State “Civil Union” Laws.** Civil union/domestic partnership laws confer certain rights and benefits upon domestic partners which vary depending on state law. Some of these rights and benefits include laws relating to title, tenure, descent and distribution, intestate succession; causes of action related to or dependent upon

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<sup>68</sup> OKLA. CONST. Art. II, §35.

<sup>69</sup> OR. CONST. Art. XV, §5a.

<sup>70</sup> TX CONST. Art. 1, §32.

<sup>71</sup> UTAH CONST. Art. I, §29.

spousal status,<sup>72</sup> including an action for wrongful death,<sup>73</sup> emotional distress, or loss of consortium; probate law and procedure; adoption law and procedure; insurance benefits; workers' compensation rights; laws relating to medical care and treatment, hospital visitation and notification; family leave benefits; public assistance benefits under state laws and laws relating to state taxes.<sup>74</sup>

For example, in Vermont, civil union status is available to two persons of the same sex who are unrelated<sup>75</sup> and affords parties "the same benefits, protections and responsibilities under Vermont law, whether they derive from statute, policy, administrative or court rule, common law or any other source of civil law, as are granted to spouses in a marriage."<sup>76</sup> Domestic partnership laws in California,<sup>77</sup>

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<sup>72</sup> See *Salucco v. Alldredge*, 2004 WL 864459 (Superior Ct of Mass., Mar. 29, 2004)(exercising its general equity jurisdiction to dissolve a Vermont civil union).

<sup>73</sup> See *Langan v. St. Vincent Hosp.*, 196 Misc.2d 440 (N.Y. Misc. 2003)(finding that New York's statutes did not prohibit recognition of a same-sex union nor was such a union against New York's public policy on marriage thus recognizing the same-sex partner as a spouse for purposes of New York's wrongful death statute), overruled by *Langan v. St. Vincent Hosp.*, 802 N.Y.S. 2d 476 (NY AD 2 Dept., 2005).

<sup>74</sup> Constitutional amendments approved in Arkansas, Georgia, Kansas, Kentucky, Michigan, North Dakota, Oklahoma, Ohio and Utah contain language which state that a legal status which is substantially similar to marriage (i.e. civil unions or domestic partnerships) may not be recognized.

<sup>75</sup> Vt. Stat. Ann. Tit. 15 §§ 1203, 5163. See also, "The Vermont Guide to Civil Unions" found at [<http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html>].

<sup>76</sup> Vt. Stat. Ann. Tit. 15 § 1204. See also, *Salucco v. Alldredge*, 2004 WL 864459 (Superior Ct of Mass., Mar. 29, 2004)(discussing Vermont's civil union statutes). On October 1, 2005, Connecticut's civil union laws go into effect. A Connecticut civil union will be available to an individual at least 18 years of age, of the same sex as the other party to the civil union, no more closely related to the other than first cousin and not a party to another civil union or marriage. 2005 Conn. Legis. Serv. P.A. 05-10 (S.S.B. 963).

<sup>77</sup> CA Fam. §§ 297, 298 and 299(extending the rights and duties of marriage to persons registered as domestic partners on and after January 1, 2005). It should be noted that opposite-sex domestic partners over the age of 62 meeting the eligibility requirements of Title II of the Social Security Act (SSA) for old age benefits (as defined in 42 U.S.C. § 402(a)), or Title XVI of the SSA for aged individuals (as defined in 42 U.S.C. § 1381) are eligible to register as domestic partners.



Hawaii,<sup>78</sup> and New Jersey<sup>79</sup> also offer some marital benefits to same-sex couples, although not as comprehensive as Vermont's or Connecticut's civil unions.<sup>80</sup>

## Pending Federal Legislation

Several bills have been introduced in the 109<sup>th</sup> Congress to address the issue of same-sex marriage.<sup>81</sup> For example, on January 24, 2005, S.J.Res. 1, a proposed constitutional amendment was introduced. The text of the proposed constitutional amendment is as follows:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

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<sup>78</sup> Hawaii's term for domestic partners is "reciprocal beneficiaries." Reciprocal beneficiaries must be eighteen years old, ineligible to marry, and unmarried. This status includes relationships not involving sex or the same residence. Haw. Rev. Stat. § 572C-5; See also, [<http://www.hawaii.gov/health/vital-records/reciprocal/index.html>] (discussing Hawaii's reciprocal beneficiary status).

<sup>79</sup> The New Jersey Domestic Partnership Act is effective July 11, 2004, and grants legal status to same-sex couples and unmarried, opposite-sex couples age 62 or over under certain New Jersey laws.

<sup>80</sup> Domestic partnerships also exist at the local level. For example, New York City allows residents an opportunity to register their domestic partnerships provided that both individuals are eighteen years of age or older, unmarried or related by blood in a manner that would bar his or her marriage in New York State, have a close and committed personal relationship, live together and have been living together on a continuous basis. N.Y.C. Admin. Code § 3-241. It should be noted that this statute allows both same-sex and opposite-sex partners to register.

<sup>81</sup> Proposed constitutional amendments were introduced in the 108<sup>th</sup> Congress. H.J.Res. 56 and S.J.Res. 26 text was as follows:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

S.J.Res. 30 was introduced with technical changes to S.J.Res. 26. The text of S.J.Res. 30 and S.J.Res. 40 is as follows:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

On July 14, 2004, the Senate considered and voted on a required procedural motion. This motion failed by a vote of 48-50, which prevented further consideration of S.J.Res. 40.

Similar proposed constitutional amendments include S.J.Res. 13, introduced on April 14, 2005,<sup>82</sup> and H.J.Res. 39, introduced on March 17, 2005.<sup>83</sup> In addition, H.R. 1100, introduced on March 3, 2005, would amend title 28 of the United State Code to limit Federal court jurisdiction over questions under DOMA.<sup>84</sup>

Although uniformity may be achieved upon ratification of the proposed constitutional amendments, States would no longer have the flexibility of defining marriage within their borders. Moreover, States may be prohibited from recognizing a same-sex marriage performed and recognized outside of the United States.<sup>85</sup> It appears that this amendment would not impact a State's ability to define civil unions or domestic partnerships and the benefits conferred upon such.

However, an issue may arise regarding the time in which an individual is considered a man or a woman. As the first official document to indicate a person's sex, the designation on the birth certificate "usually controls the sex designation on all later documents."<sup>86</sup> Some courts have held that sexual identity for purposes of marriage is determined by the sex stated on the birth certificate, regardless of

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<sup>82</sup> The text of S.J.Res. 13 is as follows:

SECTION 1. Marriage in the United States shall consist only of the union of a man and a woman.

SECTION 2. Congress shall have the power to enforce this article by appropriate legislation.

<sup>83</sup> The text of H.J.Res. 39 is as follows:

SECTION 1. Marriage in the United States shall consist only of a legal union of one man and one woman.

SECTION 2. No court of the United States or of any State shall have jurisdiction to determine whether this Constitution or the constitution of any State requires that the legal incidents of marriage be conferred upon any union other than a legal union between one man and one woman.

SECTION 3. No State shall be required to give effect to any public act, record, or judicial proceeding of any other State concerning a union between persons of the same sex that is treated as a marriage, or as having the legal incidents of marriage, under the laws of such other State.

<sup>84</sup> H.R. 1100 is identical to H.R. 3313, the Marriage Protection Act of 2003, introduced during the 108<sup>th</sup> Congress. On July 22, 2004, the House voted on and passed H.R. 3313. The Senate did not consider the legislation during the 108<sup>th</sup> Congress.

<sup>85</sup> It appears that the Netherlands, Belgium and Ontario, Canada are the only international jurisdictions that sanction and/or recognize a same-sex union as a "marriage," per se.

<sup>86</sup> Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 *Ariz. L. Rev.* 265,309 (1999) (discussing biological characteristics and sexual identity).

subsequent sexual reassignment.<sup>87</sup> However, some argue that this method is flawed, as an infant's sex may be misidentified at birth and the individual may subsequently identify with and conform his or her biology to another sex upon adulthood.<sup>88</sup>

## Conclusion

States currently possess the authority to decide whether to recognize an out-of-state marriage. The Full Faith and Credit Clause has rarely been used by States to validate marriages because marriages are not "legal judgments." With respect to cases decided under the Full Faith and Credit Clause that involve conflicting State statutes, the Supreme Court generally examines the significant aggregation of contacts the forum has with the parties and the occurrence or transaction to decide which State's law to apply. Similarly, based upon generally accepted legal principles, States routinely decide whether a marriage validly contracted in another jurisdiction will be recognized in-State by examining whether it has a significant relationship with the spouses and the marriage.

Congress is empowered under the Full Faith and Credit Clause of the Constitution to prescribe the manner that public acts, commonly understood to mean legislative acts, records, and proceedings shall be proved and the effect of such acts, records, and proceedings in other States.<sup>89</sup>

The Supreme Court's decisions in *Romer v. Colorado* and *Lawrence v. Texas* may present different issues concerning DOMA's constitutionality. Basically *Romer* appears to stand for the proposition that legislation targeting gays and lesbians is constitutionally impermissible under the Equal Protection Clause unless the legislative classification bears a rational relationship to a legitimate State purpose. Because same-sex marriages are singled out for differential treatment, DOMA appears to create a legislative classification for equal protection purposes that must meet a rational basis test. It is possible that DOMA would survive constitutional scrutiny under *Romer* inasmuch as the statute was enacted to protect the traditional institution of marriage. Moreover, DOMA does not prohibit States from recognizing same-sex marriage if they so choose.

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<sup>87</sup> See e.g., *In re Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); *Littleton v. Prange*, 9 S.W. 3d 223 (Tex. App. 1999); but see, *M.T. v. J.T.*, 355 A.2d 204 (N.J. 1976)(determining an individual's sexual classification for the purpose of marriage encompasses a mental component as well as an anatomical component).

<sup>88</sup> If a mistake was made on the original birth certificate, an amended certificate will sometimes be issued if accompanied by an affidavit from a physician or a court order.

<sup>89</sup> It should be noted that only on five occasions previous to the DOMA has Congress enacted legislation based upon this power. The first, passed in 1790 (1 Stat. 122, codified at 28 U.S.C. § 1738), provides for ways to authenticate acts, records and judicial proceedings. The second, dating from 1804 (2 Stat. 298, codified at 28 U.S.C. 1738), provides methods of authenticating non-judicial records. Three other Congressional enactments pertain to modifiable family law orders (child custody, 28 U.S.C. § 1738A, child support (28 U.S.C. § 1738B) and domestic protection (18 U.S.C. § 2265)).

*Lawrence* appears to stand for the proposition that the zone of privacy protected by the Due Process Clause of the Fourteen Amendment extends to adult, consensual sex between homosexuals. *Lawrence's* implication for statutes banning same-sex marriages and the constitutional validity of the DOMA are unclear.

**Table 1. State Statutes Defining “Marriage”**

State	Statute	Marriage definition <sup>a</sup>	Non-Recognition
Alabama	ALA. CODE § 30-1-19 (2003)	X	X
Alaska	ALASKA STAT. § 25.05.011 (2003)	X	
Arizona	ARIZ. REV. STAT. § 25-101 (2003)		X
Arkansas	ARK. CODE ANN. § 9-11-109 (2003)	X	
California	CAL. FAM. CODE § 300 (2003)	X	
Colorado	COLO. REV. STAT. § 14-2-104 (2003)	X	
Connecticut	Judicial Interpretation		X <sup>b</sup>
Delaware	DEL. CODE ANN. tit.13 § 101 (2002)		X
Florida	FLA. STAT. Ch. 741.04 (2002)	X	
Georgia	GA. CODE ANN. § 19-3-3.1 (2002)		X
Hawaii	HAW. REV. STAT. ANN. § 572-1 (2003)	X	
Idaho*	IDAHO CODE § 32-209 (2003)	X	
Illinois*	750 ILL. COMP. STAT. 5/201 (2003)	X	X
Indiana	IND. CODE ANN. § 31-11-1-1 (2003)	X	X
Iowa	IOWA CODE § 595.2 (2003)	X	
Kansas*	KAN. STAT. ANN. § 23-101 (2002)	X	
Kentucky	KY. REV. STAT. ANN. § 402.020 (2002)		X
Louisiana	LA. CIV. CODE art. 86 (2003)	X	

State	Statute	Marriage definition <sup>a</sup>	Non-Recognition
Maine	ME. REV. STAT. ANN. tit. 19, § 701 (2003)		X
Maryland	MD. CODE ANN. FAM. LAW § 2-201 (2002)	X	
Massachusetts	Judicial Interpretation	X <sup>c</sup>	
Michigan	MICH. COMP. LAWS § 551.1 (2003)	X	X
Minnesota	MINN. STAT. § 517.01 (2002)	X	
Mississippi	MISS. CODE ANN. § 93-1-1 (2003)		X
Missouri*	MO. REV. STAT. § 451.022 (2003)		X
Montana	MONT. CODE ANN. § 40-1-103 (2002)	X	
Nebraska	NEB. REV. STAT. ANN. art. 1, § 29 (2002)		X
Nevada	NEV. REV. STAT. ANN. §122.020 (2003)	X	
New Hampshire	N.H. REV. STAT. ANN. § 457:2 (2002)		X
New Jersey	Judicial Interpretation	X <sup>d</sup>	
New Mexico	N.M. STAT. ANN § 40-1-1 (2002)	X <sup>e</sup>	
New York	Judicial Interpretation	X <sup>f</sup>	
North Carolina	N.C. GEN. STAT. § 51-1.2 (2003)		X
North Dakota	N.D. CENT. CODE § 14-03-01 (2002)	X	
Ohio*	OHIO REV. CODE ANN. §3101	X <sup>g</sup>	X
Oklahoma	OKLA. STAT. tit. 43 § 3.1 (2003)		X
Oregon	OR. REV. STAT. § 106.010 (2001)	X <sup>h</sup>	
Pennsylvania*	PA. STAT. ANN. tit. 23 § 1704 (2002)		X
Rhode Island	R.I. GEN. LAWS § 15-1-1 (2002)	X <sup>i</sup>	
South Carolina*	S.C. CODE ANN. § 20-1-10 (2002)		X

State	Statute	Marriage definition <sup>a</sup>	Non-Recognition
South Dakota	S. D. CODIFIED LAWS § 25-1-1 (2002)	X	
Tennessee*	TENN. CODE. ANN. § 36-3-113 (2003)	X	
Texas	TEX. FAM. CODE ANN. § 2.001 (2002)	X	
Utah	UTAH CODE ANN. § 30-1-2 (2003)		X
Vermont	VT. STAT. ANN. tit. 15 § 8 (2003)	X	
Virginia	VA. CODE ANN. § 20-45.2 (2003)		X
Washington	WASH. REV. CODE ANN. § 26.04.010 (2003)	X	
West Virginia	W. VA. CODE § 48-2-603 (2003)		X
Wisconsin	WIS. STAT. § 765.01 (2002)	X <sup>j</sup>	
Wyoming	WYO. STAT. § 20-1-101 (2003)	X	
Puerto Rico	P.R. LAWS ANN. tit. 31, § 221 (2002)	X	

**Note:** States marked with an asterisk have a statute establishing same-sex unions as violation of the state's public policy.

- a. Marriage consists of a contract between one man and one woman.
- b. Since nothing in the statute, legislative history, court rules, case law, or public policy permitted same-sex marriage or recognized the parties' Vermont civil union as a marriage, the trial court lacked jurisdiction to dissolve the union.
- c. The Supreme Judicial Court has interpreted "marriage," within Massachusetts' statutes, "as the union of one man and one woman." *Adoption of Tammy*, 619 N.E.2d 315 (1993). However, in *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003), the court construed the term "marriage" to mean the voluntary union of two persons as spouses, to the exclusion of all others.
- d. Although no specific language in this statute or other New Jersey marriage statutes prohibits same-sex marriages, the meaning of marriage as a heterosexual institution was so firmly established that the court could not disregard its plain meaning and the clear intent of the legislature. *Rutgers Council v. Rutgers State University*, 689 A.2d 828 (1997).
- e. Marriage is a civil contract requiring consent of parties.
- f. Marriage has been traditionally defined as the voluntary union of one man and one woman as husband and wife. See e.g., *Fisher v. Fisher*, 250 N.Y. 313, 165 N. E. 460 (1929). A basic assumption, therefore, is that one of the two parties to the union must be male and the other must

be female. On the basis of this assumption, the New York courts have consistently viewed it essential to the formation of a marriage that the parties be of opposite sexes.

g. Effective May 7, 2004.

h. Marriage is a civil contract entered into in person by males at least 17 years of age and females at least 17 years of age, who are otherwise capable, and solemnized in accordance with ORS 106.1

i. Men are forbidden to marry kindred.

j. Marriage, so far as its validity at law is concerned, is a civil contract, to which the consent of the parties capable in law of contracting is essential, and which creates the legal status of husband and wife.