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### The Evolution - or End - of Marriage?: Reflections on the Impasse over Same-Sex Marriage

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#### Recommended Citation

Linda C. McClain, *The Evolution - or End - of Marriage?: Reflections on the Impasse over Same-Sex Marriage*, in 44 *Family Court Review* 200 (2006).

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# READER COMMENTARY: THE EVOLUTION--OR END--OF MARRIAGE?: REFLECTIONS ON THE IMPASSE OVER SAME-SEX MARRIAGE

April, 2006

## Reporter

44 Fam. Ct. Rev. 200 \*

**Length:** 6760 words

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## Highlight

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The debate over legalizing same-sex marriage implicates the question of whether doing so would signal the end--or destruction--of the institution of marriage. The appeal to preserving a millennia-old tradition of marriage against change fails to reckon with the evolution that has already occurred. Invocations of gender complementarity between parents as essential to child well-being also conflict with growing recognition in family law that children's best interests can be served by gay and lesbian parents. Canada's path toward same-sex marriage suggests that impassé need not be inevitable. In the United States, this impassé stems in part from the problem that same-sex marriage serves as an emblem of everything that threatens marriage.

**Keywords:** marriage; same-sex marriage; gay and lesbian parents; best interests of the child

## Text

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**[\*200]** I appreciate the opportunity to comment on *Family Court Review's* "Special Issue: The Evolution of Marriage." <sup>1</sup> The kernel of this Special Issue was an earlier program, sponsored by the Family and Juvenile Law Section of the Association of American Law Schools, on whether cases such as *Lawrence v. Texas* <sup>2</sup> and *Goodridge v. Dept. of Public Health* <sup>3</sup> signal "The End of Marriage As We Know It?" <sup>4</sup> As the titles of these programs--and my commentary--indicate, and as the contributions to this Special Issue make vividly clear,

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<sup>1</sup> See *Special Issue: The Evolution of Marriage*, [44 FAM. CT. REV. 33-105 \(2006\)](#).

<sup>2</sup> [539 U.S. 558 \(2003\)](#).

<sup>3</sup> [798 N.E.2d 941 \(Mass. 2003\)](#).

<sup>4</sup> Jennifer Rosato, *Guest Editor's Message*, [44 FAM. CT. REV. 33 \(2006\)](#).

participants in the debate over same-sex marriage view the stakes as high. On one view, exemplified by Professor Lynn Wardle's contribution, recognizing marriages between same-sex partners will bring about the "end" of the institution of marriage in several undesirable ways.<sup>5</sup> On another view, evident in the contributions by lawyer Kate Kendell<sup>6</sup> and the Honorable Irwin Cotler,<sup>7</sup> Minister of Justice and Attorney General of Canada, recognizing same-sex marriages is an appropriate evolution of marriage laws, preservative--rather than destructive--of the civil purposes of marriage and in keeping with values of equality, dignity, and respect for diversity. Attempting to step back from this seeming impasse over same-sex marriage and to shift the focus to the real needs of actual families formed by same-sex couples, Professor Jennifer Rosato argues that it would be in children's best interests to extend the parentage presumption that now applies to married couples (i.e., that a child born during a marriage is the child of the mother's husband) to same-sex couples rearing children.<sup>8</sup>

Is impasse, at least in the United States, over the question of the end or evolution of marriage inevitable and irresolvable? Who has the better of the argument--the end (in the sense of destruction) camp or the evolution camp? In this Commentary, I will concur with those who contend that recognizing same-sex marriage is an appropriate and just evolution of the laws of marriage. In so doing, I will critically engage some of the arguments put forth by Professor Wardle as to why same-sex marriage would signal the end of, as he puts it, "conjugal marriage."<sup>9</sup> I will also suggest that an instructive example of how impasse over same-sex marriage need not be inevitable exists in Canada's journey toward legalizing **[\*201]** same-sex marriage in its Civil Marriage Act, as detailed in the Honorable Irwin Cotler's informative contribution to this Special Issue.

The end or evolution debate is not merely a hypothetical one. Changes in marriage laws to accord recognition of same-sex couples have already occurred, although more extensively outside than inside the United States. Lawsuits brought by same-sex couples challenging marriage laws have invited critical reflection on the government's interests in the institution of civil marriage. As contributors detail, several European nations and Canada now permit same-sex marriage. And even more recently, the Constitutional Court of South Africa declared that constitutional principles of dignity and equality render unconstitutional the exclusion of same-sex couples from the institution of marriage--although it deferred its judgment to accord the legislature a chance to fashion an appropriate remedy.<sup>10</sup> Within the United States, since May 17, 2004 (as a result of the *Goodridge* decision and a subsequent legislative enactment), marriage has been available in Massachusetts to gay and lesbian couples resident in that state; at least 6,500 same-sex couples have wed.<sup>11</sup>

Another path of legal reform has been the creation of new institutional forms to recognize and support intimate commitment by same-sex partners. In Europe, registered partnership schemes extend many if not most of the incidents of marriage to same-sex couples; some schemes also are open to opposite-sex couples.<sup>12</sup> In Hawaii, a

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<sup>5</sup> Lynn D. Wardle, *The "End" of Marriage*, [44 FAM. CT. REV. 47 \(2006\)](#).

<sup>6</sup> Kate Kendell, *The Right to Marry and the San Francisco Experience*, [44 FAM. CT. REV. 35 \(2006\)](#).

<sup>7</sup> Hon. Irwin Cotler, *Marriage in Canada--Evolution or Revolution?*, [44 FAM. CT. REV. 62 \(2006\)](#).

<sup>8</sup> Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, [44 FAM. CT. REV. 76 \(2006\)](#). The final contribution to the Special Issue, by Hofstra law student Jeffrey Dodge, also takes a child-centered focus to urge mediation of child custody issues, when same-sex couples terminate their relationship. Jeffrey A. Dodge, *Same-Sex Marriage and Divorce: A Proposal for Child Custody Mediation*, [44 FAM. CT. REV. 89 \(2006\)](#). Given space constraints, I regret that I will not be able to address this essay in my Commentary.

<sup>9</sup> Wardle, *supra* note 5, at 47.

<sup>10</sup> Minister of Home Affairs v. Fourie, Case CCT 60/04 (December 1, 2005).

<sup>11</sup> Raphael Lewis, *After Vote, Both Sides in Debate Energized*, BOSTON GLOBE, Sept. 15, 2005.

reciprocal beneficiary's status (with a subset of the legal incidents of marriage) is available both to same-sex couples and to pairs of family members in interdependent relationships who do not fit within the marriage laws (e.g., two adult siblings). California, as Kendell's article points out, has a very substantial domestic partnership law, under which--since January 2005--same-sex partners are treated as spouses with respect to the many rights and responsibilities California links to marriage.<sup>13</sup> Later in 2005, the California legislature passed a bill that would have permitted same-sex marriage, but Governor Arnold Schwarzenegger promptly said he would veto it, on the ground that California's courts should decide whether such a law violated an earlier California Defense of Marriage Act law defining marriage as between a man and a woman.<sup>14</sup>

Two states, Vermont and Connecticut, now authorize civil unions for same-sex couples. That legal status is equivalent to marriage with respect to the specific incidents of marriage under state law. However, one criticism of the two track--civil union and marriage--approach is that it preserves marriage, with its rich history of symbolic associations, as the domain of heterosexual couples. And, so long as the Defense of Marriage Act remains the law, neither married same-sex couples nor those in civil unions will be regarded as married for purposes of federal law.

More changes in family law may be in store, as various lawsuits challenging state marriage laws wend their way through several state court systems (as mentioned in Kendell's informative essay).<sup>15</sup> Courts facing these challenges, legislatures deliberating about law reform, and citizens debating the issues will all, in some way, confront this question of whether recognizing same-sex marriage signals the evolution or end of marriage. Related to this basic question are other questions on which there is heated disagreement: Is preserving traditional marriage a sufficient basis for barring same-sex marriage? Do state governments have sufficient justification for barring same-sex marriage? For example, are procreation and an optimal setting for childrearing adequate justifications for confining the legal incidents of marriage to opposite-sex couples? Depending on the standard of constitutional review applied, this requires asking whether government's legitimate, important, or compelling interests in regulating marriage justify defining marriage exclusively in terms of a union of one man and one woman. Hawaii's, Massachusetts', and Vermont's highest [\*202] courts answered this question "no," but some state courts have answered in the affirmative.<sup>16</sup> And as federal lawmakers continue to debate the proposed Federal Marriage Protection Amendment, legislators and various witnesses who support such an amendment will no doubt continue to assert that barring same-sex marriage is vital to preserving the "millennia old" institution of marriage and the unique gender complementarity of the male-female union. In response, opponents will counter with appeals not only to federalism, and allowing state law to evolve without federal interference, but also to realism about the capacities and needs of the actual families formed by gay men and lesbians.

Why do opponents of same-sex marriage believe that recognizing same-sex marriage would signal or hasten the end of marriage? The end of marriage, Professor Wardle points out, could connote several distinct meanings. First, the end of marriage could mean the destruction of marriage. Wardle argues that recognizing same-sex marriage would end marriage in this sense because it would replace "conjugal marriage" with "committed intimate relationships."<sup>17</sup> In his opinion, *Lawrence*, in striking down sodomy laws because they intrude upon protected constitutional liberty, simply reflects an "illegitimate practice" of judges imposing their personal policy preferences under the guise of interpreting the constitution.<sup>18</sup> The Supreme Court pointedly eschewed the issue of marriage,

<sup>12</sup> See generally YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002).

<sup>13</sup> Kendell, *supra* note 6, at 44.

<sup>14</sup> Dean E. Murphy, *Schwarzenegger to Veto Same-Sex Marriage Bill*, N.Y. TIMES, Sept. 8, 2005, at A18.

<sup>15</sup> See Kendell, *supra* note 6, at 42.

<sup>16</sup> See, e.g., *Lewis v. Harris*, 875 A.2d 259 (N.J. App. Div. 2005) (rejecting *Goodridge*'s reasoning and affirming governmental interest in procreation and child rearing as a basis for marriage laws).

<sup>17</sup> Wardle, *supra* note 5, at 48.

on the ground that it was not before the Court, and--as Wardle seems to concede--it is unlikely, in the current political climate, that the Court will find a constitutional right to same-sex marriage. Nonetheless, *Lawrence* has proved influential to the same-sex marriage debate; as Wardle points out, it features prominently in *Goodridge*.<sup>19</sup> Moreover, its language about respect and dignity signal a significant sea change from the disrespect accorded to homosexual intimate association in *Bowers v. Hardwick*, which *Lawrence* overruled as "not correct when it was decided, and . . . not correct today."<sup>20</sup>

I disagree with Wardle that cases like *Lawrence* and *Goodridge* reflect judicial usurpation. His stance seems to be that vindicating individual rights by interpreting abstract constitutional principles is an illegitimate exercise; by contrast, some constitutional scholars would argue that the core of constitutional adjudication--as some justices on the Supreme Court have put it--is "reasoned judgment" about how abstract constitutional principles such as liberty and equality should bear on individual rights claims brought before a court.<sup>21</sup> It is striking that Wardle and some others in the marriage movement defend at least some exercises of judicial power to vindicate rights concerning marriage. Thus, in other writing, Wardle defends the Supreme Court's decision in *Loving v. Virginia*, in which the Court struck down antimiscegenation laws and vindicated--on liberty and equality grounds--the rights of persons from different races to marry.<sup>22</sup> On one view, though, such a judicial ruling usurped "the people's" right to define what marriage meant in Virginia. Certainly, Virginia could point to a centuries-old practice--or tradition--that antimiscegenation (but for the so-called "Pochohantas exception") was a fundamental element of marriage law.<sup>23</sup>

Thus, it simply seems to be too broad a condemnation of *Lawrence* and *Goodridge* to say that they are illegitimate exercises of judicial power because they vindicate individual rights. A more precise charge that Wardle lodges against *Goodridge* is that it treated same-sex couples as indistinguishable from "conjugal couples" in terms of advancing the state's interest in marriage.<sup>24</sup> Here we come to a key reason for the impasse over same-sex marriage. What, in Wardle's view, is unique about marriage? How did *Goodridge* trample upon it? Wardle charges that, in redefining civil marriage as the "voluntary union of two persons as spouses to the exclusion of all others," Massachusetts' Supreme Judicial Court "disenfranchised citizens" who have "worked through the democratic process to maintain a *millennia-settled* policy that marriage is the union of one man and one woman."<sup>25</sup>

**[\*203]** The appeal to millennia stands out because a millennia-settled policy about marriage surely predates the Commonwealth of Massachusetts as well as the United States. And yet appeals to millennia-old traditions about marriage pervade contemporary defenses of marriage. Marriage defenders bristle at the notion--articulated in *Goodridge*--of marriage as an "evolving paradigm."<sup>26</sup> And here we see a curious, as well as distressing, impasse.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 49. For references to *Lawrence* in the *Goodridge* majority opinion, see, for example, [798 N.E.2d at 948, 953, 958-59](#).

<sup>20</sup> [Lawrence, 539 U.S. at 578](#) (overruling [Bowers v. Hardwick, 478 U.S. 186 \(1986\)](#)).

<sup>21</sup> [Planned Parenthood v. Casey, 505 U.S. 833, 849 \(1992\)](#) ("reasoned judgment"); RONALD DWORKIN, FREEDOM'S LAW (1996); JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY (forthcoming).

<sup>22</sup> Lynn D. Wardle, *Constitutional Protection for Marriage: Why and How*, 20 BYU J. PUB. L. (forthcoming) (draft of manuscript on file with author).

<sup>23</sup> See RACHEL F. MORAN, INTERRACIAL INTIMACY 19, 49--50 (2001) (noting antimiscegenation laws in Virginia dating back to 1662, but also exceptions for intermarriage of Native Americans and Whites because of Pochohantas's role in rescuing Captain John Smith). In other writing, Wardle attempts to link the same-sex marriage movement--in my view, not convincingly--with antimiscegenation laws and the eugenics movement as all reflecting discredited ideologies seeking to capture and redefine marriage. Wardle, *supra* note 22.

<sup>24</sup> Wardle, *supra* note 5, at 48.

<sup>25</sup> *Id.* at 50.

No matter how often historians of marriage point out dramatic transformation in the laws of marriage and in society's understandings of marriage, marriage defenders invoke "traditional marriage" and insist that changing the definition of marriage threatens to destroy the institution of marriage.

Professor Wardle and I have exchanged our views in other fora on this matter of marriage as static versus marriage as evolving,<sup>27</sup> and so I will not attempt a full airing here. Suffice it to say that perhaps the most salient transformation has been the evolution of marriage away from the common law model of marriage--and the doctrine of coverture--in which marriage was a hierarchical relationship in which the husband was head of the household and legal representative of the wife, and the wife, his dependent, whose civil existence was suspended during marriage. Marriage reform in the direction of a model of marriage as an equal partnership began in the nineteenth century, but since the 1970s successful constitutional challenges to gender-based classifications have led to a more complete shift away from marriage as a legal status in which the roles of "husband" and "wife" carry with them distinct sets of legal rights and responsibilities (e.g., empowering the husband as legal head of household with the right to choose the family's domicile) toward a regime of gender neutrality, which speaks of reciprocal rights and responsibilities of spouses and of parents, rather than of husbands and wives or mothers and fathers.<sup>28</sup> Of what significance is this transformation for the question of whether marriage's definition should open to include two men or two women? Viewing the same-sex marriage debate in light of this dramatic legal transformation, Professor Nan Hunter has recently argued that "the only requirement of gender that remains in the law of marriage is the exclusion of same-sex couples. . . . One result of allowing gay couples to marry would be to finish the project of removing sex-based distinctions from that area of law."<sup>29</sup>

Why does gender remain, for Wardle and other opponents of same-sex marriage, a compelling rationale for resisting a change in marriage's definition? The contemporary appeal to gender is framed less in terms of a hierarchy than a unique complementarity between the genders. Beyond the obvious complementarity of sexual difference and the capacity for procreation, there are also forms of psychic and cultural complementarity that, on this view, benefit men and women as well as children. Wardle contends:

The assumption that same-sex unions are fungible with marriages in terms of social policy is wrong. The heterosexual dimensions of the relationship are at the very core of what makes "marriage" what it is, and why it is so valuable to individuals and to society. The union of two persons of different genders creates a union of unique potential strengths and inimitable potential value to society. It is the *integration* of the universe of gender differences profound and subtle, biological and cultural, psychological and genetic--associated with sexual identity that constitutes the core and essence of marriage. Just as men and women are different, so a union of two men or two women is not the same as the union of a man and a woman.<sup>30</sup>

This gender integration argument has been prominent in arguments in defense of the proposed Federal Marriage Protection Amendment.<sup>31</sup> Yet it has failed in the legal challenges to marriage laws in Hawaii, Vermont, and

<sup>26</sup> See [798 N.E.2d at 954](#).

<sup>27</sup> Compare Lynn D. Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, [32 HOFSTRA L. REV. 349 \(2003\)](#) with Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, [32 HOFSTRA L. REV. 379 \(2003\)](#) and, for a more recent discussion about the Federal Marriage Protection Amendment, compare Wardle, *supra* note 22 with Linda C. McClain, "God's Created Order," *Gender Complementarity, and the Federal Marriage Amendment*, 20 BYU J. PUB. L. (forthcoming).

<sup>28</sup> Readers of this journal no doubt are familiar with these developments, but for two informative histories, see MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* (1985); LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* (1998).

<sup>29</sup> Nan D. Hunter, *The New Law of Marriage*, 14 THE GOOD SOCIETY 11, 12 (2005).

<sup>30</sup> Wardle, *supra* note 5, at 55.

<sup>31</sup> I offer some examples in McClain, "God's Created Order," *supra* note 27.

Massachusetts. As Rosato's essay in the Special Issue points out, in Hawaii, the state could not satisfy its burden of showing that an optimal [\*204] child-rearing environment required heterosexual parents.<sup>32</sup> Indeed, even the state's expert witnesses testified that gay and lesbian parents can be "as fit and loving parents, as non-gay men and women and different-sex couples."<sup>33</sup> The *Goodridge* court noted that in Massachusetts, the legislature and the courts had moved to protect the family in its diverse forms, just as Vermont's highest court noted that family law had evolved to facilitate parenting by gay men and lesbians.<sup>34</sup>

One frustrating feature of the debate over same-sex marriage is the seeming impasse with respect to children's best interests. As Rosato points out, children's best interests often features as a purported rationale for restricting the rights of same-sex couples.<sup>35</sup> And yet, more than a few state courts and legislatures have concluded that the best interests of children are served by lending stability to families formed by same-sex couples, whether by second-parent adoption laws or by notions of a de facto parent.<sup>36</sup> Most recently, California's highest court construed a child support law to conclude that, given the state's interest in ensuring that a child has the financial support of two parents, a child could have two mothers.<sup>37</sup> This sort of functional argument, in my view, is quite persuasive. No doubt disputes about the empirical data concerning the impact of family form will continue. But, as Rosato's essay notes, major medical organizations, such as the American Association of Pediatrics, have not found that children of same-sex parents suffer when measured against children of opposite-sex parents.<sup>38</sup> In light of this and similar evidence, Rosato sensibly argues that, even without legalizing same-sex marriage, states could take an important step to bridge the gap between abstract claims about children's best interests and the real needs of children of same-sex parents by extending the parentage presumption to families with same-sex parents.

Is there a way beyond the impasse in the United States over same-sex marriage? A look at how Canada has handled the issue may be instructive. In his informative essay *Marriage in Canada--Evolution or Revolution?*, the Honorable Irwin Cotler suggests that to understand why Canada followed the path of legalizing same-sex marriage rather than the path of civil unions requires appreciation of certain "unique features of Canadian law"--in particular, the "transformative" change reflected in the adoption, in 1982, of the Canadian Charter of Rights and Freedoms.<sup>39</sup> The entrenching of basic rights and freedoms reflected an "equality revolution" that directly responded to a history, in Canada, of discrimination against groups, including "women, Aboriginal people, racial or religious minorities, children's groups or same-sex couples," who, prior to this "transformative revolution," did not have standing, "in many instances, to bring their concerns before the courts."<sup>40</sup> The Civil Marriage Act, which became law in 2005, is anchored in "two foundational principles" of the Charter, as Cotler explains: "the equality principle, and within that, extending equal access to civil marriage to same-sex couples; and the religious freedom principle, acknowledging that religious groups will remain free to follow their beliefs and make their own decisions about marriage."<sup>41</sup> First, equality. Section 15 of the Charter identifies a right to equality and names various grounds on

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<sup>32</sup> Rosato, *supra* note 8, at 81 (discussing *Baehr v. Miike*, No. 91-1394 (Cir. Ct. Dec. 3, 1996)).

<sup>33</sup> *Baehr v. Miike*, No. CIV. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), at \*17.

<sup>34</sup> [Goodridge, 798 N.E.2d at 962-63](#); [Baker v. State, 744 A.2d 864, 882 \(1999\)](#).

<sup>35</sup> Rosato, *supra* note 8, at 76.

<sup>36</sup> *Id.* at 76. For an example of this functional approach, see [In re Adoption of Tammy, 619 N.E.2d 315, 316-17 \(Mass. 1993\)](#) (upholding adoption by a biological mother and her lesbian partner because it was in the "best interest of the child").

<sup>37</sup> *Elisa B v. Superior Court of El Dorado County*, slip opinion S125912 (Cal. Aug. 22, 2005).

<sup>38</sup> Rosato, *supra* note 8, at 78.

<sup>39</sup> Cotler, *supra* note 7, at 62.

<sup>40</sup> *Id.* at 63.

<sup>41</sup> *Id.* at 62.

which persons have a right to be free from discrimination. Sexual orientation is not listed, but it has been held to be an "analogous ground" that is "worthy of constitutional protection," because of similarity to those listed.<sup>42</sup> As Cotler's review of the relevant history explains, steps toward the protection of same-sex relationships began when courts ruled that different and unequal treatment of same-sex and opposite-sex cohabiting couples (or what is called common-law relationships) violated the Charter. He concludes that perhaps Canada skipped the step of civil unions because, in effect, Canadian law (e.g., the Modernization of Benefits and Obligations Act) accorded to same-sex and opposite-sex "common-law" relationships (i.e., committed relationships of at least one year's duration) most of the obligations granted to married couples under the law.<sup>43</sup> Strikingly, in [\*205] contrast to Wardle's notion that "conjugal marriage" is uniquely distinguishable from other forms of committed adult relationships, this Canadian notion of common-law relationships includes same-sex and opposite-sex couples who have lived in "a conjugal relationship for a period of at least a year."<sup>44</sup> To state the obvious, there has not been a parallel move in the United States to protect cohabitants. To the contrary, some state constitutional amendments adopted to ward off same-sex marriage also seem to preclude the creation of a domestic partnership or civil union status and, *a fortiori*, would seem to bar according any benefits based on a de facto domestic partnership.<sup>45</sup> In any case, there would be fears that such a move would weaken marriage as an institution. (As an aside, my own view on this matter is that, while this sort of ascribing of marriage-like status to persons who have not married may have a limited place in a family law system, a better solution in the United States would be to open up marriage to same-sex couples and also encourage states to adopt kinship registration systems that would allow recognition and support of other committed relationships.)<sup>46</sup>

Canada's federal government faced the same-sex marriage question because legal challenges brought by gay and lesbian couples led to a flurry of judicial holdings that restricting marriage to opposite-sex couples violated the equality rights section of the Charter.<sup>47</sup> In those opinions, courts stressed not only how Charter values of dignity and equality were at stake in the denial of access to the public institution of marriage, but also how same-sex couples and different-sex couples were more alike than different with respect to their capacity or capability to form "lasting and loving relationships" and their similar needs for security and stability in such relationships.<sup>48</sup> (So too, as I elaborate elsewhere, themes of equal capacity featured prominently in the Vermont and Massachusetts decisions.<sup>49</sup>) Cotler argues that what followed was "an exemplary democratic discussion and debate"--a "dialogue between [sic] Parliament, the people, and the courts"--during which a full range of "deeply held expressed views" was heard with respect.<sup>50</sup>

This process may seem to some readers far from the often polarizing discourse in the United States over same-sex marriage, in which nothing less than the future of civilization is said to be at stake if same-sex couples are allowed to affirm publicly their commitment by marrying. One reason for such impassioned rhetoric may be that same-sex

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<sup>42</sup> *Id.* at 66.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 67.

<sup>45</sup> See Rosato, *supra* note 8, at 84 n.6.

<sup>46</sup> LINDA C. MCCLAIN, THE PLACE OF FAMILIES 155-219 (2006) (arguing for same-sex marriage and a kinship registration scheme).

<sup>47</sup> Cotler, *supra* note 7, at 64.

<sup>48</sup> See, e.g., Halpern v. Attorney General of Canada, C39172 and C3914 (Ct. App. Ontario, 2003), available at [www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.htm](http://www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.htm) (referring to equal capability).

<sup>49</sup> MCCLAIN, *supra* note 46, at 174-77.

<sup>50</sup> Cotler, *supra* note 7, at 65.



marriage serves, for those concerned about protecting marriage, as an emblem of everything that threatens marriage. For example, Wardle posits that *Lawrence* and *Goodridge* also portend the end of marriage in the sense that these two decisions were the "last straw" in "tampering with a social institution whose values and limits are being rediscovered as the distortion of the institution becomes increasingly shocking."<sup>51</sup> Thus, they energized the marriage movement.<sup>52</sup> Yet if one looks at one key document in this self-styled "grass-roots movement to strengthen marriage," *The Marriage Movement: A Statement of Principles* (to which Wardle is a signatory), it is the failure of the "divorce revolution" and the consequences of high divorce rates for child well-being that is mentioned first as the impetus for forming the marriage movement.<sup>53</sup> Next comes the failure of the "unwed-childbearing revolution," and the "feminization of both parenting and poverty." Next comes concern that marriage is becoming the province of "the better educated, more affluent, and White," and that racial inequality is borne out in unequal access to marriage. "Current rates of divorce, family conflict, and unwed parenting," the Statement warns, "are not good for children, for adults, or for society."

Strikingly, no mention is made in the Statement's account of "Why We Come Together" as a marriage movement about same-sex marriage as a threat to marriage. The "contemporary marriage crisis" detailed in the Statement concerns the gap between Americans' aspiration for a happy, long-lasting marriage and the reality of declining rates of marital happiness and permanence.<sup>54</sup> To renew a marriage culture, the Statement calls upon couples [\*206] to deepen their commitment, upon parents to raise children to succeed in marriage, upon faith-communities to shore up marriage, and upon professionals to slow the quick recourse by clients to divorce.<sup>55</sup> Admittedly, the Statement, issued in 2000, predates *Lawrence* and *Goodridge*, but not the Hawaii or Vermont litigation, or the enactment of the federal Defense of Marriage Act.

Viewed against the backdrop of the marriage movement's broader concern to strengthen societal commitment to marriage, same-sex marriage seems most threatening because it appears to separate marriage from procreation and child rearing, making marriage and parenting by an opposite-sex couple seem unnecessary.<sup>56</sup> Will barring same-sex marriage by passing a Federal Marriage Protection Amendment really strengthen marriage? When Oklahoma and Utah conducted statewide surveys on attitudes about marriage, supported with federal funds, researchers found that both men and women reported that, by far, the most frequent reason given for divorce is "lack of commitment."<sup>57</sup> The other most frequently given reasons are "too much conflict and arguing," "infidelity and extramarital affairs," "getting married too young," and, particularly for women and lower-income persons, "domestic violence."<sup>58</sup> How will prohibiting same-sex marriage strengthen marriage and address those problems? At the core of challenges brought by same-sex couples to state marriage laws is the wish to obtain public

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<sup>51</sup> Wardle, *supra* note 5, at 51.

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

<sup>53</sup> The Marriage Movement: A Statement of Principles," available at [www.marriagemovement.org/html/report.html](http://www.marriagemovement.org/html/report.html). The passages quoted in text come from the opening section of the Statement, entitled "Why We Come Together."

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> This is clear in the more recent report issued by the Institute for American Values and some other organizations in the marriage movement, A Report from the Council on Family Law, *The Future of Family Law: Law and the Marriage Crisis in North America* 8 (2005) (discussing contrast between "conjugal" model of marriage and marriage as "only a close personal relationship").

<sup>57</sup> Christine Johnson et al., *Marriage in Oklahoma: 2001 Baseline Statewide Survey on Marriage and Divorce* 15-16 (Oklahoma State University Bureau for Social Research, 2002); *Marriage in Utah: Baseline Statewide Survey on Marriage and Divorce* 13 (Governor's Commission on Marriage, October 2003).

<sup>58</sup> Johnson, *supra* note 57, at 15-16, 34; *Marriage in Utah*, *supra* note 57, at 13, 26.

affirmation of commitment: think again of the Massachusetts court's statement that "exclusive and permanent commitment" is the *sine qua non* of marriage.<sup>59</sup>

In conclusion, it may be that a crucial reason for the impasse over same-sex marriage is that same-sex marriage carries far too much weight as an emblem of everything that threatens marriage. Perhaps it is easier to think that passing a marriage protection amendment will save marriage as an institution than to focus on stresses and problems faced in actual marriages. What seems most puzzling to some observers of the debate is why, at a time when marriage may be under threat due to such issues as a lack of commitment, there is such a zealous effort to keep marriage away from same-sex couples seeking to embrace the public commitment marriage signifies.

If the battle over same-sex marriage, as both Wardle and Kendell argue, must be waged in part by changing hearts and minds,<sup>60</sup> then a concluding note on how that battle is going in Massachusetts, the only state within the United States in which (since May 17, 2004) same-sex couples may marry, may be instructive. Wardle, recall, charges that *Goodridge* disenfranchised the citizens of Massachusetts, including state legislators, but he does not mention almost immediate mobilization to overturn *Goodridge*: the legislature approved a state constitutional amendment that would bar same-sex marriage and create same-sex civil unions--the remedy Massachusetts' highest court rejected. Under Massachusetts' procedures, if the legislature approves that amendment in a subsequent session, it may then submit it to the people through a public referendum. Surely, if the lawmakers and the voters of Massachusetts perceived a vital threat to marriage emanating from their fellow gay and lesbian citizens marrying, they could and would avail themselves of this process. Yet, as I noted elsewhere, "as citizens and lawmakers have observed that same-sex marriages in their states have not had negative effects, public opposition to same-sex marriage has steadily eroded."<sup>61</sup> Thus, on September 14, 2005, a proposed constitutional amendment to bar same-sex marriage and establish civil unions failed by a 39 to 157 vote, a defeat explained in part by some lawmakers perceiving that, as one freshman lawmaker put it:

It is evident that the sky has not fallen. What we saw . . . was how important marriage really is. We saw couples who had been together longer than some of us had been alive finally be able to receive the same benefits that other couples had always received and taken for granted.<sup>62</sup>

**[\*207]** Perhaps frustration by opponents of same-sex marriage (like Governor Mitt Romney) with these sorts of democratic outcomes at the statewide level will lead them to redouble their support for a Federal Marriage Protection Amendment. But a more optimistic hope, with which I will conclude, is that more of such encounters among citizens may lead to a change of hearts and minds and so portend a way out of the impasse over same-sex marriage.

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<sup>59</sup> [Goodridge v. Dept. of Public Health, 798 N.E.2d 941, 961 \(Mass. 2003\)](#).

<sup>60</sup> See Kendell, *supra* note 6, at 45; Wardle, *supra* note 5, at 56.

<sup>61</sup> MCCLAIN, *supra* note 46, at 180.

<sup>62</sup> [Lewis, supra](#) note 11 (quoting Senator Edward M. Augustus). Some opponents of same-sex marriage viewed this defeat as a victory because they would favor a measure that banned same-sex marriage and did not offer a civil union alternative.