WHAT'S LOVE GOT TO DO WITH IT? THE CORPORATIONS MODEL OF MARRIAGE IN THE SAME-SEX MARRIAGE DEBATE

> The time may come, far in the future, when contracts and arrangements between persons of the same sex who abide together will be recognized and enforced under state law. When that time comes, property rights and perhaps even mutual obligations of support may well be held to flow from such relationships. But in my opinion, even such a substantial change in the prevailing mores would not reach the point where such relationships would be characterized as "marriages". At most, they would become personal relationships having some, but not all, of the legal attributes of marriage. And even when and if that day arrives, two persons of the same sex, like those before the Court today, will not be thought of as being "spouses" to each other within the meaning of the immigration laws. For that result to obtain, an affirmative enactment of Congress will be required.[1]

I. INTRODUCTION

The 2005 film, *Brokeback Mountain*, based on Annie Proulx's short story about two male ranch hands who carry on a homosexual affair in the 1960s,[2] demonstrates a relatable sentiment for many same-sex couples. While ranch hands Jack Twist and Ennis del Mar are on a camping trip away from their respective wives, Jack relays to Ennis how he has planned for them to eventually live together and have "a little ranch together -- little cow and calf operation -- . . . it'd be some sweet life."[3] Ennis rejects Jack's notion by warning that such an open, domestic arrangement could threaten their lives, and that as far as "two guys living together, no way."[4]

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1. *Adams v. Howerton*, 486 F. Supp. 1119, 1125 (C.D. Cal. 1980).
2. *Brokeback Mountain* (Focus Features 2005) (motion picture).
3. *Id.*
4. *Id.*

Although Jack did not explicitly frame his desires within a marriage context, such desires of "a sweet life" echo the sentiments of many same-sex couples in the United States who contemplate marriage only to face exclusion because such an arrangement is not legally recognized.[5] Nevertheless, since the Hawaii Supreme Court remanded a case in favor of same-sex couples seeking marriage licenses in *Baehr v. Lewin*[6] in 1993, the debate over legal recognition of same-sex marriage[7] has taken prominence with same-sex couples battling it out in other courtrooms,[8] with the enactment of state and federal legislation regarding the subject,[9] with local and national campaigns and

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5. *See e.g.* William N. Eskridge, Jr., *The Case for Same-Sex Marriage* 1-2 (Free Press 1996). Professor Eskridge introduces his book on same-sex marriage with the story of the lesbian couple who later became the plaintiffs in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). *Id.* After describing how Ninia Baehr and Genora Dancel had become engaged, Professor Eskridge notes that

> [a]t this point most couples would announce their engagement to their families, friends, and coworkers. Most couples would set a date for the ceremony and obtain a marriage license. These steps were not possible for Ninia and Genora. Lesbian and gay couples are not allowed to marry in the United States.

Eskridge, at 2.

6. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993).

7. As a matter more of accuracy than semantics, this comment uses the term "same-sex marriage" throughout—rather than "gay" or "homosexual marriage"—to characterize a marriage between two persons of the same sex. This choice parallels the reasons why the Hawaii Supreme Court, in *Baehr v. Lewin*, preferred the term "same-sex marriage" over other variations:

> "Homosexual" and "same-sex" marriages are not synonymous; by the same token, a "heterosexual" same-sex marriage is, in theory, not oxymoronic. . . . Parties to "a union between a man and a woman" may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.

Id. at 52 n. 11; *see also Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 953 n. 11 (Mass. 2003).

8. *See Baehr*, 852 P.2d 44; *Goodridge*, 798 N.E.2d 941; *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

9. For federal legislation, *see Defense of Marriage Act* under 1 U.S.C. § 7 (1996) and 28 U.S.C. § 1738C (1996). For a survey of state legislation banning same-sex marriage recognition, refer to webpage statistical data compiled by the Human Rights Campaign. *Human Rights Campaign, State Prohibitions on Marriage for Same-Sex Couple*, http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19449 (last updated Nov. 2006).

protests,[10] and with voluminous opinions in the news media.[11] Aside from the religious perspectives on the legitimacy and morality of same-sex relationships and marriages, much discourse for and against legal recognition of same-sex marriage has centered around whether a person has the fundamental right to marry another of the same sex and whether such a fundamental right is constitutionally protected on either state or federal levels.[12]

Prior to the mid-to-late 1990s, the majority of cases seeking legal recognition of same-sex marriage hinged their fundamental rights arguments on equal protection and due process grounds. Recent smaller cases attempting to obtain recognition of same-sex marriages have been initiated under other theories, such as right to privacy,[13] denial of benefits,[14] wrongful death,[15] and denial of federal tax refunds.[16] Such cases seem to shift the emphasis for recognizing same-

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10. *See e.g.* Associated Press, *Gay-Marriage Advocates Protest King March: Critics Say Church's March Exploits Civil Rights Leader's Legacy*, http://www.msnbc.msn.com/id/6699763/ (last updated Dec. 11, 2004) (thousands of protesters in Atlanta, Georgia marched to the grave of Martin Luther King, Jr., in opposition to same-sex marriage); Matthew Mosk, *Same-Sex Marriage Ban Draws Protest: Md. Couples Mobilized by New Legislative Efforts*, Wash. Post B3 (Feb. 14, 2006) (gay rights advocacy group, Equality Maryland, organized a demonstration against Maryland's proposed ban on same-sex marriage).

11. The Human Rights Campaign has compiled from various news outlets an internet list of news editorials advocating same-sex marriage. *See* Human Rights Campaign, *Human Rights Campaign, Editorials on Marriage*, http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=16964&TEMPLATE=/TaggedPage/TaggedPageDisplay.cfm&TPLID=28 (last accessed Apr. 3, 2007). Meanwhile, the web also boasts of opinions and editorials against same-sex marriage. *See e.g.* Michele Bachmann, *WorldNetDaily, How Same-Sex Marriage Threatens Liberty*, http://worldnetdaily.com/news/article.asp?ARTICLE_ID=38195 (last updated Apr. 24, 2004); Eugene F. Rivers & Kenneth D. Johnson, *The Weekly Standard, Same-Sex Marriage: Hijacking the Civil Rights Legacy*, http://www.weeklystandard.com/Content/Public/Articles/000/000/012/285fhdqe.asp?pg=1 (last updated June 1, 2006); The Washington Times, *Editorials/Op-Ed, Don't Legalize Gay Marriage*, http://www.washingtontimes.com/op-ed/20030624-085740-1188r.htm (last updated June 25, 2003).

12. *See* Eskridge, *supra* n. 5, at 123-24.

13. *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 at *1 (Alaska Super. Feb. 27, 1998).

14. *Levin v. Yeshiva U.*, 754 N.E.2d 1099, 1101 (N.Y. 2001).

15. *Bouley v. Long Beach Meml. Med. Ctr.*, 25 Cal. Rptr. 3d 813, 814 (Cal. App. 2d Dist. 2005).

16. *McConnell v. U.S.*, 2005 WL 19458 at *1 (D. Minn. Jan. 3, 2005).

sex marriage from constitutional law theories to theories in the realm of private law. Coincidentally, an alternative model of marriage has developed amongst legal scholarship that frames the debate on legalizing same-sex marriage—and the definition of marriage itself—within private law as well, particularly within contract and corporations law. This comment seeks to evaluate the potential effectiveness of arguing for same-sex marriage recognition using the corporations model of marriage as one alternative theory. Part II will track the jurisprudential history of the same-sex marriage debate, and discuss the traditional fundamental rights arguments in support of recognizing same-sex marriage and their results. Part III will first examine the corporations model of marriage itself and survey the recent legal scholarship that has contributed to this alternative marriage model. Then, Part III will delve into predictions regarding how the courts might react to the corporations model of marriage. Finally, Part IV will provide some concluding thoughts and remarks about the corporations model of marriage and its potential role not just in the path to legally recognizing same-sex marriage, but perhaps in current ideas of marriage itself.

II. HISTORICAL PERSPECTIVE

A. *EARLY CASES–1970S TO 1980S*

The case that launched the current debate for legal recognition of same-sex marriage took place in the Minnesota courts. In 1970, a gay male couple—of which one of the partners was a University of Minnesota law student[17]—tried to obtain a marriage license from the town clerk of Hennepin County, Minnesota.[18] The clerk's refusal to issue the license solely because the couple was of the same sex led to a lawsuit that eventually reached the Minnesota Supreme Court, where the issue before the court en banc was "whether a marriage of two persons of the same sex is authorized by [Minnesota] statutes and, if not, whether state authorization is constitutionally compelled."[19]

17. William N. Eskridge, Jr. & Darren R. Spedale, *Gay Marriage: For Better or Worse? What We've Learned from the Evidence* 11 (Oxford U. Press 2006).

18. *Baker v. Nelson*, 191 N.W.2d 185, 185 (Minn. 1971).

19. *Id.*

Because the Minnesota marriage statute did not expressly prohibit a person from marrying another of the same sex,[20] the specific issue contended on state grounds was whether "the absence of an express statutory prohibition against same-sex marriages evinces a legislative intent to authorize such marriages."[21] If the Minnesota statute lacked intent to authorize same-sex marriages, then the second issue would have inquired into whether prohibiting petitioners from same-sex marriage denied them a fundamental right under the Ninth Amendment of the Federal Constitution and whether petitioners were deprived of due process and equal protection under the Fourteenth Amendment.[22] In this way, the jurisprudential marathon towards legalizing same-sex marriage stepped off on a constitutional footing.

Refusing to overturn the denial of petitioners' marriage license, the Minnesota Supreme Court first found that, absent any express prohibition of same-sex marriage, the Minnesota marriage statute still did not authorize same-sex marriage.[23] The Court first based its ruling on statutory construction and imported dictionary definitions of the word "marriage" into the statute. Citing from *Webster's Third New International Dictionary* and *Black's Law Dictionary*—which both defined marriage as an opposite-sex union[24]—the court found that the

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20. *Id.*

21. *Id.*

22. *Id.* at 186.

23. *Id.*

24. The Minnesota Supreme Court footnoted the precise definitions of the word "marriage" from both *Webster's Third New International Dictionary* and *Black's Law Dictionary*. *Id.* at 186 n. 1. The Court relied on the 1966 edition of *Webster's Third New International Dictionary*, which defined "marriage" as "the state of being united to a person of the opposite sex as husband or wife." *Webster's Third Intl. Dictionary* 1384 (Philip Babcock Gove, ed., G. & C. Merriam Co. 1966). Correspondingly, the edition of *Black's Law Dictionary* that the Court used defined "marriage" as "the civil status, condition, or relation of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex." Henry Campbell Black, *Black's Law Dictionary* 1123 (4th ed., West 1968). If the Minnesota Supreme Court were to have decided the case today, the Court might have relied less heavily on *Black's Law Dictionary* because the dictionary's current 2004 edition does include a definition for "same-sex marriage" under its general definition of "marriage." *Black's Law Dictionary* 994 (Bryan A. Garner ed., 8th ed., West 2004).

Incidentally, the *Oxford English Dictionary*—which purports to be "the last word on words for over a century"—defines "marriage" principally as "[t]he condition of being a husband or wife; the relation between married persons; spousehood, wedlock."

Minnesota marriage statute "employs that term as one of common usage, meaning the state of union between persons of the opposite sex."[25] More significantly, the court also supported this definition of marriage as an opposite-sex union by deferring to tradition and viewing marriage as "uniquely involving the procreation and rearing of children within a family . . . ."[26] By adopting the United States Supreme Court's view in *Skinner v. Oklahoma ex rel. Williamson*[27] that " '[m]arriage and procreation are fundamental to the very existence and survival of the race,' " the *Baker* Court implicitly found that marriages between same-sex individuals were fundamentally different and did not deserve state authorization in Minnesota because marital unions, sexual or otherwise, between same-sex individuals would not further the procreative goal basic to the traditional institution of marriage.[28] According to the Court, such a goal was immutable because

> [t]his historic institution [of marriage] manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which petitioners contend. The due process clause of the Fourteenth Amendment is not a charter for restructuring [marriage] by judicial legislation.[29]

Not only was the Court unwilling to find any justification for legalizing same-sex marriage because same-sex marriages did not serve the functions of "traditional" marriage, but such a difference in same-sex marriages led the Court to also conclude that the fundamental right to marry a person of the same-sex did not exist.

After establishing its threshold definition of marriage and finding

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Oxford U. Press, *Oxford English Dictionary, History of the Dictionary*, http://www.oed.com/about/history.html (last accessed Apr. 3, 2007); *Oxford English Dictionary* vol. IX, 396 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. Oxford U. Press 1989). In the dictionary's 1997 supplemental edition, the editors added other meanings to the word "marriage" that extended the definition to include "[a]n antique object assembled from components differing in provenance, date, etc.," and "the assembling of such an object." *Oxford English Dictionary Additions Series* vol. 3, 271 (John Simpson ed., Oxford U. Press 1997). A very narrow reading of these definitions and additions offers the perplexed understanding that society recognizes the "marriage" of inanimate, antique objects but not a marriage between persons of the same-sex.

25. *Baker*, 191 N.W.2d at 185-86 (footnote omitted).

26. *Id.* at 186. The Court further stated that marriage is an institution "as old as the book of Genesis." *Id.*

27. *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535 (1942).

28. *Baker*, 191 N.W.2d at 186 (quoting *Skinner*, 316 U.S. at 541.)

29. *Id.*

no fundamental right for same-sex marriage existed, the *Baker* Court easily dismissed the petitioners' constitutional arguments. The Court held that "[t]he equal protection clause of the Fourteenth Amendment, like the due process clause, [was] not offended by [Minnesota's] classification of persons authorized to marry. There [was] no irrational or invidious discrimination."[30] If no fundamental right to marry persons of the same sex existed under the Constitution, then the petitioners' equal protection or due process arguments bore no merit. Even the petitioners' argument that denying them the right to marry was similar to denying interracial couples the right to marry in anti-miscegenation cases did not impress the Court.[31] Instead, the *Baker* Court believed that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[32] Unlike same-sex couples, interracial married couples comprised of persons of the opposite sex who could procreate. Consequently, the petitioners found themselves trying to base their claim on a right that did not seem to exist and thus was not constitutionally protected. Echoing this sentiment, the United States Supreme Court subsequently dismissed the petitioners' constitutional arguments on appeal "for want of substantial federal question."[33]

Following *Baker v. Nelson*, other cases in the 1970s that beckoned for legal recognition of same-sex marriage on related constitutional grounds traveled through brethren state courts to reach similar results: that marriage was traditionally and fundamentally between opposite-sex individuals and thus same-sex couples had no constitutionally protected right to marry. In *Jones v. Hallahan*,[34] a lesbian couple in Kentucky appealed Jefferson County's decision not to issue the couple a marriage license by contending that the clerk's failure to issue the license deprived them of several basic constitutional rights, including the right to marry.[35] Like the Minnesota marriage statute, the Kentucky marriage statute did not expressly define marriage, nor did it specifically prohibit marriages between same-sex

30. *Baker*, 191 N.W.2d at 187.
31. *Id.*
32. *Id.*
33. *Baker v. Nelson*, 409 U.S. 810, 810 (1972).
34. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. App. 1973).
35. *Id.* at 589.

persons.[36] In a jurisprudential approach echoing *Baker*, the *Jones* court resorted to statutory construction and relied on common dictionary meanings of "marriage"—citing to *Webster's New International Dictionary, The Century Dictionary and Encyclopedia*, and *Black's Law Dictionary*—to define marriage as between man and woman.[37] After defining marriage as between partners of the opposite sex only, the *Jones* court, relying on *Baker*, denied the appellants' claim that they had a fundamental right to same-sex marriage worthy of constitutional protection because "what [appellants] propose is not a marriage."[38]

Likewise, *Singer v. Hara*, [39] a 1974 case from the Court of Appeals of Washington state, declined similarly to recognize same-sex marriage.[40] Unlike *Baker* and *Jones*, however, the *Singer* decision delved further into the constitutionality issues rather than prematurely foreclosing them. Here, like the previous cases, a gay couple who was denied a marriage license sued on equal protection and due process grounds.[41] After concluding—first based on a plain reading and later on legislative intent—that the Washington marriage statute did not authorize same-sex marriage, the *Singer* court questioned whether such exclusion was unconstitutional on state equal protection or federal due process grounds.[42] First, the court examined whether appellants fell within the impermissible legal classification of sex protected by the Equal Rights Amendment of Washington's constitution.[43] If so, then the court would have had to apply a strict scrutiny test to determine whether excluding same-sex marriages under Washington's marriage statute was unconstitutional. The *Singer* court noted respondent King County's position that the Equal Rights Amendment should only apply if appellants as males were being treated differently than females when it came to being able to marry persons of the same sex.[44] Since the statute prohibited both females and males from marrying persons of the

36. *Id.*
37. *Id.*
38. *Id.* at 590.
39. *Singer v. Hara*, 522 P.2d 1187 (Wash. App. Div. 1 1974).
40. *Id.* at 1189.
41. *Id.* at 1188-89 (footnote omitted).
42. *Id.* at 1189.
43. *Id.* at 1190.
44. *Id.* at 1191.

same sex, the appellants were not impermissibly a class that was discriminated against based upon sex.[45] The court then, in order to interpret the marriage statute, defined marriage by relying on common definitions of marriage and on the *Baker* and *Jones* cases, and justified this definition because "our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children."[46] In this manner, because "it is apparent that no same-sex couple offers the possibility of the birth of children by their union," the fundamental right to marry need not be extended to same-sex couples under Washington's marriage statute.[47] In a sentence reminiscent of *Jones*, the court here pronounced that "[a]ppellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself."[48]

Interestingly, when appellants claimed they had been discriminated against as homosexuals, the *Singer* court used the procreation argument to find a rational basis for the Washington marriage statute to exclude same-sex couples from marriage because procreation afforded " 'interests of basic importance in our society' " in the "private relationship of a man and a woman (husband and wife)" within the marriage context, while procreation did not offer the same for same-sex relationships.[49] Since the court held that there was no fundamental right to marry same-sex persons under the appellants' equal protection argument, it consequently found no need to review the appellants' claim under their due process theory.[50]

The last of the early cases was *Adams v. Howerton*.[51] Plaintiff Sullivan, a male Australian citizen who was trying to find a reason to remain in the United States after his non-immigrant visa expired, secured a marriage license in Boulder, Colorado, to wed his lover, Adams, a male United States citizen.[52] Adams then petitioned the Immigration and Naturalization Service [hereinafter INS] to allow Sullivan to stay in the United States, by claiming through marriage that

45. *Id.*
46. *Id.* at 1195.
47. *Id.*
48. *Id.* at 1196.
49. *Id.* at 1197 (citation omitted).
50. *Id.* at 1195 n. 11.
51. *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980).
52. *Id.* at 1120.

Sullivan was an " 'immediate relative' " because he was his American lover.[53] The INS denied Adams' petition, and Sullivan sued under due process and equal protection grounds.[54] After applying statutory construction upon the Colorado marriage statute, the district court found that marriage was an opposite-sex union and supported its reasoning " 'because of societal values associated with the propagation of the human race.' "[55] Since marriage in Colorado only recognized opposite-sex unions, the *Adams* court found no equal protection or due process violations in barring same-sex couples from marrying.[56] Thus, procreation reared its head again in the debate over legally recognizing same-sex marriage.

On appeal, the Ninth Circuit Court of Appeals affirmed *Adams* but on different grounds.[57] Here, the Ninth Circuit was deciding whether the definition of "spouse" used to determine "immediate relatives" under section 201(b) of the *Immigration and Nationality Act of 1952*[58] discriminated against Sullivan as a same-sex "spouse" and

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53. *Id.*

54. *Id.* at 1120-21.

55. *Id.* at 1123 (quoting *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. App. Div. 1 1974)).

56. *Id.* at 1124. One interesting note about this case is that because the plaintiffs, Sullivan and Adams, his lover, had received a marriage license, they also tried to defend their marriage under a putative spouse theory, where Sullivan and Adams claimed that they were each the putative spouse of the other. The district court judge here rejected the plaintiffs' putative spouse argument on the grounds that

> [t]he entire concept of putative spouse requires that the claimant entertain a good faith belief in the validity of his marriage to another. Given the scriptural, canonical, and civil law authorities which I have mentioned, and given the prevailing mores and moral concepts of this age, one could not entertain a good faith belief that he could be married to a person of the same sex. In our society, the questionable validity of same-sex marriages is such that all persons must be deemed on notice of the possible invalidity thereof.

Id. at 1123.

57. *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1982).

58. Section 201(b), as amended by 8 U.S.C. § 1151(b), provides that

> [t]he "immediate relatives" referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States: Provided, That in the case of parents, such children must be at least twenty-one years of age. The immediate relatives specified in this subsection who are otherwise qualified for admission shall be admitted as such, without regard to the numerical limitations in this chapter.

Id. at 1038 n.1. (citation omitted).

was thus unconstitutional.[59] Because ultimately the INS would have been the governmental entity to categorize Sullivan as Adams' immediate relative or not, the court here found that carving out a definition of marriage under the Colorado marriage statute was not necessary.[60] Rather, by relying predictably on common meanings from the same dictionaries used in *Baker*, *Jones*, and *Singer*, the court defined marriage as a union between a man and a woman for purposes of construing "spouse" under section 201(b), which, much like the previously-discussed marriage statutes, was silent on the issue of whether "spouse" included a person of the same sex.[61] The Ninth Circuit then found that since the federal government had almost plenary power over immigration, Congress was able to enact immigration laws that permitted the INS to exclude same-sex "spouses."[62] By using a rational basis test, the court then justified such exclusion because marriage was traditionally and necessarily for procreation and because same-sex marriages would not advance that goal.[63] As a result, the law not only barred Sullivan from marriage, but from remaining in the United States as well.

Incidentally, marriage cases involving transsexuals have fared no better. As the *Baker*, *Jones*, *Singer*, and *Adams* cases—which facially involved same-sex couples—were being heard, the same-sex marriage debate indirectly arose in marriage cases where one of the individuals was a transsexual who either had or was contemplating a surgical sex change. Only one case has been successful. The Superior Court of New Jersey, Appellate Division, in *M.J. v. J.T.*,[64] upheld the validity of such a marriage for dissolution purposes, reasoning that by the time the couple had obtained their marriage license, the plaintiff, a male-to-female transsexual, had already surgically changed from male to female and "should be considered a member of the female sex for marital purposes."[65] The court used a test that determined the sex of a transsexual for legal purposes by examining whether, at the time of marriage, there was disharmony—or disagreement—between the sex

59. *Id.* at 1038.
60. *Id.* at 1039.
61. *Id.* at 1040.
62. *Id.* at 1041.
63. *Id.* at 1042-43.
64. *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. App. Div. 1976).
65. *Id.* at 211.

that the transsexual psychologically designated for him- or herself and the transsexual's physical, anatomical sex.[66] If disharmony existed, then the sex of the transsexual individual would be defined by his or her anatomical sex; but if there was harmony between the transsexual's psychological sex and his or her anatomical sex, then the sex of the transsexual would be defined by whichever sex was reflected by the harmony.[67] In *M.T. v. J.T.*, since the plaintiff had changed her sex by the time the couple married, a legally-recognized marriage existed and the "defendant, a man, became her lawful husband, [and was] obligated to support her as his wife" for dissolution purposes.[68]

The *M.T. v. J.T.* decision was an anomaly. Other cases, involving married couples where one member was a transsexual, all defined a person's sex as immutable—usually because, even though one can surgically change one's sex by altering the appearance of sexual organs, one's chromosomal sex cannot be changed.[69] These cases tended to find that—although facially the marriages seemed to be comprised of a man and a woman—once the sex of the transsexual individual was found to be immutable, the married couples were actually same-sex couples and thus were incongruent with the idea that marriage was between a man and a woman. In fact, after determining the sex of the transsexuals, some of these cases cited the familiar rhetoric that marriage was between opposite-sex individuals and worthy of protection for procreation purposes.[70] Perhaps, then, the reasoning behind the legitimacy of the marriage in *M.T. v. J.T.* was that after the couple was deemed to be an opposite-sex couple, the case no longer involved potentially the marriage of a same-sex couple, but rather it involved an opposite-sex couple. In this way, beyond all the

66. *Id.* at 210-11.

67. *Id.*

68. *Id.* at 211.

69. *See e.g. Frances B. v. Mark B.*, 78 Misc. 2d 112, 118 (N.Y. Sup. Ct. 1974) (New York lower court invalidated a marriage where defendant, a female-to-male transsexual who had not yet had a sex change, had induced plaintiff, a heterosexual female, into marriage); *see also Anonymous v. Anonymous*, 67 Misc. 2d 982, 984-85 (N.Y. Sup. Ct. 1971) (New York lower court invalidated a marriage where defendant, a male-to-female transsexual, had a sex change after the marriage to plaintiff, a heterosexual male); *see also In re Ladrach*, 513 N.E.2d 828, 832 (Ct. of Com. Pleas 1987) (Ohio probate court invalidated a marriage where petitioner, a male-to-female transsexual, had a sex change prior to marrying a man because of the immutability of the transsexual's male chromosomal sex).

70. *Frances B.*, 78 Misc. 2d at 116-17; *Anonymous*, 67 Misc. 2d at 984.

issues of sex determination, *M.T. v. J.T.* could be viewed as a traditional marriage case.

In sum, the courts hearing these early same-sex marriage cases based marriage upon traditional Western notions of marriage for child-rearing and reproduction. Such a narrow definition of marriage as an opposite-sex union for procreative purposes consequently excluded same-sex marriages. Based on this logic, these cases thus reasoned that no fundamental right for one to marry another of the same sex existed, and absent this fundamental right, same-sex plaintiffs could not resort to constitutional arguments to initiate or prevail on their discrimination claims. In addition, these cases frequently grounded the narrow definition of marriage based on history and tradition. Often the aforementioned cases discussed or cited to religious and historical sources to convey the historical weight that procreation has pressed upon marriage and to establish procreation as the primary reason why people have traditionally married.[71] The unanimity in the way these early cases viewed marriage according to a common meaning that only promoted opposite-sex unions not only demonstrated an easy fallback for these courts to rely upon statutory construction to disfavor same-sex marriages, but also this unanimity likely reflected prevalent social and moral boundaries that did not tolerate same-sex relationships.

Because of these unfavorable judicial decisions, the progress of legal recognition of same-sex marriage stalled shortly after the last of these early cases was decided. As Professor William Eskridge notes,

> [e]very judge and state attorney general who addressed this issue agreed that states could exclude same-sex couples from civil marriage, and several states enacted laws making it clear that civil marriage was limited to one-man, one-woman couples. This string of defeats ended the initial gay-liberal movement for same-sex marriage. Activists turned to other issues, including antigay violence, job discrimination, and the AIDS epidemic.[72]

When it came to the inability of same-sex unions to naturally procreate, this fundamental "deficiency" became a major distinguishing factor that produced overwhelmingly preclusive effects for recognizing same-sex couples under the traditional definition of marriage.

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71. *See Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. App. Div. 1 1974).

72. Eskridge & Spedale, *supra* n. 17, at 17-18 (footnote omitted).

Procreation was seemingly the death of same-sex marriage.

B. *RECENT CASES—1990S TO PRESENT*

One 1993 Hawaii Supreme Court case finally made some progress. The case, *Baehr v. Lewin*,[73] involved three same-sex couples who sued after Hawaii's Department of Health refused to grant them marriage licenses "solely on the ground that the applicant couples were of the same sex."[74] The couples based most of their claims against the Department of Health on state equal protection and due process, right of privacy, lack of adequate remedy, and present and future injury theories.[75] In a move that was both reminiscent of *Baker* and that implied that no fundamental right to same-sex marriage existed, the Department of Health amended its answer asserting the defense that the couples had failed to state a claim upon which relief could be granted.[76]

At issue again was a state marriage statute.[77] The circuit court

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73. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

74. *Id.* at 49.

75. *Id.* at 50.

76. *Id.*

77. *Id.* at 49. The version of the Hawaii marriage statute at issue reads as follows: *Requisites of valid marriage contract.* In order to make valid the marriage contract, it shall be necessary that:

> (1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, *brother and sister* of the half as well as to the whole blood, *uncle and niece, aunt and nephew*, whether the relationship is legitimate or illegitimate;
>
> (2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit court within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2 [relating to consent of parent or guardian];
>
> (3) The *man* does not at the time have any lawful *wife* living and that the *woman* does not at the time have any lawful *husband* living;
>
> (4) Consent of neither party to the marriage has been obtained by force, duress, or fraud;
>
> (5) Neither of the parties is a person afflicted with any loathsome disease concealed from, and unknown to, the other party;

below had found that Hawaii's statute recognized only heterosexual marriages[78] and " '[was] obviously designed to promote the general welfare interests of the community by sanctioning traditional man-woman family units and procreation.' "[79] Therefore, same-sex couples had no fundamental right to marry that was protected by Hawaii's state constitution,[80] and denying them such right did not violate due process under Hawaii's constitution.[81] Because the circuit court found that plaintiffs were also not a group that had been " 'subject[ed] to purposeful, unequal treatment or have been relegated to a position of political powerlessness in order to be considered a "suspect class" ' "[82] the court used a "rational relationship test" and ultimately justified the statute as " 'clearly a rational, legislative effort to advance the general welfare of the community by permitting only heterosexual couples to legally marry. . . .' "[83]

When the plaintiffs appealed, the Hawaii Supreme Court rephrased the right to privacy claim as a claim to recognize the fundamental right to same-sex marriage:

> [T]he precise question facing this court is whether we will extend the *present* boundaries of the fundamental right of marriage to include same-sex couples, or, put another way, whether we will hold that same-sex couples possess a fundamental right to marry. In effect, as the applicant couples frankly admit, we are being asked to recognize a new fundamental right.[84]

Because the right of privacy under Hawaii's constitution was

> (6) It shall in no case be lawful for any person to marry in the State without a license for that purpose duly obtained from the agent appointed to grant marriage licenses; and
>
> (7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the *man and woman* to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony.

Id. (emphasis in original) (quoting Haw. Rev. Stat. § 572-1 (1985).

78. *Id.* at 54.
79. *Id.* at 53-54.
80. *Id.* at 54.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 56-57.

subsumed under the United States Constitution, and because the United States Supreme Court had held that " 'the right to marry is part of the fundamental "right of privacy" implicit in the Fourteenth Amendment's Due Process Clause' "[85] and linked the right to marry to the right of procreation in *Skinner v. Oklahoma ex rel. Williamson*,[86] the Hawaii Supreme Court aligned its decision accordingly with the United States Supreme Court and declined to recognize that appellants had any fundamental right to same-sex marriage and thus neither did they have any right to privacy:

> Applying the foregoing standards to the present case, we do not believe that a right to same-sex marriage is so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions. Neither do we believe that a right to same-sex marriage is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed. Accordingly, we hold that the applicant couples do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise.[87]

Again, the importance of procreation outweighed any fundamental right to same-sex marriage.

Nonetheless, unlike the earlier 1970s courts, the Hawaii Supreme Court found that appellants were "free to press their equal protection claim,"[88] and if successful, "the State of Hawaii [would] no longer be permitted to refuse marriage licenses to couples merely on the basis that they [were] of the same sex."[89] The Court found that "a state may deny the right to marry only for compelling reasons."[90] Because Hawaii's equal protection clause had a higher threshold of protection than the United States Constitution[91] when it came to prohibiting sex

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85. *Id.* at 55 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)).

86. *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942).

87. *Baehr*, 852 P.2d at 57.

88. *Id.*

89. *Id.*

90. *Id.* at 59 (citing *Salisbury v. List*, 501 F. Supp. 105, 107 (D. Nev. 1980)).

91. *See Baehr*, 852 P.2d at 59-60 ("The equal protection clauses of the United States and Hawaii Constitutions are not mirror images of one another. The fourteenth amendment to the United States Constitution somewhat concisely provides, in relevant

discrimination,[92] and the Hawaii marriage statute restricted the marital relationship to male and female,[93] the issue was whether persons denied the right to marry others of the same sex fell under the category of persons discriminated against based on sex.[94] The *Singer* court had made the same inquiry and found that persons who wanted to marry those of the same-sex had not been discriminated against by sex.[95] Here, however, the *Baehr* Court was not ready to conclude accordingly; rather, the court expressed that "[i]t [was] the state's regulation of access to the status of married persons, on the basis of the applicants' sex, that [gave] rise to the question whether the applicant couples have been denied the equal protection of the laws in violation of article I, section 5 of the Hawaii Constitution."[96] In fact, the *Baehr* Court rejected *Singer*'s reasoning as an "exercise in tortured and conclusory sophistry,"[97] and found that "sex-based classifications are subject, as a *per se* matter, to some form of 'heightened' scrutiny, be it 'strict' or 'intermediate,' rather than mere 'rational basis' analysis."[98] Because the *Baehr* Court found that marriage under the Hawaii statute was defined by a sex-based classification exclusive to opposite-sex couples only, rather than both opposite-sex and same-sex couples, the Court remanded the case so that the statute could undergo a strict scrutiny test to justify its classification.[99]

An even more favorable judicial decision regarding same-sex marriage arose in 1999 with *Baker v. State*[100] from the Vermont Supreme Court. The facts, claims, and procedural history resembled

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part, that a state may not 'deny to any person within its jurisdiction the equal protection of the laws.' Hawaii's counterpart is more elaborate. Article I, section 5 of the Hawaii Constitution provides in relevant part that '[n]o person shall . . . be denied the equal protection of the laws, *nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of* race, religion, *sex,* or ancestry.' Thus, by its plain language, the Hawaii Constitution prohibits state-sanctioned discrimination against any person in the exercise of his or her civil rights on the basis of sex." (parenthetical omitted)).

92. *Id.* at 60.

93. *Id.*

94. *Id.* at 58.

95. *See Singer v. Hara*, 522 P.2d 1187, 1190-91 (Wash. App. Div. 1 1974).

96. *Baehr*, 852 P.2d at 60.

97. *Id.* at 63.

98. *Id.* at 65 (footnote omitted).

99. *Id.* at 68.

100. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

previous cases: same-sex couples who were denied marriage licenses sued local and state governments on statutory and constitutional grounds, and appealed after the trial court had granted the state's motion to dismiss for failure to state a claim.[101] On appeal, the Vermont Supreme Court decided against appellants' claims based on the Vermont marriage statute because the Court had found that the statute's definition of marriage was rooted in the common dictionary meaning of an opposite-sex union.[102] The Court was not persuaded by appellants' novel argument that "the underlying purpose of marriage is to protect and encourage the union of committed couples and that, absent an explicit legislative prohibition, the statutes should be interpreted broadly to include committed same-sex couples."[103] Instead, the Court found that "the evidence demonstrates a clear legislative assumption that marriage under our statutory scheme consists of a union between a man and a woman."[104] Hence, *Baker v. State* began with the same narrow definition of marriage that echoed back even to *Baker v. Nelson.*

Here, however, is where *Baker v. State* diverged. By construing Vermont's Common Benefits clause (Vermont's constitutional equivalent of an equal protection provision),[105] the Vermont Supreme Court held that same-sex couples "may not be deprived of the statutory

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101. *Id.* at 867-68.

102. *Id.* at 868. The Court held that "[a]lthough it is not necessarily the only possible definition, there is no doubt that the plain and ordinary meaning of 'marriage' is the union of one man and one woman as husband and wife." *Id.* at 868 (referencing *Webster's New Intl. Dictionary* 1506 (William Allan Neilson ed., 2d ed., G. & C. Merriam Co. 1955); *Black's Law Dictionary* 986 (Bryan A. Garner ed., 7th ed., West 1999). Furthermore, the Court then found that "[t]his understanding of the term is well rooted in Vermont common law," and that "[t]he legislative understanding is also reflected in the enabling statute governing the issuance of marriage licenses . . . ." *Id.* at 868-69.

103. *Id.* at 869.

104. *Id.*

105. Vermont's Common Benefits clause provides,

> [t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

Vt. Const. ch. I art. 7 (2007).

benefits and protections afforded persons of the opposite sex who choose to marry."[106] Vermont's Common Benefits clause did not adhere to the same analysis scheme—either strict scrutiny and/or rational basis—that the Equal Protection and Due Process clauses of the United States Constitution did because the Vermont constitution predated the United States Constitution, had different case law approaches to determining constitutionality of statutory provisions, and historically possessed a principle of inclusion.[107] Attempting to adhere to that "spirit" of inclusiveness in the Vermont constitution, the Court developed its own approach to evaluate the statute's constitutionality.[108] Initially, "[w]hen a statute is challenged under Article 7, [the court] first define[s] that 'part of the community' disadvantaged by the law."[109] Secondly, the Court "look[s] next to the government's purpose in drawing a classification that includes some members of the community within the scope of the challenged law but excludes others"[110] and "examine[s] the nature of the classification to determine whether it is reasonably necessary to accomplish the State's claimed objectives."[111] Under this second prong, the Court relies on three factors to determine whether exclusion was "reasonably necessary:"

> (1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive.[112]

Under the first prong, the Court easily found that the statute "exclude[d] anyone who wishe[d] to marry someone of the same sex"[113] because the statute "appl[ied] expressly to opposite-sex couples."[114] Then the Court identified that "[t]he principal purpose the State advances in support of the [sic] excluding same-sex couples from

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106. *Baker*, 744 A.2d at 867.
107. *Id.* at 870-75.
108. *Id.* at 877-78.
109. *Id.* at 878.
110. *Id.*
111. *Id.*
112. *Id.* at 879.
113. *Id.* at 880 (footnote omitted).
114. *Id.*

the legal benefits of marriage is the government's interest in 'furthering the link between procreation and child rearing,' "[115] and that such exclusion is "significantly under-inclusive" if the goal of marriage was procreation.[116] If the reason for barring same-sex couples from marriage was procreation, then the exclusion was not extensive enough because it left out opposite-sex couples who either intended to marry "for reasons unrelated to procreation"[117] or who are "incapable of having children."[118] Additionally, the Court found that "a significant number of children today are actually being raised by same-sex parents, and that increasing numbers of children are being conceived by such parents through a variety of assisted-reproductive techniques."[119] Moreover, the Court mentioned that the Vermont legislature had "acted affirmatively to remove legal barriers so that same-sex couples may legally adopt and rear the children conceived through [reproductive technological] efforts."[120] By showing that opposite-sex couples married for reasons other than reproduction and that same-sex couples did raise children, the Court not only demonstrated the underinclusiveness of excluding same-sex couples from marriage but also seemingly extinguished the procreation presumption of marriage.

To determine under the second prong whether excluding same-sex couples from marriage benefits was reasonably necessary, the Vermont Supreme Court looked specifically to its three pre-established factors. Since the exclusion of same-sex couples from marriage had been found to be underinclusive, the Court went on to discuss the remaining two unanalyzed factors. As far as the benefits of marriage are concerned, the Court found overwhelming significance in the way that "access to a civil marriage license and the multitude of legal benefits, protections, and obligations that flow from it significantly enhance the quality of life in our society."[121] Also because same-sex couples could procreate and raise children, the Court then found that barring same-sex couples from marriage benefits did not further any

115. *Id.* at 881.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* (citation omitted).
120. *Id.* at 882 (citation omitted).
121. *Id.* at 883.

procreative goals of marriage.[122] In this fashion, the Court held that Vermont had "a constitutional obligation to extend to plaintiffs the common benefit[s], protection[s], and security that Vermont law provides opposite-sex married couples."[123]

Though the Vermont Supreme Court did not recognize that there was a fundamental right to same-sex marriage and left that task to "some future case [that] may attempt to establish that-notwithstanding equal benefits and protections under Vermont law-the denial of a marriage license operates per se to deny constitutionally-protected rights,"[124] the Court did extend to committed same-sex couples the benefits of marriage. Shortly after the decision, the Vermont legislature, in 1999, passed legislation providing for civil unions that conferred the same benefits and protections of marriage on same-sex couples.[125]

This same concern for extending marriage benefits and protections to same-sex couples was shared recently by the fall 2006 decision from the New Jersey Supreme Court in *Lewis v. Harris*.[126] Seven same-sex couples in New Jersey, who sought out marriage licenses "to enjoy the legal, financial, and social benefits that are afforded by marriage,"[127] challenged the constitutionality of New Jersey's marriage laws[128] after they were denied the ability to marry.[129] At the trial level, the plaintiffs' claims were dismissed because the court found that the New Jersey marriage statute defined marriage as an opposite-sex union and thus, the same-sex couples did not possess a fundamental right to marry that was either protected by the constitution nor violated when they were denied their marriage licenses.[130] The appellate division affirmed.[131] On further appeal, however, the New Jersey Supreme Court held that despite the lack of a fundamental right to same-sex marriage, it "[could not] find a legitimate public need for an unequal legal scheme of benefits and

122. *Id.* at 884.
123. *Id.* at 886.
124. *Id.*
125. *See* Vt. Stat. Ann. tit. 15 §§ 1201-1207 (1999).
126. *Lewis v. Harris*, 908 A.2d 196, 223 (N.J. 2006).
127. *Id.* at 200.
128. *See* N.J. Stat. Ann §§ 37:1-1 to 37:2-41 (2007).
129. *Lewis*, 908 A.2d at 200-01.
130. *Id.* at 203.
131. *Id.*

privileges that disadvantages committed same-sex couples."[132] Instead, the Court pronounced that "[e]quality of treatment is a dominant theme of our laws and a central guarantee of our State Constitution"[133] and found that

> [t]here is no rational basis for, on the one hand, giving gays and lesbians full civil rights in their status as individuals, and, on the other, giving them an incomplete set of rights when they follow the inclination of their sexual orientation and enter into committed same-sex relationships.[134]

In particular, the Court saw that same-sex couples in New Jersey who registered for benefits and protections under the state's domestic partnership laws were not provided the same type of protection and benefits—such as statutory leave to care for an infirm domestic partner, statutory presumptions in wills, and certain adoption presumptions—that the state's married couples received.[135] Because such disparity affected the quality of family life for same-sex couples and their children,[136] the New Jersey Supreme Court decided to extend marriage benefits and protections to same-sex couples.[137]

Incidentally, the procreation argument was subdued in *Lewis* because the state "[did] not argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children."[138] Nor did the state replace procreation with another purpose to justify opposite-sex marriage. The Court postulated that perhaps the state avoided the procreation argument "because the public policy of this State is to eliminate sexual orientation discrimination and support legally sanctioned domestic partnerships."[139] Indirectly, this remark reveals the discriminatory nature of the procreation argument. On the other hand, one could believe that the points that deflated the strength of the procreation argument in *Baker v. State* could also have pushed the state in *Lewis* away from using procreation to argue against same-sex marriage.

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132. *Id.* at 218.
133. *Id.* at 220.
134. *Id.* at 217.
135. *Id.* at 215-17.
136. *Id.* at 218.
137. *Id.* at 224.
138. *Id.* at 217.
139. *Id.*

Indeed, the procreation argument that primarily bolstered the case for opposite-sex marriage and shunned recognition of same-sex marriage seemed to destabilize both in the wake of *Baker v. State* and in the changing nature of same-sex relationships, which includes parenting through both state adoption and reproductive technologies. In light of the *Baehr* decision in 1993, much discussion arose over the recognition of same-sex marriage in the national imagination. Professor Eskridge notes that as far as the Hawaii decision and the awakening of the possibility of same-sex marriage,

> the country didn't like that one bit. Americans of various ethnicities, religions, and political orientations united in opposition to extending the valued institution of marriage to *homosexuals*. Between 1995 and 2005, forty-three states adopted statutes or constitutional amendments barring their judges from recognizing same-sex marriages in their jurisdictions. States have a fair amount of discretion to refuse to recognize out-of-state marriages, but Congress enacted the Defense of Marriage Act (DOMA) in 1996 to make doubly certain the states would not have to recognize such marriages. Moreover, DOMA mandated that more than eleven hundred federal statutory and regulatory provisions using the terms "marriage" or "spouse" could never include same-sex couples married under state law.[140]

In support of the *Defense of Marriage Act* (hereinafter *DOMA*), the House Judiciary Committee, headed by then-Illinois-representative Henry Hyde, found that the federal government had "an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing."[141] In 1998, even the state of Hawaii amended its constitution so that its legislature retained the "power to reserve marriage to opposite-sex couples."[142]

For *Baker v. State* to enter the same-sex marriage debate after the *DOMA*'s 1996 enactment, the decision could be seen as resistance to the procreation presumption of marriage (or what Professor Eskridge

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140. Eskridge & Spedale, *supra* n. 17, at 20 (emphasis in original); *see also* 1 U.S.C. § 7 (1996); 28 U.S.C. § 1738C (1996).

141. H.R. Rpt. 104-664 at 13 (July 9, 1996).

142. Haw. Const. art. 1 § 23 (2006).

calls the defense-of-marriage argument).[143] Despite such resistance, however, the traditional model of marriage as an opposite-sex union for the purposes of procreation continues to resurface—especially in the congressional introduction of a proposal for the Federal Marriage Amendment (hereinafter FMA) in 2003 and 2004.[144]

C. *THE MASSACHUSETTS DECISION*

What partly prompted such congressional introduction of the FMA proposal to define marriage as a union between opposite-sex couples was a 2003 case from the Supreme Judicial Court of Massachusetts, *Goodridge v. Department of Public Health.*[145] Plaintiffs were fourteen same-sex couples who had been denied the right to marry and who sued the Massachusetts Department of Public Health for violations of state law.[146] The claims were dismissed at the trial level because the court below held that "prohibiting same-sex marriage rationally furthers the Legislature's legitimate interest in safeguarding the 'primary purpose' of marriage, 'procreation,' "[147] and that opposite-sex couples "do not rely on 'inherently more cumbersome' noncoital means of reproduction, and they are more likely than same-sex couples to have children, or more children" than same-sex couples.[148]

Taking the case on appeal, the Massachusetts Supreme Judicial Council primarily relied on Massachusetts case law and common dictionary meanings to determine that the state marriage statute[149] defined marriage as an opposite-sex union[150] and that the statute could not extend to same-sex couples.[151] The Court found this exclusion to be detrimental because "[w]ithout the right to marry-or more properly,

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143. Eskridge & Spedale, *supra* n. 17, at 30 ("[T]he Vermont Supreme Court unanimously rejected the defense-of-marriage argument. The majority opinion, by Chief Justice Jeffrey Amestoy, ruled that the state has 'a legitimate and longstanding interest in promoting a permanent commitment between couples for the security of their children.' ").

144. *Id.* at 39.

145. *Id.*; *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

146. *Goodridge*, 798 N.E.2d at 949-50.

147. *Id.* at 951.

148. *Id.*

149. *See* Mass. Gen. Laws ch. 207 §§ 19-20 (1998).

150. *Goodridge*, 798 N.E.2d at 952-53.

151. *Id.* at 953.

the right to choose to marry-one is excluded from the full range of human experience and denied full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship.' "[152] The Court also found that "[Massachusetts] laws assiduously protect the individual's right to marry against undue government incursion. Laws may not 'interfere directly and substantially with the right to marry.' "[153] Though the Court acknowledged that the state had police powers to regulate marriage,[154] it also pronounced that "[w]hether and whom to marry, how to express sexual intimacy, and whether and how to establish a family-these are among the most basic of every individual's liberty and due process rights."[155] Accordingly,

> central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations. . . . The liberty interest in choosing whether and whom to marry would be hollow if the Commonwealth could, without sufficient justification, foreclose an individual from freely choosing the person with whom to share an exclusive commitment in the unique institution of civil marriage.[156]

Despite the harshness of the Massachusetts marriage statute, the Court's sympathy for same-sex couples indicated a willingness to side in favor of same-sex marriage.

Reviewing the appellants' constitutional arguments, the Court allotted a strict scrutiny test for the equal protection claims and a rational basis test for claims arising under due process. Although the state asserted that only a rational basis test should be used because it had claimed that no fundamental right to same-sex marriage existed, the Court found that even if a rational basis test was used for either due process and equal protection cases, the prohibition of same-sex marriage would not meet that lower threshold.[157] The Court deflated the state's three "rational" arguments against recognizing same-sex marriage. First, regarding the state's procreation argument, the Court found that "[Massachusetts] laws of civil marriage do not privilege

152. *Id.* at 957 (quoting *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999)).
153. *Id.* (quoting *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978)).
154. *Id.* at 954.
155. *Id.* at 959 (citations omitted).
156. *Id.*
157. *Id.* at 961.

procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family"[158] and that "[f]ertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married."[159] Rather, "it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage."[160] The Court observed that

> [i]f procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means. The attempt to isolate procreation as "the source of a fundamental right to marry," overlooks the integrated way in which courts have examined the complex and overlapping realms of personal autonomy, marriage, family life, and child rearing. Our jurisprudence recognizes that, in these nuanced and fundamentally private areas of life, such a narrow focus is inappropriate.[161]

Consequently, the " 'marriage is procreation' argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage."[162]

By acknowledging recent demographic shifts in the makeup of the American family and by holding that "[t]he 'best interests of the child' standard does not turn on a parent's sexual orientation or marital status,"[163] *Goodridge* rejected the state's second argument "that confining marriage to opposite-sex couples ensures that children are raised in the 'optimal' setting"—meaning a family of opposite-sex parents.[164] The state's last argument "that limiting marriage to opposite-sex couples furthers the Legislature's interest in conserving scarce State and private financial resources"[165] was discarded because

158. *Id.*
159. *Id.* (citation omitted).
160. *Id.* (footnote omitted).
161. *Id.* at 962 (citation omitted).
162. *Id.*
163. *Id.* at 963 (citation omitted).
164. *Id.* at 962.
165. *Id.* at 964.

the state had generalized that individual members within same-sex couples were less financially dependent on each other than opposite-sex couples, which ignored the fact that many same-sex couples had children or other dependents and that Massachusetts law did not confer financial benefits to married couples based on each member's demonstration of financial dependence on each other.[166] As a result, the state's arguments for excluding same-sex marriages fell short of the rational basis test.

The traditional idea that marriage is for child-rearing and procreation still survives today. In the recent 2003 and 2004 failed attempts to introduce and enact the FMA against legally recognizing same-sex marriages, FMA proponents repeatedly resorted to procreation and child-rearing as reasons to exclude same-sex marriage.[167] Even President George W. Bush hinted at the procreative goals of marriage in his 2005 State of the Union Address when he endorsed a federal constitutional amendment to protect marriage "[f]or the good of families, children, and society."[168] Nevertheless, in the three decades since *Baker v. Nelson*, the line of case law has finally begun to shift away from one exclusively uniform view of what state-authorized marriages provide to the American society. Judicial decision-making, particularly from Vermont, Massachusetts, and recently New Jersey, have, in their rejection of the procreation model of marriage, begun implicitly to displace any previously uniform social purpose of marriage. Under these cases, procreation is no longer the sole purpose of marriage, but rather only one reason why couples marry. Amongst the breadth of state and federal case law on same-sex marriage in general, that old consensus regarding the purpose of marriage in American society no longer exists.

It is likely that this initial displacement of the procreation model of marriage will also gradually usher in a judicial climate perhaps more conducive to accepting, or at least discussing, alternative marriage models that could be receptive to recognizing same-sex marriage.

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166. *Id.*

167. *See* Eskridge & Spedale, *supra* n. 17, at 38-39.

168. George W. Bush, Speech, *State of the Union Address* (Chamber of the U.S. H.R., The U.S. Capitol, D.C., Feb 2, 2005), in U.S. Govt., *The White House, News & Policies, February 2005, State of the Union Address*, http://www.whitehouse.gov/news/releases/2005/02/ 20050202-11.html (last updated Feb. 2, 2005).

Although "[t]he Vermont and Massachusetts cases have hardly been death knells for the defense-of-marriage objection to same-sex marriage," at least the thought has shifted away from one controlling, overriding purpose of marriage.[169] Within such a softening climate, perhaps there is a possible life for legally recognizing same-sex marriage. Just what form that recognition will take, however, and what policy reasons states will advance to justify recognition of same-sex unions remains unclear.

III. THE CORPORATIONS MODEL OF MARRIAGE

A. *PRIVATIZATION OF MARRIAGE*

What if, instead of giving states the power to define the purposes of marriage, the law empowered couples with the ability to define their own purposes and goals for entering into marital bliss? The minor—but significant—displacement of procreation as the controlling purpose behind the definition of marriage as an opposite-sex union in recent same-sex marriage cases from Vermont, New Jersey, and Massachusetts have perhaps afforded room for legal discourse about the nature of state-authorized marriages. As seen in these cases, the law does afford important protections and benefits to married couples—which is likely why these courts found the exclusion of these protections and benefits to same-sex couples was discriminatory, even if these courts did not ultimately recognize the fundamental right to same-sex marriage. Opposite-sex couples do marry for reasons other than to start families; conversely, same-sex couples can conceive—albeit artificially—and they can raise children.[170] One recent author has even discussed the *Goodridge* case at length and attempted to reconceptualize marriage based on a property rights theory, likening state abrogation of marriage—as in the case of same-sex couples—to a situation under the Takings Clause.[171]

The sentiment for allowing couples the ability to legally define

169. Eskridge & Spedale, *supra* n. 17, at 31.

170. *See Baker v. State*, 744 A.2d 864, 881 (Vt. 1999) (Court discussed opposite-sex couples who marry and do not procreate); *see also Lewis v. Harris*, 908 A.2d 196, 201-02 (N.J. 2006) (Court described at length the family lives of the seven same-sex couples in the suit who seek marriage licenses, some of whom are raising children).

171. *See* Goutam U. Jois, Student Author, *Marital Status as Property: Toward a New Jurisprudence for Gay Rights*, 41 Harv. Civ. Rights-Civ. Libs. L. Rev. 509 (2006).

their own marriages has reverberated within a particular line of discourse vying for privatizing marriage and viewing it from an economic perspective. This approach harkens back to the common-law notion that a marriage is contractual in nature.[172] Instead of letting the state define the reasons for marriage—whether procreative or pecuniary, religious or amorous—scholarship in this area has advocated that the power to define marriage should be privatized and given to marrying couples to define for themselves what goals underscore their own marriages. Professor Edward Zelinsky notes that "[a]s [the same-sex marriage] debate has unfolded, it has become clear that there is a better alternative to all of these: to deregulate marriage altogether. Marriage should become solely a religious and cultural institution with no legal definition or status."[173] Already, the trend to privatize has surfaced in the realm of domestic cohabitation cases, where, according to Professor Zelinsky, "courts typically deny that cohabitation carries any legal significance and then apply traditional legal rules—contract, constructive trust, quantum meruit—to fashion divorce-like remedies for the former cohabitants."[174] By analogy, Professor Zelinsky advocates the same treatment of marriage in order to legally recognize same-sex marriages: "Abolishing the concept of civil marriage would formally codify this reality; legal rules the same as or similar to those governing married couples increasingly apply outside of marriage as well."[175]

Others have also propounded upon privatizing marriage. On his internet blog, Judge Richard A. Posner has posited that

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172. Mary Anne Case, Lecture, *Marriage Licenses* (U. of Minn. L. Sch., Minneapolis, Minn., Oct. 26, 2004), in 89 Minn. L. Rev. 1758, 1766 (2005) ("The state has been a relative latecomer in the regulation of marriage, however, and, Henry Maine to the contrary notwithstanding, the history of marriage in Anglo-American law seems thus far to have been one of movement from contract to status and only part way back again. Legal historians have noted that the earliest English laws concerning marriage treat it as, in effect, a contract for the purchase of a wife, a purely private transaction, with 'no trace of any such thing as public license or registration; no authoritative intervention of priest or other public functionary. It is purely a private business transaction.' " (quoting George Elliot Howard, *A History of Matrimonial Institutions* vol. 1, 285 (Humanities Press 1964) (originally published 1904) (footnote omitted)).

173. Edward Zelinsky, *Government Should Get Out of the Marriage Game*, Conn. L. Trib. 23 (July 26, 2004).

174. Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 Cardozo L. Rev. 1161, 1168 (2006).

175. Zelinsky, *supra* n. 173, at 23.

> [t]he more fundamental economic question is why marriage is a legal status. One can imagine an approach whereby marriage would be a purely religious or ceremonial status having no legal consequences at all, so that couples, married or not, who wanted their relationship legally defined would make contracts on whatever terms they preferred. . . . The analogy would be to partnership law, which allows the partners to define the terms of their relationship, including the terms of dissolution. As with all contracts, the law would impose limits to protect third-party interests, notably those of children.[176]

Along the same reasoning, Professor Colin P. A. Jones notes that

> [a]s one of the oldest types of contractual relationship, marriage has always been a form of partnership. Subject to certain statutory constraints, businesspeople have long been free to form whatever sort of partnership they consider appropriate to their needs. Why not make the same flexibility possible for marriage?[177]

Likewise, another recent author has also noted that "[e]liminating marriage as a legal institution would leave a significant gap in the law governing married individuals."[178] Within this "gap," "spouses may benefit from establishing terms of a contract to define their expectations and responsibilities. Government's proper role, accordingly, is to protect this spousal relationship by enforcing private contracts between individuals."[179] Even *The Economist* has voiced similar ideas:

> [M]arriage is the union of a man and a woman, and so cannot be extended to same-sex couples. They may live together and love one another, but cannot, on this argument, be "married." But that is to dodge the real question—why not?—and to obscure the real nature of marriage, which is a *binding commitment*, at once legal, social and personal, between two people to take on special

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176. Gary Becker & Richard A. Posner, *The Becker-Posner Blog: The Law and Economics of Gay Marriage—Posner* [¶ 6], http://www.becker-posner-blog.com/archives/ 2005/07/the_law_and_eco.html (last updated July 17, 2005).

177. Colin P. A. Jones, *A Marriage Proposal: Privatize It*, 11 The Indep. Rev. 115, 115 (2006).

178. Cynthia M. Davis, Student Author, *"The Great Divorce" of Government and Marriage: Changing the Nature of the Gay Marriage Debate*, 89 Marq. L. Rev. 795, 802 (2006).

179. *Id.* (footnotes omitted).

> obligations to one another. If homosexuals want to make such marital commitments to one another, and to society, then why should they be prevented from doing so while other adults, equivalent in all other ways, are allowed to do so?[180]

Surely such "binding commitments" could encompass private enforceable contracts between even same-sex individuals.

So what could be "those terms" that Judge Posner says partners to a privatized marriage could possibly define for themselves? Judge Posner himself poses the notion that "[t]here could be five-year marriages, 'open' marriages, marriages that could be dissolved at will (like employment at will), marriages that couldn't be dissolved at all, and so forth, and alimony and property settlement would be freely negotiable as well."[181] Meanwhile Professor Jones sees "off-the-shelf marital partnership kits" that would include certain default terms.[182] Within a hypothetically-privatized sphere of regulation, the possibilities are perhaps infinite. Could such a realm even allow for same-sex marriages? In this fictional and hypothetical realm, what terms could allow Jack and Ennis, the fictional gay cowboys from *Brokeback Mountain*, to own a ranch and run their cow and calf operation while entering into an ideally "sweeter life" of same-sex marriage?

B. *AN INTRIGUING PROPOSAL: THE CORPORATE MARRIAGE*

Jack and Ennis could corporatize their marriage. One vehicle within a privatized sphere of marriage that would grant couples, both same-sex and opposite-sex, the ability to define their own marriages is the corporations model of marriage. Although generally existing within a business context, corporations, like marriages, are associations or unions of sorts. The common dictionary meaning of the word "corporation" from *Webster's Third New International Dictionary* describes a corporation as "a body of persons associated for some purpose (as standardization of conditions)."[183] Similarly, under *Black's Law Dictionary*, a corporation is "a group or succession of

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180. *The Case For Gay Marriage*, 370 The Economist 1, 9 (Feb. 28, 2004) (emphasis added).

181. Becker & Posner, *supra* n. 176, at [¶ 6].

182. Jones, *supra* n. 177, at 116.

183. *Webster's Third New Intl. Dictionary* 510 (Philip Babcock Gove ed., G. & C. Merriam Co. 1993).

persons established in accordance with legal rules into a legal or juristic person that has legal personality distinct from the natural persons who make it up, exists indefinitely apart from them, and has the legal powers that its constitution gives it."[184] Despite signifying an association or union, however, the dictionary definition of "corporation" bears no restriction based on sex differentiation or any further explicit limitation other than ones established by "purpose" or "constitution." In contrast, the common dictionary definition of "marriage," which the *Baker* and *Jones* courts used to construe marriage statutes, required marriage to be opposite-sex.[185] Therefore, a plain reading of the common dictionary definition of "corporation" lends itself easily to a union of two persons, but without any explicit sex differentiation.

Beyond a simple plain-meaning comparison between marriages and corporations, these two legal statuses or entities share other, more significant, legal implications. Broadly-speaking, "the laws governing marriage today are far more like those governing business corporations than those governing nonprofits"[186] because what lies behind the state promotion of both marital and incorporated unions "is the assumption that the social good is likely to be promoted when government facilitates people working together to achieve joint ends."[187] While, in most of the cases rejecting same-sex marriage, the promotion of the nuclear family and procreation have been the "joint ends" of marriage; on the other hand, in corporations law, "the menu of options for those

184. *Black's Law Dictionary* 365 (Bryan A. Garner ed., 8th ed., West 2004). Incidentally, the lengthy definition of "corporation" from *The Oxford English Dictionary* includes corporation as "[a] number of persons united, or regarded as united in one body; a body of persons" and in a legal context, "[a] body corporate legally authorized to act as a single individual; an artificial person created by royal charter, prescription, or act of the legislature, and having authority to preserve certain rights in perpetual succession." *Oxford English Dictionary* vol. III, 956 (J.A. Simpson & E.S.C. Weiner eds., 2d ed., Oxford U. Press 1989). Nowhere in the definition exist limitations that bar such "persons united"—by race, sex, gender, creed, or otherwise—other than by law.

185. *See supra* n. 24 (where the *Webster's Third New International Dictionary* definition of "marriage," relied upon by the court in *Baker v. Nelson*, is listed therein); *see also Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. App. 1973).

186. Case, *supra* n. 172, at 1782.

187. *Id.*; *see also* Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 Harv. Civ. Rights-Civ. Libs. L. Rev. 79, 115 (2001) ("Both corporations and marriages involve individuals forming a new fictional legal entity and operating it for their mutual (and, presumably, society's) gain.").

starting a business has increased."[188] In this fashion, corporations have various leeways when it comes to selecting their "purpose." Otherwise from a general perspective, however, both the laws of marriage and corporations seem to view the good of collective unity, whether in a domestic or an economic sphere.[189]

On a more microscopic level of comparison, the legal mechanics involved in the respective lives of corporations and marriages also share similarities. Beginning with the creation of both marriages and close corporations, commonalities exist between them because both involve state action.[190] With marriages, the couple legally commences the marital relationship by applying for a license issued by the state and/or local city government.[191] Once licensed, the couple's relationship in a civil marriage is contractual by nature, often resembling a three-party contract where the parties are "two willing spouses and an approving State."[192] The requirements—other than that the couple is comprised of two opposite-sex persons—to obtain a marriage license are generally sparse, requiring only the names, addresses, parties' ages, names of parents, and whether any of the parties had previous marriages.[193] California's marriage application, for instance, is a one-page form that asks, in addition to the aforementioned biographical information, for the applicants' "usual occupation" and "education years completed."[194] In Massachusetts—where same-sex marriage is legal—the marriage application also asks for a merely basic amount of information about the individuals.[195]

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188. Case, *supra* n. 172, at 1777.

189. *Id.* at 1782. ("Perhaps at some extremely high level of generality this accords with the scriptural injunction that 'two are better than one, because they have a good reward for their labor . . . .' " (quoting *Ecclesiastes* 4:9 (Am. Stand. Ed.)).

190. Ertman, *supra* n. 187, at 112-13.

191. *Id.* at 117; *see also* Unif. Marriage and Divorce Act § 203, 9A U.L.A. 179 (1998).

192. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (citation omitted); *see also Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993) (stating the establishment of a contract in marriage).

193. Ertman, *supra* n. 187, at 118.

194. *See* L.A. County Registrar-Recorder/County Clerk, *Marriage License Application* 1, http://lavote.net/RECORDER/PDFS/confMarriageApp.pdf (last accessed Apr. 6, 2007); *see also* S.F. Govt., *Office of the County Clerk, Marriage License Form* 1, http://www.sfgov.org/site/uploadedfiles/ countyclerk/docs/public.pdf (last accessed Apr. 6, 2007).

195. Gay & Lesbian Advocates & Defenders, *How to Get Married in Massachusetts,*

Similarly, a corporation is created when its articles of incorporation are filed with the secretary of state.[196] Sections 2.02(a) and (b) of the *Revised Model Business Corporation Act* provide that certain descriptions should be listed within the articles of incorporation, including the corporate name, address of the registered agent, incorporator's name and address, a general purpose statement, and other such information.[197] The instructions for filing articles of incorporation for a stock corporation in California, for example, ask for a minimal amount of information, requiring only the corporation's name, a general purpose statement, name and California address of the corporation's designated agent, and the number of shares of stock.[198] Likewise, Delaware's requirements for incorporating a stock corporation are equally sparse, asking for the same information as California but in different order.[199] Once filed with the secretary of state, a certificate is issued and the relationship of the de jure corporation's officers and the governing state is contractual.[200]

In addition, another commonality between the formation of marriages and corporations encompasses the parties' abilities to contract for liabilities before entering into either the marriage or corporate relationship. With marriages, a couple entering into a marriage can enter into a pre-nuptial contract for delineating in advance the rights and duties of each party once married and the type of property distribution upon dissolution.[201] Likewise, a corporation's articles of incorporation may provide action for "the imposition of personal liability on shareholders for the debts of the corporation to a specified extent and upon specified conditions" and "the liability of a

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"How Do We Get A Marriage License? Step One," http://www.glad.org/marriage/howtogetmarried.html (last accessed Apr. 6, 2007).

196. Ertman, *supra* n. 187, at 117; *see also* Rev. Model Bus. Corp. Act § 2.03(b) (ABA 2006) ("The secretary of state's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation.").

197. Rev. Model Bus. Corp. Act § 2.02(a)-(b).

198. Cal. Sec. of St., *Organization of California Stock Corporations* 4-5, http://www.ss.ca.govbusiness/corp/pdf/articles/corp_artsgen.pdf (last updated Mar. 2005).

199. Del. Govt., *Division of Corporations, Certificate of Incorporation* 2, http://www.state.de.us/corp/incstk.pdf (last accessed Mar. 6, 2007).

200. 18 Am. Jur. 2d *Corporations* § 81 (2007).

201. Ertman, *supra* n. 187, at 118.

director to the corporation or its shareholders for money damages for any action taken, or any failure to take any action, as a director . . . ."[202]

Amusingly, both the laws of marriage and corporations even respectively allow for validating marriages and corporations in the face of defective marriage formation or incorporation. For instance, the *Uniform Marriage and Divorce Act* provides that, despite failing to fulfill actual marriage requirements, one who cohabits with another in good faith belief that one is married to another is a "putative spouse until knowledge of the fact that he [or she] is not legally married terminates his [or her] status and prevents acquisition of further rights."[203] As a putative spouse, one acquires the same rights conferred upon a legal spouse.[204] Certain states, such as California and Louisiana, recognize putative spouses for purposes of property distribution upon death or dissolution.[205] In the law of corporations, an analogous concept exists to save corporations that fail to meet valid incorporation requirements: "A *de facto* corporation is said to exist when there is insufficient compliance to constitute a de jure corporation vis-à-vis a challenge by *the state*, but the steps taken toward formation of a corporation are sufficient to treat the enterprise as a corporation with respect to *third parties*."[206] The broad resemblance between both concepts is that both putative marriages and *de facto* corporations require some element of good faith in either the putative spouse's treatment of the putative marriage as a real marriage or in the actions of the corporate officers of the *de facto* corporation to act as if the corporation had actually existed.[207]

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202. Rev. Model Bus. Corp. Act § 2.02(b)(2)(v), (b)(4) (ABA 2006).

203. Unif. Marriage and Divorce Act § 209 9A U.L.A. 192 (West 2006).

204. *Id.*

205. *See e.g. In re Est. of Vargas*, 111 Cal. Rptr. 779, 780-81 (Cal. App. 2d Dist. 1974); *Wagner v. Co. of Imperial*, 193 Cal. Rptr. 820, 822 (Cal. App. 4th Dist. 1983); *Succession of Rossi*, 214 So. 2d 223, 227 (La. App. 4th Cir. 1968), *writ refused*, 216 So. 2d 309 (1968).

206. Melvin Aron Eisenberg, *Corporations and Other Business Organizations: Cases and Materials* 89 (Concise 9th ed., Found. Press 2005).

207. *See Centinela Hosp. Med. Ctr. v. Super. Ct.*, 263 Cal. Rptr. 672, 674 (Cal. App. 2d Dist. 1989) ("For the purposes of this appeal, section 377, subdivision (b)(2), defines an 'heir' as a putative spouse dependent upon the decedent, who is 'the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.' "); *see also Wagner*, 193 Cal. Rptr. at 822 ("To establish [plaintiff] was [husband's] putative

Resemblances also arise in the dissolution methods of both marriages and corporations: "Corporate dissolution, particularly for close corporations, parallels divorce."[208] First, as with the commencement of marriages and corporations, dissolution for both entities again require state action.[209] The *Uniform Marriage and Divorce Act* provides procedures for formal dissolution that necessarily involve a state court decree.[210] Correspondingly, the *Revised Model Business Corporation Act* requires corporate dissolution to be filed with the secretary of state.[211] Hence, the state is prominent in the life and death of both marriages and corporations.

Secondly, the particular forms of termination for marriages and corporations also correspond. With the establishment of no-fault divorce, modern marriages are dissolved at the election and desire of a dissatisfied spouse.[212] In California, where no-fault divorce in the United States first originated with the enactment of the *Family Act of 1969*, the requirements for no-fault divorce are either (1) irreconcilable differences between the spouses that have caused the irremediable

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spouse under section 377, [plaintiff] was not required to show she and [husband] participated in a solemnization ceremony. Under section 377 [plaintiff] must only prove she had a good faith belief her marriage to [husband] was valid; solemnization would be at most evidence of such good faith belief."); *Cantor v. Sunshine Greenery, Inc.*, 398 A.2d 571, 573 (N.J. 1979) ("The mere fact that there were no formal meetings or resolutions or issuance of stock is not determinative of the legal or De facto existence of the corporate entity, particularly under the simplified New Jersey Business Corporation Act of 1969, which eliminates the necessity of a meeting of incorporators. See N.J.S.A. 14A:2-6 and Commissioners' Comment thereunder. The act of executing the certificate of incorporation, the Bona fide effort to file it and the dealings with plaintiffs in the name of that corporation fully satisfy the requisite proof of the existence of a De facto corporation. To deny such existence because of a mere technicality caused by administrative delay in filing runs counter to the purpose of the De facto concept, and would accomplish an unjust and inequitable result in favor of plaintiffs contrary to their own contractual expectations.").

208. Ertman, *supra* n. 187, at 118 (footnote omitted).

209. *Id.* at 119 (footnote omitted.) ("[C]orporate dissolution requires the formality of filing articles of dissolution, just as divorce requires formal state action.").

210. *See generally* Unif. Marriage and Divorce Act § 302 9A U.L.A. 200 (West 2006).

211. *See generally* Rev. Model Bus. Corp. Act § 14.03(a) (ABA 2006).

212. *Black's Law Dictionary* provides that "no-fault divorce" is "[a] divorce in which the parties are not required to prove fault or grounds beyond a showing of the irretrievable breakdown of the marriage or irreconcilable differences." *Black's Law Dictionary* 516 (Bryan A. Garner ed., 8th ed., West 2004).

breakdown of the marriage or (2) a spouse's incurable insanity.[213] Since 1985, nearly all fifty states now allow couples to dissolve their marriages based on some type of no-fault.[214] In corporations law theory, voluntary dissolution, where incorporators or initial directors of a corporation "may dissolve the corporation by delivering to the secretary of state . . . for filing articles of dissolution,"[215] or where the corporation's board of directors or shareholders "may propose dissolution for submission to the shareholders,"[216] is thusly "akin to nofault divorce."[217] For instance, dissolution of a corporation by voters can be likened to dissolution of a marriage based on irreconcilable differences.[218] Moreover, the judicial dissolution of marriages that harkens back to the days when divorces were granted under fault-based regimes parallels dissolution of a corporation

> when the corporation continually violates state law, a situation possibly analogous to divorce for domestic violence. Such a divorce is more consistent with the old fault base of cruelty, although recurring abuse indicates the kind of irreconcilable differences that justify divorce in no-fault regimes.[219]

Other overlap between marriage and corporate dissolutions can be made between a marriage annulment, where a court "renders a marriage void from the beginning,"[220] and administrative corporate dissolution, where dissolution "results from the corporation's failure to fulfill statutory requirements, such as filing an annual report."[221] This particular analogy between marriage annulments and corporate dissolution is furthered by the situation allowing incorporators or initial directors to file articles of dissolution before the corporation has commenced its business affairs or issued shares, which in the marriage context is like an annulment based on lack of consummation.[222]

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213. Cal. Fam. Code Ann. § 2310 (West 2007).
214. *Black's Law Dictionary* 516 (Bryan A. Garner ed., 8th ed., West 2004).
215. Rev. Model Bus. Corp. Act §14.01 (ABA 2006).
216. *Id.* at § 14.02.
217. Ertman, *supra* n. 187, at 118-19.
218. *Id.* at 119.
219. *Id.* at 119 n. 230.
220. *Black's Law Dictionary* 100 (Bryan A. Garner ed., 8th ed., West 2004).
221. Ertman, *supra* n. 187, at 119 (footnote omitted); *see also* Rev. Model Bus. Corp. Act § 14.20 (ABA 2006).
222. Ertman, *supra* n. 187, at 119.

Once validly formed, both marriages and corporations, as state-authorized legal statuses, embody analogous characteristics as well. Under the status of an "entity," the corporation is considered a legal person that "can exercise power and have rights in its own name. For example, a corporation can sue or be sued, and can hold property."[223] Section 3.02 of the *Revised Model Business Corporation Act* includes an extensive list of certain default powers that a corporation as an entity can exercise, including but not limited to: selling and conveying property;[224] making contracts;[225] borrowing and lending money;[226] entering into partnerships and joint ventures;[227] conducting out-of-state businesses;[228] and making charitable donations.[229] Likewise, married couples have often been considered an entity, especially in community property states where the marriage is often referred to as the "economic community."[230] Regardless of whether the married couple resides in a community or separate property state, married couples have also the ability to own property jointly together, for instance either classically in joint tenancy or tenancy by the entirety.[231] Married couples can own businesses together,[232] file joint taxes,[233] and create joint bank

223. Eisenberg, *supra* n. 206, at 77; *see also* Rev. Model Bus. Corp. Act § 3.02 ("Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs . . . .").

224. Rev. Model Bus. Corp. Act § 3.02(5) (ABA 2006).

225. *Id.* at § 3.02(7).

226. *Id.* at § 3.02(7)-(8).

227. *Id.* at § 3.02(9).

228. *Id.* at § 3.02(10).

229. *Id.* at § 3.02(13).

230. *See e.g.* Leslie Joan Harris, *Tracing, Spousal Gifts, and Rebuttable Presumptions: Puzzles of Oregon Property Distribution Law*, 83 Or. L. Rev. 1291, 1292 ("Rules of marital property ownership also express assumptions about the extent to which spouses are regarded as economic partners or as separate economic actors. . . . Community property emphasizes the economic union of spouses, since it provides that the parties own equally all property that either party earns during the marriage.").

231. *See generally* Jesse Dukeminier & James E. Krier, *Property* 276-77 (6th ed., Aspen Publishers 2006) (discussing the concept of tenancy by the entirety).

232. *See e.g.* U.S. Govt., *Internal Revenue Service, Employees-Other Employment Scenarios Husband and Wife Business,* "Both Spouses Carrying on the Trade or Business," http://www.irs.gov/ businesses/small/article/0,,id=97732,00.html (last accessed Apr. 6, 2007) (instructing which forms to file for a married couple who own a business together).

accounts.[234] Lastly, just as a corporation can incur liabilities and be sued, a couple can incur debts together during the marriage and also be sued under liability as joint tortfeasors. Thus, merely beyond formation and dissolution, marriages and corporations are comparable when it comes to the exercise of day-to-day rights and responsibilities as entities.

Nonetheless, even within their respective entity statuses, marriages and corporations continue to share overlap, particularly regarding the rights of individuals within either a marriage or a corporation. Generally, the two most prominent duties of a corporation—the duty of care and the duty of loyalty—have relative counterparts in the marriage context. Whereas under the duty of care, "[s]hareholders [in a corporation] have a right to expect that directors will exercise reasonable supervision and control over the policies and practices of a corporation,"[235] spouses generally also have a duty of care to each other by marriage:

> The exchange of marriage vows represents each party's implicit agreement to be bound by a regime of informal social norms underscoring a commitment to the relationship and by a set of legal rights and obligations affirming that the union is one of economic sharing and mutual care. *These obligations include the duties to care for one another and for any children who become part of the family, to share property and income acquired during the union, and to provide support to dependent family members should the union dissolve.* Couples who undertake this formal commitment to one another become eligible to receive an array of government benefits and privileges, recognizing that their relationship of mutual care and support benefits society, as well as themselves.[236]

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233. *See e.g.* U.S. Govt., *Internal Revenue Service, Forms and Publications, Publication 501*, http://www.irs.gov/publications/p501/ ar02.html#d0e1351 (last accessed Apr. 6, 2007) ("Married persons. If you are considered married for the whole year, you and your spouse can file a joint return, or you can file separate returns.") (emphasis omitted). Incidentally, the IRS website includes a short definition of marriage for filing status purposes: "a marriage means only a legal union between a man and a woman as husband and wife." *Id.*

234. *See e.g.* Dukeminier & Krier, *supra* n. 231, at 290 (discussing hypotheticals involving husband and wife ("H and W") owning a joint savings account).

235. *Francis v. United Jersey Bank*, 432 A.2d 814, 824 (N.J. 1981).

236. Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for*

Such a duty of care can also be seen in traditional—as opposed to modern—community property theory where the husband had the exclusive right to manage and control the couple's community property.[237] In addition, under corporations law, the duty of loyalty, where a director of a corporation must act in what he or she reasonably believes is the corporation's best interests, parallels the duty of loyalty that a husband and wife have between each other when certain situations arise, particularly when they share confidential information.[238]

Specifically, "[t]he rights of spouses may be more similar to the rights of shareholders in close corporations than those in public corporations."[239] *Black's Law Dictionary* defines a close corporation as "[a] corporation whose stock is not freely traded and is held by only a few shareholders (often within the same family)."[240] This type of corporation might lend itself situationally closer to a marital union since legally a marriage is only comprised of two individuals and generally considered a family unit. In this manner, within a close corporation, "minority shareholders often are unable to elect new managers, cannot freely transfer their shares, and generally cannot leave the corporation without affecting its life," while similarly a married person cannot sell or transfer his or her rights to the marriage and the person's departure from his or her marriage would also affect the life of the marriage.[241] Additionally, the fiduciary duties between shareholders of a close corporation and between spouses also overlap.[242] In a close corporation, "[m]ajority shareholders of close corporations often are held to fiduciary duties similar to those that

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Dependency, 2004 U. Chi. Legal Forum 225, 236 (2004) (emphasis added).

237. *See generally* Susan Westerberg Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975*, 24 UCLA L. Rev. 1, 64-80 (1976) (discussing the historical rights of husbands in managing the economic community of the marriage).

238. *See S.E.C. v. Yun*, 327 F.3d 1263, 1272-74 (11th Cir. 2003) (finding that in the context of insider trading where the wife gave confidential information that she acquired from her husband, a duty of loyalty existed (1) if husband and wife had a history of sharing and maintaining business confidences or (2) if the wife in disclosing confidential information breached an agreement to maintain husband's business confidences).

239. Ertman, *supra* n. 187, at 115.

240. *Black's Law Dictionary* 365 (Bryan A. Garner ed., 8th ed., West 2004).

241. Ertman, *supra* n. 187, at 115.

242. *Id.* at 120-21.

business partners owe each other."[243] The fiduciary duties within business partnerships parallel those of close corporations because of " 'the fundamental resemblance' of the two models, including the 'trust and confidence' essential to the partnership and 'the inherent danger to minority interest in the close corporation.' "[244] Thus, the fiduciary duties of business partners and members in a close corporation are " 'consistent with the social norm of reciprocal trust and love between spouses.' "[245] So just as a shareholder in a close corporation has the ability to seek action if he or she was injured by the breach of a fiduciary duty, a cause of action would arise for a spouse's breach of a fiduciary duty, such as misappropriation of marital assets.[246]

Of course, like most analogies, differences do exist between marriages and corporations. The most glaring difference probably lies in the fact that legal marriages comprise of two persons while a corporation, even a closed corporation, can consist of more than two shareholder members, an attribute that could resemble polygamous or "open" marriages. In her comparison between marriage and corporations, Professor Marta Ertman points out this problem, but does not offer a counterpoint nor reconciliation.[247] Meanwhile, Professor Jones' comparison embraces the concept of marital corporations that could "[have] hundreds or thousands of couples as stockholders, all sharing common values about marriage."[248] As a matter of fact, Professor Jones' corporations model of marriage is more like a publicly traded corporation than Professor Ertman's model. According to Professor Jones,

> [s]ome [marriage corporations] might be established as nonprofit organizations that also work to further social or environmental causes about which some couples have strong feelings. Others might become investment vehicles whose assets formed the marital nest egg. Still others might charge a subscription fee that would be invested and then pay dividends to lasting marriages at significant anniversaries.[249]

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243. *Id.*
244. *Id.* at 121 n. 243.
245. *Id.* at 121 n. 244.
246. *Id.* at 121-23.
247. *Id.* at 114.
248. Jones, *supra* n. 177, at 116.
249. *Id.* Professor Jones sees

Although Professor Jones' model appears radical compared to the customary "union between man and woman," this difference exemplifies the broadening of possibilities if the concept of marriage becomes privatized, and in a way, reflects Judge Posner's assertion that privatization "would permit people to define their legal relationships in accordance with their particular preferences and needs."[250] Also, in terms of liability, corporations enjoy limited liability while married couples are generally liable "for debts incurred on behalf of the marriage . . . ."[251] Professor Ertman, however, downplays this difference by showing that spouses do have some limited liability for marriage debts, for instance, in bankruptcy proceedings where nonfiling spouses are not required to offset debts of the filing spouse.[252]

Another difference is that corporations "are free-standing entities with perpetual life" while "[m]arriages, in contrast, end with the death of one spouse."[253] Here, Professor Ertman plays up the symbolic by mentioning how "[s]ome religious doctrines assert that marriages are perpetual, and that spouses are reunited in heaven"[254] and how these other cultural understandings of marriage may preserve it as an institution with perpetual life, a temporal concern similarly shared by the corporation.[255] Though such reconciliation is creative, the difference is still concrete rather than symbolic. Professor Jones makes use of this difference by implying that the perpetual life of a marital corporation might allow for the marital corporation to be devisable or inheritable: "[Marital corporation] shares would not be freely transferable, except perhaps to children (like precious family assets, such as mom's wedding ring)."[256] Again, Jones' corporations model embraces ideas not normally within the traditional notions of marriage.

> the establishment of marital corporations (MCs), each having hundreds or thousands of couples as stockholders, all sharing common values about marriage. Couples getting married would subscribe to the shares of an existing MC, whose charter documents would set forth the terms of the type of marriage to which the subscribing couples agree.

Id.

250. Becker & Posner, *supra* n. 176, at [¶ 7].

251. Ertman, *supra* n. 187, at 117 (footnote omitted).

252. *Id.*

253. *Id.* at 115.

254. *Id.* at 116 (footnote omitted).

255. *Id.* at 117.

256. Jones, *supra* n. 177, at 117.

Lastly, a third perceptible difference between marriages and corporations lies in the way that, upon creation, corporations are allowed to establish their own purposes of existence, whereas in marriages, the state generally dictates the purpose of state-authorized marriage, which traditionally involved the preservation of family via procreation.[257] Section 3.01(a) of the *Revised Model Business Corporation Act* mandates that "[e]very corporation incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation."[258] States generally require that, at a minimum, the articles of incorporation have a general purpose statement. In Delaware, for instance, the general purpose statement for a stock corporation must be included in the third section of the certificate of incorporation and must recite the following: "The purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware."[259] Such a general purpose statement allowing for "any lawful act or activity" seems broad enough to encompass various types of corporations and their individual dealings. Yet, at its officers' discretion, a corporation may elect to have a limited purpose instead of a general purpose statement in which the corporate officers' breach of such a limited purpose may result in an ultra vires action.[260] Thus, corporations have the option to broaden or narrow their purposes of business. On the contrary, the stated purpose of legally-recognized marriages has traditionally been

257. *See generally Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *Singer v. Hara*, 522 P.2d 1187 (Wash. App. Div. 1 1974).

258. Rev. Model Bus. Corp. Act § 3.01(a) (ABA 2006).

259. Del. Govt., *Division of Corporations, Certificate of Incorporation* 2, http://www.corp.delaware.gov/incstk.pdf (last updated July 2004); *see also* California's general purpose requirement for domestic stock corporations which requires that the general purpose statement is recited in section and in this exact wording:

> The purpose of the corporation is to engage in any lawful act or activity for which a corporation may be organized under the GENERAL CORPORATION LAW of California other than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the California Corporations Code.

Cal. Sec. of St., *Organization of California Stock Corporations* 2, http://www.ss.ca.gov/business/corp/pdf/articles/corp_artsgen.pdf (revised Mar. 2005) (emphasis omitted).

260. *See* Rev. Model Bus. Corp. Act § 3.04 (ABA 2006).

determined by the state and not by marrying individuals. Like corporations,

> [t]he power to regulate marriage is a sovereign function reserved exclusively to the respective states. By its very nature, the power to regulate the marriage relation includes the power to determine the requisites of a valid marriage contract and to control the qualifications of the contracting parties, the forms and procedures necessary to solemnize the marriage, the duties and obligations it creates, its effect upon property and other rights, and the grounds for marital dissolution.[261]

With marriages, however, the states traditionally have extended their reserved powers in this area further than with corporations by mandating a limited purpose of marriage rather than allowing couples to choose their own purposes. This is demonstrated repeatedly in same-sex marriage cases, where states have justified refusal to issue marriage licenses to same-sex couples by finding a specific and limiting purpose to marriage, such as procreation. For example, the *Singer* court found that Washington's refusal to issue licenses to same-sex couples was "based upon the state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children."[262] In this way, unlike corporations, with their ability to select a broad general purpose statement, marriages seem to be forced by the state into a limited purpose upon formation.

Nevertheless, this difference might be the pivotal reason why a corporations model of marriage might make allowances for same-sex couples. This ability to define purpose without strict state interference is why privatization might help recognize same-sex marriages:

> Business models offer an attractive alternative to naturalized constructions of intimate relations for at least two reasons. First, market rhetoric is rarely naturalized. Second, contracts do not require public or majoritarian approval to be enforced, and could, therefore, disrupt the hierarchical structure that naturalized understandings impose upon marginalized groups. In short,

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261. *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993) (citations omitted).

262. *Singer*, 522 P.2d at 1195.

contract provides a way around majoritarian morality.[263]

An equalizing factor exists in giving all marrying couples the ability to define the purposes of their own marriages and lessens the chances that the views—or established purpose—of a "majoritarian morality" could possibility exclude certain "marginalized groups." Because "[e]xclusivity and the use of choice to define one's identity lie at the core of modern society already,"[264] the ability of the corporations model of marriage to

> [extend] this flexibility to marriage is only logical. Those who believe for religious or other reasons that only "their" version of marriage is the real thing will be free to conduct their affairs accordingly without insisting that their views be forcibly imposed on others.[265]

Theoretically-speaking,

> [i]mporting business models to family law would counteract inequality in two ways. First, business models would make differences among relationships morally neutral, (the equivalent of the differences among partnerships, corporations, and LLCs). Second, they would alleviate the inequity of the "haves" coming out ahead of the "have-nots" by expanding the definition of family to include, for instance, same-sex co-habitation . . . .[266]

Although couples deciding to marry could choose to form the marriage within a partnership agreement made to fit their situations and needs,[267] it seems that "[e]ven greater efficiencies might be achieved through the establishment of marital corporations . . . ."[268] Professor Jones' marriage-to-corporations analogy exemplifies this achievement by describing how marriages could be created for many different purposes reflecting religious or social values, from a "Catholic [marital corporation]" to "[p]lain vanilla [marital corporations that] would probably be popular among people who just want to get married without thinking about it too much."[269]

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263. Ertman, *supra* n. 187, at 90 (footnote omitted).
264. Jones, *supra* n. 177, at 116.
265. *Id.*
266. Ertman, *supra* n. 187, at 101.
267. Jones, *supra* n. 177, at 116.
268. *Id.*
269. *Id.*

Particularly, what does this mean for same-sex marriage? First, by viewing marriage as purely a contract that establishes a corporation, the corporations model would readily eliminate the sex classification often inherent in the marriage statutes discussed in same-sex marriages cases since *Baker v. Nelson*: "[A]llowing same-sex unions, through either an [marital corporation] [sic] regime or the ad hoc approach that some states are already following, eliminates the presumption of reproduction that underlies traditional marriage."[270] Even more so, the marriage-to-corporations analogy seems to "justif[y] state recognition of relationships to the extent that state recognition reflects the needs and expectations of the parties rather than a moral judgment that one form of intimate affiliation is natural while others are unnatural and immoral."[271] Following this logic, if the corporations model undermines the procreation argument, then marriages would no longer be likely defined according to opposite-sex classifications. Since same-sex couples are—from the majority of same-sex marriage cases—"marginalized groups" when it comes to obtaining state recognition of their marriages, the corporations model of marriage would theoretically allow same-sex couples to thwart any morality impediments if marriages were based fully on the enforceability of contracts.

Secondly, a corporations model of marriage may more easily confer upon same-sex couples benefits and protections already enjoyed by married couples—a matter with which the Massachusetts, Vermont, and New Jersey high courts concerned themselves particularly in their rulings.[272] As Professor Jones notes, "in today's world, [marriage] is also about benefits."[273] Likewise, on a more pedagogical level,

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270. *Id.* at 117.

271. Ertman, *supra* n. 187, at 123.

272. *See Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) ("Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution."); *see also Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) ("[W]e find a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples."); *see Lewis v. Harris*, 908 A.2d 196, 218 (N.J. 2006) ("In light of the policies reflected in the statutory and decisional laws of this State, we cannot find a legitimate public need for an unequal legal scheme of benefits and privileges that disadvantages committed same-sex couples.").

273. Colin P. A. Jones, *Marriage Proposal: Why Not Privatize? Partnerships Could Be Tailored to Fit*, S.F. Chronicle D1, D5 (Jan. 22, 2006). This article by Professor

"[l]egal economists view marriage, like other enterprises, as existing for profit maximization, while romantics, moralists, and others see marriage as existing for social purposes that are often unprofitable, such as pursuing intimacy, caring for dependents, or controlling sexual conduct."[274] Corporations also possess this duality because they "may be formed for any lawful purpose, usually either for profit maximization or for a charitable or educational purpose."[275] As already seen, the corporations as legal persons or entities are able to exercise a range of powers,[276] including the ability to "deal with, real or personal property, or any legal or equitable interest in property,"[277] and to establish "benefit or incentive plans for any or all of its current or former directors, officers, employees, and agents."[278] Along these same lines, domestic partnership laws enacted by some states, for example California, already confer upon non-married, cohabiting couples the rights and benefits that married couples enjoy.[279] Additionally, under a more literal analogy between marriage and corporations, where marriages as public corporations would have shareholders, the marital corporation could "open up a vast range of possible business opportunities throughout society,"[280] including using marriage as an investing tool[281] or, depending on what belief or purpose upon which the marital corporation is based, turning a marriage into a "huge status symbol" with high market value.[282]

So hypothetically, under a corporations model of marriage, Jack and Ennis, our fictional ranch hands from *Brokeback Mountain*, could structure a marriage with the following purpose: "To pursue a married life together as a same-sex couple while jointly owning and managing a

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Jones was an earlier version of what was printed in *The Independent Review*.

274. Ertman, *supra* n. 187, at 117 (footnotes omitted).

275. *Id.* (footnote omitted).

276. *See* Rev. Model Bus. Corp. Act § 3.02 (ABA 2006).

277. *Id.* at § 3.02(4).

278. *Id.* § 3.02(12).

279. Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 Drake L. Rev. 861, 870 (2006) ("California has a statewide domestic partnership law that grants most spousal rights to same-sex couples . . . ." (footnote omitted)).

280. Jones, *supra* n. 177, at 116.

281. *Id.*

282. *Id.*

bovine ranch operation."[283] As seen above, there is room for an analogy between marriages and corporations; both legal entities premise themselves upon a collectivity that benefits society,[284] that is created and dissolved by state mechanism, that can function with similar rights and powers, and that shares corresponding duties amongst its members. With corporations, however, much more liberty is afforded in the way that corporations can operate according to a myriad of self-defined purposes rather than one that is state-mandated, which is the case with civil marriages. A system of state-regulated marriage that—like the system of state-regulated corporations—permits couples to adopt their own purposes for entering into marriages would be conducive for a same-sex couple to enter into a marriage for perhaps "the explicit purpose of maintaining a committed same-sex union," and for their marriage to achieve legal recognition. Conversely, such a system would also allow a traditional marriage between a man and a woman—or "husband and wife"—where procreation and the preservation of a nuclear family is at the couple's core goal. Under the corporations model of marriage, each marriage would stand on equal footing.

C. *THE BUSINESS OUTLOOK: JURIDICAL FORECAST FOR THE CORPORATIONS MODEL OF MARRIAGE*

In light of the Vermont, Massachusetts, and New Jersey rulings, where the procreation presumption of marriage has been rejected, the corporations model of marriage would not only recognize same-sex marriages but seemingly other kinds of marriage in general.[285] Although these more-liberal judiciaries have displaced the significance of procreation in the modern marriage, these courts, however, have only expressed that marriage serves many functions and do not offer to resolve the issue of same-sex marriage on a single consensus.[286] While

283. Of course, with the bovine operation, Jack and Ennis could run into an ultra vires situation if they decide to operate a chicken farm instead while still remaining married together. They would have to decide jointly to amend their purpose statement before that hypothetical arose. *See* Rev. Model Bus. Corp. Act § 10.01 (ABA 2006).

284. Ertman, *supra* n. 187, at 115 and accompanying text (discussing the social goals that come with collectivity in both marriage and corporations).

285. Davis, *supra* n. 178, at 815-16.

286. *See Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 954-55 (Mass. 2003) ("Marriage also bestows enormous private and social advantages on those who choose

Massachusetts has incorporated same-sex unions within its state-regulated marriage scheme, Vermont has only adopted civil unions, and, at the time of this writing, New Jersey's adoption of civil unions is only in its nascent stage.[287]

Moreover, uncertainty surrounds any indication whether other courts involved in determining the legal recognition of same-sex marriage would decide according to Vermont, Massachusetts, and New Jersey, or whether those three cases will truly become a minority in the way they view marriage compared to state high court rulings from the rest of the country.[288] Adherence to the traditional values and goals of marriage still exists within the national imagination.[289] The introduction of the FMA, directing that marriage is a union between man and woman, and the numerous enactments of state legislation against recognition of same-sex marriage,[290] exemplify this adherence to traditionally-recognized marital schemes. Consequently, there is slight tension and uncertainty about the determined goals of marriage that translate into any public policy that would either further recognition of same-sex marriage or not.[291] In terms of utilizing the corporations model of marriage for advocating the adoption of same-sex marriage, the inquiry is whether generally, in such a dispersed environment, a judiciary—liberal or otherwise—would be receptive to this model.

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to marry. Civil marriage is at once a deeply personal commitment to another human being and a highly public celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family. 'It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.' " (citing U.S. Supreme Court case *Griswold v. Conn.*, 381 U.S. 479, 486 (1965)); *see also Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993) ("[M]arriage as a ' "partnership to which both partners bring their financial resources as well as their individual energies and efforts." ' " (citations omitted)).

287. *See generally* John Holl, *As New Jersey Opens Door to Civil Unions, Couples Rush In*, N.Y. Times B1 (Feb. 19, 2007).

288. Eskridge & Spedale, *supra* n. 17 and the accompanying text (Professor Eskridge and Spedale noting that the Vermont and Massachusetts decisions are a minority).

289. Eskridge & Spedale, *supra*, n. 17 at 31 ("The objection [made by Vermont and Massachusetts cases] is too speculative or symbolic to be persuasive to many judges in gay-friendly states. But [the defense-of-marriage objection to same-sex marriage] remains persuasive to most Americans (many of whom also accept the definitional and stamp-of-approval arguments [against same-sex marriage] as well).").

290. H.R. Jt. Res. 56, 108th Cong. § 1 (May 21, 2003).

291. *See* William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. Pub. L. 623, 648-49 (2004).

It is likely that the corporations marriage model with its penchant for "equalization" or "normalization" will have difficulty in gaining acceptance or even implementation. First, like the way plaintiffs in same-sex marriage cases had to confront a threshold definition presented by courts that restricted marriage to an opposite-sex union for the purpose of procreation and thusly foreclosed any fundamental right to same-sex marriage, the corporations model, which depends on the privatization of marriage, has its own threshold battle: states have plenary power to regulate marriage and such state power lies generally with state legislatures. In fact, the *Goodridge* decision emphasized Massachusetts' plenary power in regulating marriage in its initial examination of marriage:

> We begin by considering the nature of civil marriage itself. Simply put, the government creates civil marriage. In Massachusetts, civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution. . . . While only the parties can mutually assent to marriage, the terms of the marriage—who may marry and what obligations, benefits, and liabilities attach to civil marriage—are set by the Commonwealth. Conversely, while only the parties can agree to end the marriage (absent the death of one of them or a marriage void ab initio), the Commonwealth defines the exit terms.[292]

In essence, "[c]ivil marriage is created and regulated through exercise of the police power."[293] *Baker v. State* also notes similarly that

> a marriage contract, although similar to other civil agreements, represents much more because once formed, *the law* imposes a variety of obligations, protections, and benefits. As the Maine Supreme Judicial Court observed, the rights and obligations of marriage rest not upon contract, "but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of contract."[294]

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292. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003) (citations omitted).

293. *Id.* (citing *Cmmw. v. Stowell*, 449 N.E.2d 357, 360 (Mass. 1983)).

294. *Baker v. State*, 744 A.2d 864, 883 (Vt. 1999) (quoting *Adams v. Palmer*, 51 Me. 480, 483 (1863) (emphasis added)).

Likewise, *Baehr* reflects, as well, that "[t]he power to regulate marriage is a sovereign function reserved exclusively to the respective states,"[295] and that

> [b]y its very nature, the power to regulate the marriage relation includes the power to determine the requisites of a valid marriage contract and to control the qualifications of the contracting parties, the forms and procedures necessary to solemnize the marriage, the duties and obligations it creates, its effect upon property and other rights, and the grounds for marital dissolution.[296]

Interestingly, in *Baehr*, from the perspectives of both the procreative and corporations models of marriage, the Hawaii Supreme Court discussed the state's plenary power by using both procreative and business metaphors to emphasize that the state not only was "the exclusive progenitor of the marital partnership,"[297] but that the state had a "monopoly on the business of marriage creation [that] has been codified by statute for more than a century."[298]

Secondly, regulation of marriage is generally achieved through legislation, not judicial decision-making. Theoretically, the legal category of marriage is gradually becoming obsolete because courts have made available the benefits conferred upon married couples to unmarried couples through domestic partnership laws, and so "[d]eregulating marriage is, in large measure, a formal recognition of current cultural and legal reality."[299] In addition, "judges and legislators will be open to business models because family law is already progressing toward privatization."[300] In this way, there could be potential room for a corporations model of marriage. Nonetheless, likely new state legislation or amendments to existing state marriage statutes will be the ultimate instruments used to privatize marriage. Despite statistics in domestic partnership laws supporting de-regulation, courts are unlikely to completely abrogate the authority that any state has in legally recognizing marriages. Rather, courts generally tend to limit the effects of legislation by finding whether the legislation, in part or whole, is unconstitutional. The Vermont and

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295. *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993) (citations omitted).
296. *Id.* (citations omitted).
297. *Id.*
298. *Id.*
299. Zelinsky, *supra* n. 173.
300. Ertman, *supra* n. 187, at 81 (footnote omitted).

New Jersey decisions demonstrated this when those courts found that their state marriage statutes violated state constitutions by barring same-sex couples from the benefits and protections of marriage; other similar examples also exist in the Hawaii Supreme Court's decision to remand the case to a lower court to determine the constitutionality of Hawaii's marriage statute on a strict scrutiny analysis and in the Massachusetts high court's finding that its state marriage statute violated the state constitution by excluding same-sex couples from marriage.[301]

Within any judicial adoption of a corporations model of marriage, the difficulty is simply a separation of powers issue: judiciaries, state and/or federal, do not have the affirmative ability to make explicit statutory laws.[302] Beyond promoting and creating decisional law, or limiting the effects of a particular statute, courts can merely suggest possible viable solutions to corresponding legislatures in the democratic legislative process; generally courts' powers in this respect are not legislative but rather deferential. Again, the minority cases in favor of same-sex couples are demonstrative. In holding that same-sex couples should receive the benefits enjoyed by married couples in *Baker v. State*, the Vermont Court was careful to

> not purport to infringe upon the prerogatives of the Legislature to craft an appropriate means of addressing this constitutional mandate, other than to note that the record here refers to a number of potentially constitutional statutory schemes from other jurisdictions. These include what are typically referred to as "domestic partnership" or "registered partnership" acts, which generally establish an alternative legal status to marriage for same-sex couples, impose similar formal requirements and limitations, create a parallel licensing or registration scheme, and extend all or most of the same rights and obligations provided by the law to married partners.[303]

Then the Court added that it "[did] not intend specifically to

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301. *See Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993); *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006); *Baker v. State*, 744 A.2d 864, 887 (Vt. 1999).

302. *See* U.S. Const. art I § 1 (2004); U.S. Const. art III § 1, 2 (2004). Articles I and III of the U.S. Constitution specifically delineate the legislative powers upon the Congress and the judicial powers upon the judiciary. *Id.*

303. *Baker v. State*, 744 A.2d at 886 (citation omitted).

endorse any one or all of the referenced acts, particularly in view of the significant benefits omitted from several of the laws."[304] The *Lewis* Court seemingly carried a more forceful tone when it held that "the Legislature must either amend the marriage statutes to include same-sex couples or create a parallel statutory structure, which will provide for, on equal terms, the rights and benefits enjoyed and burdens and obligations borne by married couples."[305] Its message, however, was still deferential:

> We will not presume that a separate statutory scheme, which uses a title other than marriage, contravenes equal protection principles, so long as the rights and benefits of civil marriage are made equally available to same-sex couples. The name to be given to the statutory scheme that provides full rights and benefits to same-sex couples, whether marriage or some other term, is a matter left to the democratic process.[306]

The *Lewis* Court, therefore, recognized its legislature's considerable leeway in reaching a favorable statutory scheme for same-sex couples.

The Supreme Judicial Council of Massachusetts, in its *Goodridge* ruling that same-sex couples could obtain marriage licenses, explicitly noted that "no one argues that striking down the marriage laws is an appropriate form of relief. Eliminating civil marriage would be wholly inconsistent with the Legislature's deep commitment to fostering stable families and would dismantle a vital organizing principle of our society."[307] Then, in a footnote, the Court asserted that although it was holding that the Massachusetts marriage statute was unconstitutional as applied to same-sex couples, it was not abolishing the statute's other regulating functions:

> Nothing in our opinion today should be construed as relaxing or abrogating the consanguinity or polygamy prohibitions of our marriage laws. Rather, the statutory provisions concerning consanguinity or polygamous marriages shall be construed in a

304. *Id.* at 887.

305. *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006).

306. *Id.*

307. *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (footnote omitted).

gender neutral manner.[308]

Accordingly, its ruling also "leaves intact the Legislature's broad discretion to regulate marriage."[309] The Court's decision was merely interpretative of the Massachusetts marriages laws, not legislative.

In the hands of state legislatures, the corporations model of marriage seems unlikely to be presently upheld or adopted because of its radical nature. For the sake of reflecting policy, legislatures seem reluctant to give up the ability to set the underlying purposes for marriage. This reluctance by state legislatures can be implicitly felt in the multitude of recent enactments of state legislation explicitly denying recognition of same-sex marriage. Since the late 1990s, nineteen states have amended their constitutions to declare same-sex marriages void and sixteen of these nineteen states have passed laws "in response to marriage litigation in the mid-1990s and the passage of the federal 'Defense of Marriage Act' that defines marriage as between a man and woman and purports to not honor marriages between same-sex couples from other jurisdictions."[310] These nineteen states are not included in the twenty-two other states that have passed laws defining marriage as a union between man and woman in reaction to recent same-sex marriage litigation and *DOMA*.[311] Though some of the legislation here was passed through public ballot measures, much of the legislation involved the hands of individual state legislatures according to the amendment processes dictated in their state constitutions. Still, such efforts are reactionary, and in light of such response, a model of marriage tailored after the modern corporation—which privatizes the ability to define the purpose of a union much further than the traditional state-authorized marriage—counters the desires of recent and present state legislatures in marriage regulation.

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308. *Id.* at 969 n. 34 (citations omitted).

309. *Id.* at 969 (footnote omitted).

310. Human Rights Campaign, *Marriage, Map: Statewide Marriage Laws*, http://www.hrc.org/Template.cfm?Section=HRC&Template=/ContentManagement/ContentDisplay.cfm&ContentID=17961 (last updated Nov. 2006).

The site lists the sixteen states as Alabama, Alaska, Arkansas, Georgia, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Texas, and Utah. *Id.*

311. *Id.* The site lists the twenty-two states as Arizona, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Maine, Minnesota, New Hampshire, North Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, and West Virginia. *Id.*

This is one reason why legislatures would be disinclined to adopt the corporations model.

Also, generally-speaking, legislative reluctance for privatizing marriage and adopting the corporations model of marriage exists because the law of marriage itself has evolved more gradually than the law of corporations. Professor Mary Anne Case observes that

> [c]ompared with that of marriage, the legal history of the corporation is infinitely shorter, simpler, and more complete. In a few brief centuries, Anglo-American corporate law was born; faced resistance and some growing pains; and reached what most regard as a fairly satisfactory equilibrium, subject to comparatively trivial variations, a few minor open questions, and some carping around the edges. By contrast, the law of marriage is now, and has been for millennia, an unstable and unsatisfactory morass. Over the same quarter century that saw the ascendancy of the contractual theory of the corporation, scholars of family law, like Hamlet and Polonius studying the clouds, have debated without resolution the most appropriate legal analogy for marriage, with partnership, contract, and labor law considered and rejected both normatively and descriptively. Meanwhile the law of marriage, as usual, has been in flux: the same quarter century, like the millennia that preceded it, saw wide swings of the pendulum on many fundamental questions concerning the formation, dissolution, and incidents of marriage.[312]

Also, in Professor Case's view, the failure of the law of marriage to "reach equilibrium" is "because the law of marriage has not yet finished evolving."[313] She contends "that the law of marriage has

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312. Case, *supra* n. 172, at 1778 (footnotes omitted). Case's reference to Hamlet and Polonius can be found in act 3.2 of *Hamlet*:

Hamlet: Do you see yonder cloud that's almost in shape of a camel?

Polonius: By th' mass, and 'tis: like a camel, indeed.

Hamlet: Methinks it is like a weasel.

Polonius: It is backed like a weasel.

Hamlet: Or like a whale.

Polonius: Very like a whale.

William Shakespeare, *The Tragedy of Hamlet, Prince of Denmark* in *The Norton Shakespeare* Act 3.2, at 345-51 (Stephen Greenblatt, Walter Cohen, Jean E. Howard, Katherine Eisaman Maus eds., W.W. Norton & Co. 1997).

313. Case, *supra* n. 172, at 1778-79.

followed a trajectory similar to the law of corporations, but with a substantially more gradual arc, so that the trajectory is not yet complete."[314] In fact, "[t]he path covered by the law of corporations in a few centuries parallels that of Anglo-American marriage law over the last millennium" and that "[m]arriage today seems to be where corporations were in the nineteenth century. . . ."[315] Correspondingly, one optimistic view for the future of the law of marriage is for it to "complete the trajectory followed by the law of corporations, co-opting competitors by moving closer to a system of default rules within which couples can structure their own lives."[316] Incidentally, in the context of comparing the laws of marriage and corporations, "[a]dmitting same-sex couples to civil marriage could be an important step in moving [marriage's] trajectory forward."[317] This observation, however, seems to present a circular, catch-22 situation. On the one hand, permitting same-sex marriages would propel marriage law more progressively towards an equilibrium that resembles the trajectory of corporations law; yet on the other hand, marriage law is moving too slowly compared to the law of corporations to accept a model of marriage that would more closely resemble corporations and would allow for same-sex marriages.

Henceforth, complications arise to bar any straightforward judicial or legislative acceptance of a corporations model of marriage. First, states possess plenary power to statutorily regulate marriage to correspond to their adopted policies, and such plenary power is exercised to a rather restrictive extent, not by state courts, but by state legislatures who ultimately have the power to enact or change marriage statutes. Beyond the scope of judicial decision-making, courts defer to legislatures in this process. Secondly, even within the hands of state legislatures, possible reluctance towards adopting such the corporations model is exemplified by the numerous recent state laws passed to reinforce opposite-sex marriages and by the slow progression of marriage law in general. Unfortunately, in this fashion, the corporations model of marriage would remain presently just a theoretical model in the minds of legal scholars, a theory that has not been consummated or incorporated by the acts of state legislatures.

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314. *Id.* at 1779.
315. *Id.*
316. *Id.* (footnotes omitted).
317. *Id.*

D. *ONE SAVING GRACE*

Still, there could be a saving grace for the corporations model of marriage. Although it seems unlikely that a state legislature might implement the corporations model of marriage in its statutory marriage scheme, this does not mean death to any use of the model in advocating for same-sex marriage. Just as it seems that our fictional same-sex couple, Jack and Ennis, might have to toss the corporations model of marriage in search for "greener pastures," such an abandonment is unnecessary; they can still use the model to demonstrate "how the grass is greener on the other side." In other words, the corporations model of marriage can still be persuasive in arguing analogically for advocating same-sex marriages.

One of the classically fundamental ways that judicial decision-making accomplishes changes and results is through the use of analogy: "The determination of similarity or difference is the function of each judge."[318] According to the late professor Edward H. Levi in *An Introduction to Legal Reasoning*,

> it appears that the kind of reasoning involved in the legal process is one in which the classification changes as the classification is made. The rules change as the rules are applied. More important, the rules arise out of a process which, while comparing fact situations, creates the rules and then applies them.[319]

The process of legal reasoning is

> open to the charge that it is classifying things as equal when they are somewhat different, justifying the classification by rules made up as the reasoning or classification proceeds. In a sense all reasoning is of this type, but there is an additional requirement which compels the legal process to be this way.[320]

The purpose of this requirement is that "[n]ot only do new situations arise, but in addition peoples' wants change. The categories used in the legal process must be left ambiguous in order to permit the infusion of new ideas. And this is true even where legislation or a constitution is involved."[321] Under this thought, "[t]he law forum is

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318. Edward H. Levi, *An Introduction to Legal Reasoning* 2 (U. Chi. Press 1949).
319. *Id.* at 3-4.
320. *Id.* at 4 (footnote omitted).
321. *Id.* at 4.

the most explicit demonstration of the mechanism required for a moving classification system."[322]

The statutory regulation of marriage is one particular classification system, and as Professor Case pronounces, it is a moving classification—albeit at a snail's pace compared to the laws governing corporations. In this way, even though difficulties exist in any present legislative adoption of the corporations model, significance still survives in the analogy between marriages and corporations. Fundamentally, both are recognized as unions or associations that promote social good.[323] Corporations, on the one hand, contribute to the market economy and commerce, and the method to incorporate them reflects this by allowing corporations to initially define their purposes either broadly or narrowly. Similarly, marriages reinforce social relationships, which have value whether or not in a religious or secular, procreative or pecuniary context. As mentioned by the *Goodridge*, *Lewis*, and *Baker* courts, couples solidify their unions via marriage for many reasons. State marriage statutes, on the other hand, have not traditionally reflected this diversity and instead have narrowed the purposes of marriage based on majoritarian policy reasons—often predominately procreative—which consequently excludes same-sex couples. The marriage-to-corporations analogy draws out this incongruity: why only recognize one reason? If marriage has many components—economic, religious, emotional, and familial—the restriction to one particular reason that ultimately excludes a marginalized group seems arbitrary, illogical, or even discriminatory.

In contrast to corporations—where the state allows for broad general purpose statements—the artificiality and strain in narrowing the purposes of marriage is further demonstrated by one line of thought from the appellate decision of *Lewis*, where the New Jersey attorney general had avoided using procreation to argue against same-sex marriage, and yet the fundamental right to same-sex marriage still did not receive recognition.[324] By not arguing that procreation was the purpose for keeping state-regulated marriages as opposite-sex unions, the state's argument left a hole that both dissents in the appellate and

322. *Id.*

323. Ertman, *supra* n. 187 and accompanying text (discussing the social goals that come with collectivity in both marriage and corporations).

324. *See Lewis v. Harris*, 875 A.2d 259, 280 (N.J. Super. App. Div. 2005) (Collester, J., dissenting).

supreme court decisions of *Lewis* found problematic. If procreation is removed from the narrow purpose of marriage, the resulting logic of the argument against same-sex marriage becomes circular—that same-sex persons " 'cannot marry because by definition they cannot marry.' "[325] On the contrary, taking note of the general purpose statements located in articles of incorporation from states such as California and Delaware, state-regulated marriages based on a general purpose of promoting social good by any lawful means would perhaps avoid the kind of circularity that a narrow purpose draws and would also show that maintaining marriage merely as an opposite-sex union does not optimize the achievement of social good when same-sex unions that could also promote social good are simultaneously excluded.

Therefore, although a corporations model of marriage is unlikely to be realized, the corporations model can be still used analogically to show the deficiencies of state-regulated marriage. This comparison not only affords a compelling exercise in creating intriguing legal discourse and in merging or marrying the bodies of corporations and marriage laws together, but the comparison serves as another useful arsenal in the same-sex marriage debate. By showing how and why "the grass is greener on the other side," the marriage-to-corporations analogy serves as a powerful comparison to shed light on the differences between the two types of unions and on the artificiality and discriminatory nature of that particular difference in state-regulated marriage schemes. Consequently, the corporations model of marriage is not only demonstrative in this debate for same-sex marriage but also subversive as well.

IV. CONCLUSION

This comment began with a quote from the lower court in *Adams v. Howerton* that contextualized marriages as contracts and predicted that one day "contracts and arrangements between persons of the same sex who abide together will be recognized and enforced under state law."[326] The rest of the *Adams* excerpt rather bleakly—but somewhat accurately so far—predicted that same-sex couples would be able to

325. *Id.*; *Lewis v. Harris*, 908 A.2d 196, 228 (N.J. 2006) (Portiz, C.J., concurring and dissenting).

326. *Adams v. Howerton*, 486 F. Supp. 1119, 1125 (C.D. Cal. 1980).

make such binding arrangements in the domestic sphere that are close but not exactly to the level and status of marriage.[327] Today, a few states have domestic partnership laws that exemplify this judicial prophecy. The notion, however, that a marriage is a contract and the inability of same-sex persons to enter into that kind of contract conjures up the old notion that, absent any illegality, people in a free market have the freedom to enter into contracts in the manner they choose. As Professor E. Allan Farnsworth notes in his classic hornbook on contract law theory,

> freedom of contract rests on the premise that it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements. In general, therefore, parties are free to make such agreements as they wish, and courts will enforce them without passing on their substance.[328]

Nonetheless, despite freedom of contract,

> [a] court may be moved by two considerations in refusing to enforce an agreement on grounds of public policy. First, it may see its refusal as an appropriate sanction to discourage undesirable conduct, either by the parties or by others. Second, it may regard enforcement of the promise as an inappropriate use of the judicial process to uphold an unsavory agreement.[329]

Similarly, Professor Arthur Linton Corbin notes in his contracts hornbook that " 'freedom of contract is not an absolute right or superior to the general welfare of the public.' Rather, 'it is subject to reasonable restraint and regulation by the state, under the police power, to protect the safety, health, morals, and general welfare of the people.' "[330]

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327. *Id.* ("When that time comes, property rights and perhaps even mutual obligations of support may well be held to flow from such relationships. But in my opinion, even such a substantial change in the prevailing mores would not reach the point where such relationships would be characterized as 'marriages.' At most, they would become personal relationships having some, but not all, of the legal attributes of marriage.").

328. E. Allan Farnsworth, *Farnsworth on Contracts* § 5.1, 1-2 (3d ed., Aspen Publishers 2003) (footnote omitted).

329. *Id.* at 2 (footnotes omitted).

330. Arthur L. Corbin, *Corbin on Contracts* vol. 8, § 79.1 (Joseph M. Perillo ed., rev. ed., Matthew Bender 2006) (quoting *State v. Nuss*, 114 N.W.2d 633, 635 (S.D. 1962)) (footnotes omitted); *see also West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391-94 (1937) (where the U.S. Supreme Court overruled its previous position held in *Lochner v. N.Y.*, 198 U.S. 45, 53 (1905), that a fundamental right to contract existed between

Several questions arise when contextualizing same-sex marriages purely in contract theory: if a person's freedom to contract may be curtailed by certain policy-unfriendly or "undesirable conduct" such as incapacity, minority, fraud, unconscionability or some other situation, or if a state court chooses not to enforce a person's freedom because the agreement was "unsavory," what does this mean to same-sex couples when state courts forbid them from exercising their freedom to enter marriage contracts? Does this relegate same-sex unions to a category of "undesirable conduct" that would preclude formation of marriage contracts? Or are marriage contracts between same-sex persons so "unsavory" that a state judiciary would find them inappropriate to enforce? Answering affirmatively to either of these last two questions seems to characterize and marginalize same-sex couples in an undeserving way.

In spite of the harsh results of framing same-sex marriage in this context, however, there is hope. As Professor Corbin informs, "courts must be mindful that times change, and that public policy must likewise change."[331] Because "[t]he mores of a people, those generally prevailing practices and opinions as to what promotes welfare and survival, change with time and circumstance,"[332] Professor Corbin contends that "[c]ourts cannot fail to be affected by these changes in times and opinions" and that "[i]ndeed, courts cannot properly perform their functions if they refuse to be affected by them. As one court has stated: 'We note the irony that one constant of public policy is that public policy is never constant.' "[333] Although public policy often seems to have a firm footing in the judicial landscape, the ground underneath that landscape is, for the most part, tectonic and does shift over time.

The landscape of same-sex marriage seems uncertain. In anticipation of the November 2006 elections, *The New York Times* reported that the same-sex marriage issue has started to lose focus.[334] On the other hand, in the same elections period, eight states had ballot

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private individuals).

331. Corbin, *supra* n. 330, at § 79.3.

332. *Id.*

333. *Id.* (quoting *Donegal Mut. Ins. Co. v. Long*, 564 A.2d 937, 943 (Pa. Super. 1989)) (footnotes omitted).

334. *See* Kirk Johnson, *Gay Marriage Losing Punch as Ballot Issue: Organized Opposition Greets Conservatives*, N.Y. Times A1 (Oct. 14, 2006).

initiatives to amend their respective constitutions to ban same-sex marriages—of which all initiatives, except for one in Arizona, were approved.[335] In early October 2006, the California Court of Appeal, First Appellate District, in *In re Marriage Cases* decided not to recognize same-sex marriages,[336] but twenty days later the New Jersey Supreme Court in *Lewis* extended marriage benefits and protections to same-sex couples.[337] Also, the state of marriage itself seems to be in flux. Statistically, according to *The New York Times*, married couples are now in the minority.[338] Although procreation is still a significant reason why people marry, other purposes have served and have been recognized as reasons why couples promise their hands to have and to hold.[339] Furthermore, enough state court litigation has ensued over recognizing same-sex marriage as a fundamental right in recent years that perhaps it might soon be time for the United States Supreme Court to finally refrain from applying its rule of prudential considerations to decide what is fundamental.[340]

As far as the corporations model of marriage is concerned, the present legislative reality of enacting a corporations-like marriage that would benefit same-sex marriages is far removed partly because of the political uncertainties of the same-sex marriage issue and partly because the mechanics of the legal system are currently dominated by a majority that views same-sex marriage as threatening. Nevertheless, the author of this comment welcomes the possibility that such predictions will be proven wrong, or that despite the difficulties, other hardships in the struggle to recognize same-sex marriage will pass in order to legally sustain same-sex marriage in modern American society. Hopefully, beyond the present scope of one minority state, the hypotheticals in this article will manifest into concrete reality so that real-life same-sex couples—real-life Jack and Ennis's of the world—will be able to obtain legally-recognized marriages and call that "a

335. Monica Davey, *Liberals Find Rays of Hope on Ballot Measures: States Consider Marriage, Stem Cell Research and Abortion*, N.Y. Times P16 (Nov. 9, 2006).

336. *See In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. App. 1st Dist. 2006).

337. *See Lewis v. Harris*, 908 A.2d 196 (N.J. 2006)

338. *See* Sam Roberts, *It's Official: To Be Married Means to Be Outnumbered: Data Suggests More Couples are Waiting*, N.Y. Times Section 1, 22 (Oct. 15, 2006).

339. *See generally Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Lewis*, 908 A.2d 196 (N.J. 2006); *Baker v. State*, 744 A.2d 864 (Vt. 1999).

340. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

sweet life." Although the *Adams* court had once grimly predicted that in the future "even such a substantial change in the prevailing mores would not reach the point where [same-sex] relationships would be characterized as 'marriages,' "[341] societal mores—like public policy reasoning, like statutory mandates, like common dictionaries and their hard-pressed meanings—are not ever-fixed marks. Public policy sways. Statutes are revised and superseded. Dictionaries go through editions. Along these lines, the *Lewis* Court recently offered a more optimistic prophecy than did the *Adams* Court twenty-seven years ago, that "[n]ew language is developing to describe new social and familial relationships, and in time will find its place in our common vocabulary."[342] With any luck, this new language will include same-sex marriage.

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341. *Adams v. Howerton*, 486 F. Supp. 1119, 1125 (C.D. Cal. 1980).

342. *Lewis*, 908 A.2d at 223.

*J.D. candidate 2008, Whittier Law School; B.A. in English Literature with Creative Writing specialization, University of California, Los Angeles (UCLA), 2000. jarthurho@aol.com. This article could not have been possible without the immense kindness and support of others. First and foremost, I thank God for providing strength, hope, courage, and opportunity at every step and turn throughout my challenging law school career, including the experience of writing this article. Special thanks are due to Professor Seval Yildirim for her support and comments during the revision process, and to Tracie L. Spies for showing me the mysteries and mayhem of California's incorporation process over coffee (wuo ai ni). I owe a great debt to Melissa Faber for her undeniable humor and for teleconferencing all the way from her undisclosed bunker in Sacramende to facilitate my countless late-night venting sessions during the article's writing stage. Likewise, much gratitude is also given to Justin Sanders who always believed in my work even without knowing the topic of my article (fo sho, bro). Also, I thank tremendously my editors, Sarita Patel and Jessie Lee, and the staff of the Whittier Law Review, who worked tirelessly on this article.

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