CIVIL PARTNERSHIP IN THE UNITED KINGDOM AND A MODERATE PROPOSAL FOR CHANGE IN THE UNITED STATES

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I. INTRODUCTION

A. Two Different Novembers

"Gay marriage was an overwhelming factor in the defeat of John Kerry. With one decision of the Supreme Court, all of a sudden we have a constitutional amendment designed, I think, to whip people up, to inflame them, make them stop thinking about other issues."[1]

On November 3, 2004, proponents of same-sex unions in the United States might have asked, "What went wrong?" In 2003, the United States Supreme Court held that states cannot criminalize the private sexual activities of same-sex couples,[2] leading some to posit openly that same-sex marriage was next.[3] In fact, less than six months prior to the November election, same-sex couples in Massachusetts were the first in United States history to legally marry.[4]

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1. Cecilia Le, *No 'Monopoly on Morality,'* UTICA OBSERVER-DISPATCH, Nov. 10, 2004, at A1, *available at* 2004 WLNR 15284930 (quoting former President Bill Clinton, speaking at Hamilton College following the 2004 election).
2. Lawrence v. Texas, 539 U.S. 558, 578 (2003).
3. Justice Scalia in particular seemed alarmed by this possibility:

> If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if . . . "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring;" what justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ?

Id. at 604-05 (Scalia, J., dissenting) (internal citations omitted). *See also* Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184, 1186 (2004) (arguing that, while Justice Scalia's claim that the *Lawrence* decision compels recognition of same-sex marriage is probably not accurate, "proponents of same-sex marriage can use the Court's reasoning to support arguments that the state has substantive due process obligations to recognize such marriages.").

But by the morning of November 3, momentum had shifted. The United States populace had re-elected President George W. Bush, who openly advocates placing a ban on same-sex marriage in the United States Constitution.[5] The Republican Party supported the same amendment as a part of its socially conservative 2004 platform,[6] and ballot proposals to constitutionally ban same-sex marriage in eleven states all passed, most by wide margins.[7]

At approximately the same time, a very different current was flowing through the United Kingdom. For the first time in its history, the entire United Kingdom would legally recognize same-sex partnerships, though not under the name "marriage."[8] The Civil Partnership Act 2004 (Civil Partnership Act), which provides same-sex couples legal recognition and substantial legal rights,[9] aroused little controversy[10] and passed easily.[11]

B. A Divisive Issue and an Incremental Model

The general issue of whether same-sex unions ought to be legally recognized has divided the United States public[12] and led to varying legal

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4. *See* Alan Cooperman & Jonathan Finer, *Gay Couples Marry in Massachusetts; Hundreds Tie Knot on Day One, But Questions Remain*, WASH. POST, May 18, 2004, at A01.

5. *See id*.

6. Linda Feldmann, *A Search for GOP's Heirs Apparent*, CHRISTIAN SCI. MONITOR, Sept. 1, 2004, at 01.

7. *See* Debra Rosenberg & Karen Breslau, *Winning the 'Values' Vote; It Was on 11 Ballots, and Won on All of Them. How the Anti-Gay-Marriage Initiatives Shaped the Presidential Contest*, NEWSWEEK, Nov. 15, 2004, at 23, *available at* 2004 WLNR 12519634.

8. The Civil Partnership Act 2004 received Royal Assent on November 18, 2004. Department of Trade and Industry, Explanatory Notes to Civil Partnership Act 2004 (c. 33) (U.K.) [hereinafter Explanatory Notes to Civil Partnership Act 2004], *available at* http://www.hmso.gov.uk/acts/en2004/2004en33.htm.

9. *E.g.*, Civil Partnership Act, 2004, c. 33, §§ 65-72, 75-84 (U.K.), *available at* http://www.opsi.gov.uk/acts/acts2004/20040033.htm; John Sparrow, *The Civil Partnership Bill 2004*, NEW L.J. (2004).

10. Sparrow, *supra* note 9; Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1572 (2004).

11. Liberal Democrats, Summary, Civil Partnership Bill – Report Stage and Third Reading (Nov. 9, 2004), http://www.libdems.org.uk/parliament/parliamentaryreport.html?id=3880&navPage=parliamentary.html [hereinafter Civil Partnership Bill].

12. For example, a recent poll in the United States shows that a substantial majority is against full legal recognition of same-sex marriages. Zofia Smardz, *The Geography of Gay Marriage*, WASH. POST, May. 23, 2004, at B03. However, the populace is about

solutions.[13] The legal status of same-sex partners across the world ranges from full acceptance as married couples in four countries[14] to oppression in other parts of the world.[15] But despite the disparate legal approaches to the issue, scholars have noted a generally consistent method of incremental reform that has developed in Europe, expanding the rights of same-sex couples step-by-step until eventually they enjoy the same rights as heterosexual couples.[16]

One scholar labels this the "necessary process" because full recognition of same-sex marriage necessarily requires that the law change with respect to the underlying rights of same-sex couples.[17] Under this European model, there are essentially three levels of legal changes that reflect greater tolerance for same-sex partners.[18] First, criminal sanctions barring sexual activity between members of the same sex are removed.[19] Second, discrimination on the basis of sexual orientation is prohibited.[20] Third, same-sex partners are incrementally granted the rights of heterosexual partners, ending with full legal recognition of same-sex marriages.[21] This process has generally been followed chronologically in European countries, and though incremental, for some Western European nations the process has been quick and smooth.[22]

However, neither speedy nor smooth change is altogether common in Europe or the rest of the world.[23] Progress is often frustrated or stalled due to

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evenly split on the issues of whether same-sex couples ought to be permitted to enter civil unions (which would grant them many of the same rights married couples enjoy) and whether the United States Constitution ought to be amended to ban same-sex marriage. *Id.* Even within the gay community, there is not necessarily consensus that same-sex marriages are a desirable social goal. Arthur S. Leonard, *Ten Propositions About Legal Recognition of Same-Sex Partners*, 30 CAP. U. L. REV. 343, 346-48 (2001).

13. *See generally* YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 1-5 (2002).

14. The Netherlands and Belgium were the first countries to grant full marriage rights to same-sex couples. *Developments in the Law – The Law of Marriage and Family, Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2004 (2003) [hereinafter *Developments in the Law*]. Recently, Spain and Canada have recognized same-sex marriage by legislative enactment. *Spain, Canada Legalize Gay Unions*, WORK & FAM. NEWSBRIEF, Aug. 1, 2005, *available at* 2005 WLNR 12603144.

15. *See* Paula L. Ettelbrick & Julie Shapiro, *Are We on the Path to Liberation Now?: Same-Sex Marriage at Home and Abroad*, 2 SEATTLE J. SOC. JUST. 475, 475 (2004).

16. *Developments in the Law*, *supra* note 14, at 2009.

17. MERIN, *supra* note 13, at 309.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Developments in the Law*, *supra* note 14, at 2009-10.

23. *Id.*

popular backlash[24] or diminished motivation in the face of substantially equal rights.[25] Furthermore, in countries where religion plays a substantial role in society, there may be a tendency for people to accept the idea of granting same-sex couples economic rights but to stop short of marriage because of its religious importance.[26] Thus the process is not completely consistent in its application across Europe. It is, however, useful in that it provides a framework that other nations can follow in the move toward legal recognition of same-sex marriage.[27]

Scholars have argued that the legal system and cultural make-up of the United States may mean that the European model is not a good model of development for the United States.[28] Specifically, it has been argued that the federalist system does not lend itself to such a model, that the judiciary plays a much larger (and arguably more intrusive) role in the United States than in Europe and that the United States has conferred rights upon same-sex couples essentially out-of-order, providing parental rights before partnership rights.[29]

This note will address the incremental push toward legal recognition of same-sex marriage in the United Kingdom and in the United States, specifically with reference to the recent enactment of the Civil Partnership Act in the United Kingdom. After an in-depth analysis of the legal approaches of each country, this note will evaluate how closely each nation's progress has approximated the European model and will argue that the progress of the United Kingdom provides a good model for the United States for three reasons.

First, the move toward legal recognition of same-sex relationships has been similar in each nation. In both the United States and the United Kingdom, laws have evolved more slowly and the judiciary has played a more prominent role than elsewhere in Europe. Second, most differences between the two nations, while having real consequences for same-sex couples, are minor in the long-term. Third, the major differences in developments between the two nations illustrate an alternate direction for advocates of rights for same-sex couples in the United States.

Having established that the legal developments in the United Kingdom are comparable to those of the United States, this note will then propose a moderate strategy for advocates of same-sex marriage in the United States. This strategy will take into account the current political climate surrounding this

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24. *Id*. at 2011.

25. Perhaps, for example, those supporting change are no longer motivated when same-sex partners are granted something like "civil unions," with many of the same rights married couples enjoy. *Id*. at 2010.

26. *Id.* at 2011.

27. In arguing that the process is "necessary," Merin believes that other nations *must* follow this framework. MERIN, *supra* note 13, at 309.

28. *See Developments in the Law*, *supra* note 14, at 2012-25.

29. *Id.* at 2012-13; *see also* Nancy D. Polikoff, *Recognizing Partners but Not Parents/Recognizing Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 712-13 (2000).

particularly divisive issue and propose that the successes in the United Kingdom can provide strategic guidance to advocates in the United States. [30]

II. APPLICATION OF THE EUROPEAN MODEL TO THE UNITED KINGDOM

A. Decriminalizing Homosexual Conduct

Unlike other European countries, the United Kingdom has only recently decriminalized consensual sexual conduct between members of the same sex.[31] Like the United States, uniform change throughout the United Kingdom came via judicial decision. In 1981, the European Court of Human Rights (ECHR) decided *Dudgeon v. United Kingdom*.[32] Interestingly, the applicant[33] in *Dudgeon* had not been charged under laws prohibiting sexual conduct between males but rather claimed that he "experienced fear, suffering and psychological distress directly caused by the very existence of the laws in question."[34] He claimed that such laws violated Articles 8 and 14 of the European Convention on Human Rights (the Convention),[35] to which the United Kingdom is a party.[36]

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30. It is important to mention here that this note does not assume that legal recognition of same-sex partnerships is morally appropriate or even desirable. Significant discussion on this issue has taken place elsewhere. *See, e.g., Same-Sex Symposium Issue*, 18 B.Y.U. J. PUB. L. 273 (2004); Leonard, *supra* note 12; *Developments in the Law*, *supra* note 14; Ettelbrick & Shapiro, *supra* note 15. This note merely recognizes the current importance of the issue, assumes that advocates of same-sex marriage will continue to fight for their cause, and proposes an alternative strategy that might be effective in the current political climate.

31. Some European countries have not regulated consensual sodomy between adults since the nineteenth century. MERIN, *supra* note 13, at 310.

32. 45 Eur. Ct. H.R. (ser. A) (1981).

33. Under the European Convention on Human Rights, either an individual or a state that is a party to the Convention may bring a complaint that a party state has violated the Convention. European Court of Human Rights, Historical Background, (Sept. 2003), http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/History+of+the+Court/.

34. *Dudgeon*, 45 Eur. Ct. H.R. (ser. A) at 160. The ECHR, like the courts of the United States, may not adjudicate a challenge to a statute unless brought by a party injured by the statute. *See id*. In *Dudgeon*, the ECHR held that Mr. Dudgeon could "claim to be the victim" of the statute because he was part of the class of persons (gay men) targeted by the statute. *Id.* at 161.

35. *Id*. at 158.

36. The United Kingdom became a party to the Convention in 1953. *See* European Court of Human Rights, Dates of Ratification of the European Convention on Human Rights and Additional Protocols, *available at* http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/Dates+of+ratification

The ECHR held that the statutes in question violated Article 8 of the Convention.[37] Article 8 protects an individual's right to privacy:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[38]

The ECHR reasoned that, under the language of the Article, laws prohibiting sexual conduct between members of the same sex could not be deemed "necessary in a democratic society."[39] The Government's proffered justification for the law, that it was necessary "for the protection of . . . morals," was held unconvincing because of the changing moral character of the times, evidenced mainly by the lack of prosecutions under the statutes.[40]

In *Dudgeon*, the ECHR importantly noted that the state of the law on legal regulation of sexual conduct between members of the same sex was not uniform throughout the United Kingdom.[41] Mr. Dudgeon lived in Northern Ireland, which outlawed all sexual conduct between males but did not regulate sexual conduct between females (unless perhaps one of the females was below the age of consent of seventeen).[42] The laws of England and Wales did not prohibit

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37. *Dudgeon*, 45 Eur. Ct. H.R. (ser. A) at 168.

38. Eur. Conv. on H.R., art. 8, (Sept. 2003), *available at* http://conventions.coe.int/Treaty/en/Treaties/Word/005.doc.

39. *Dudgeon*, 45 Eur. Ct. H.R. (ser. A) at 163-67.

40. *Id.* Note the striking similarity between this reasoning and that of the United States Supreme Court in *Lawrence v. Texas*, discussed *infra* notes 112-17 and accompanying text.

41. *Dudgeon*, 45 Eur. Ct. H.R. (ser. A) at 150-67. The ECHR also noted that all other states party to the Convention (at the time numbering twenty, *see* European Court of Human Rights, *supra* note 36), had some legislation regulating sexual conduct between members of the same sex. *Id*. at 164. The ECHR also noted that the "great majority" of this legislation was less broad than that of Northern Ireland. *Id.*

42. Two statutes in Northern Ireland regulated such conduct. The first, dating to 1861, prohibited "buggery" (sodomy) and "attempted buggery." *Id.* at 150. The second, dating to 1885, prohibited any "gross indecency" between males. *Id.* Convictions for violating the buggery statute apparently could lead to a maximum sentence of life imprisonment. *Id.*

consensual sexual activity between males age twenty-one or older.[43] The official law of Scotland was similar to that of Northern Ireland until 1980, except that sodomy was regulated by the common law, not by statute.[44] In 1980, Scottish law was formally brought in line with that of England and Wales.[45]

The *Dudgeon* ruling brought uniformity to the laws of the United Kingdom, but this uniformity was still discriminatory. The ECHR held that statutes prohibiting all sexual conduct between members of the same-sex violated Article 8 of the Convention, but an age of consent of twenty-one for men was permissible.[46] Despite the fact that, at the time, the law of the United Kingdom fixed the age of consent for females at seventeen,[47] it was not until 1994 that the age of consent for gay men was lowered from twenty-one to eighteen.[48] At that time, following a recommendation of the European Commission on Human Rights,[49] the United Kingdom equalized the age of consent for all sexual activity, making it an offense for a person aged eighteen or over to engage in sexual conduct with a person under the age of sixteen (seventeen in Northern Ireland).[50] Equalizing the ages of consent removed the final inequality in criminal regulation of sexual conduct in the United Kingdom.

B. Ending Discrimination and Granting Limited Partnership Rights

As recently as 1995, studies showed that the United Kingdom had the worst record in Europe of discrimination against gays and lesbians.[51] The courts of the United Kingdom failed to interpret sexual discrimination laws to include discrimination on the basis of sexual orientation,[52] and regulations in the United

43. England and Wales had, in the Sexual Offences Act of 1967, adopted the recommendation of a Committee on Homosexual Offences and Prostitution. *Dudgeon*, 45 Eur. Ct. H.R. (ser. A) at 152.

44. *Id.* at 153.

45. *Id*.

46. The ECHR held that, while the Government could not properly prohibit all sexual conduct between males, it was reasonable under the State's authority to fix the age of consent. *Id.* at 168.

47. *Id.* at 150.

48. U.K. Stat. 1994, c. 33, pt. XI, § 145. This statute amended § 1 of the Sexual Offences Act 1967 (Eng. and Wales), § 80 of the Criminal Justice Act 1980 (Scot.), and Art. 3 of the Homosexual Offences Order 1982 (N. Ir.). *Id.*

49. Ian Wallace, Case Comment, *Article 8: Right to Respect for Family and Private Life:* Sutherland v. U.K., 27 EUR. L. REV. 181 (2002).

50. Sexual Offences (Amendment) Act, 2000, c. 44, § 1 (U.K.).

51. *See* Frances Russell, *Sexual Orientation Discrimination and Europe*, 145 N.L.J. 374 (1995) (U.K.).

52. *See* David Manknell, *Recent Cases – Commentary – Discrimination on Grounds of Sexual Orientation, Harassment, and Liability for Third Parties*, 32 IND. L.J. 297 (2003) (arguing that such an interpretation would be "unsustainable").

Kingdom forbidding homosexuals to serve in the armed forces were upheld.[53] One scholar has argued that legislation on reproductive technology, at least prior to the Civil Partnership Act, was skewed in favor of heterosexual couples.[54]

In 1999 the House of Lords held in *Fitzpatrick v. Sterling Housing Association, Ltd.* that a same-sex partner cannot succeed to a statutory tenancy of a deceased partner because the language of the statute applied only to a "wife or husband."[55] Despite holding that same-sex partners could be members of the same family,[56] and despite the general prohibition on discrimination present in Article 14 of the Convention,[57] the House of Lords relied on the specific language of the statute as allowing different treatment of same-sex couples.[58] The right involved in this case–that of succession to statutory tenancy–may seem minor, but the implications of the statutory interpretation could be broadly applied to any statute by its terms applying to "husband and wife."

The United Kingdom is, however, quickly moving away from its discriminatory reputation in many respects. In 1997, the United Kingdom's government adopted an immigration policy allowing a partner in a same-sex relationship limited immigration rights.[59] In 2000, the Scottish Parliament became the first legislative body in the United Kingdom to recognize same-sex couples[60] when it permitted a same-sex partner to be classified as the "nearest relative" for the purposes of the Adults with Incapacity Act.[61] London began formally registering same-sex partnerships in 2001, though such partnerships were initially given no legal effect.[62]

Finally, in 2002, the Court of Appeal heard *Mendoza v. Ghaidan*, a case with virtually the same facts as those in *Fitzpatrick*, and came to the opposite conclusion.[63] The court held that an Article 14 right was implicated by the statute and then engaged in creative statutory interpretation to reach its result.[64] The court did not hold that the House of Lords was wrong in its interpretation of

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53. *See* McDonald v. Ministry of Defence, [2003] I.C.R. 937 H.L., ¶¶ 6-8 (Eng.).

54. Elaine E. Sutherland, *"Man Not Included" – Single Women, Female Couples and Procreative Freedom in the U.K.*, 15 CHILD & FAM. L.Q. 155 (2003).

55. Fitzpatrick v. Sterling Housing Ass'n, [1999] 4 All. E.R. 705 (H.L.).

56. *Id*.

57. "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Eur. Conv. on H.R., *supra* note 38, art. 14.

58. *Fitzpatrick*, 4 All. E.R. 705.

59. MERIN, *supra* note 13, at 355.

60. *Id*.

61. Adults with Incapacity (Scotland) Act, 2000, (A.S.P. 4), § 87(2).

62. MERIN, *supra* note 13, at 355. Such partnerships are now legal per the Civil Partnership Act 2004. *See infra* notes 95-99 and accompanying text.

63. Mendoza v. Ghaidan, [2002] EWCA (Civ) 1533, [35] (Eng.).

64. *Id*. For further analysis of this statutory interpretation, see *Same-Sex Partners and Succession to Rent Act Tenancies*, HOUS. L. MONITOR 9.12(1) (2002) (Eng).

Fitzpatrick, but rather that the adoption of the Human Rights Act 1998 (Human Rights Act), after the Fitzpatrick decision, compelled a different result.[65] Relying on § 3 of the Human Rights Act,[66] the Court of Appeal construed the statutory phrase "as his or her wife or husband" to mean "as if they were his or her wife or husband."[67] This interpretation could be read broadly to apply to any statute with language that could be read as discriminating against gays and lesbians.

Further developments have come in the area of employment discrimination. Late in 2003, the Secretary of State[68] promulgated regulations designed to make discrimination and harassment based on sexual orientation unlawful in the employment context.[69] The standard for harassment requires only that the employee perceive the harassment to be based on sexual orientation; any other proffered reason for the harassment will not constitute a defense.[70] By their terms, the regulations contemplate a narrow exception: employers may discriminate based on sexual orientation when there is a "genuine occupational requirement."[71] This language seems broad, but is limited explicitly to religious settings, permitting religious organizations opposed to homosexuality to discriminate.[72] While there are some other concerns about how to apply the regulations in specific contexts,[73] they are generally broad and represent an important shift in United Kingdom policy on sexual orientation discrimination.

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65. *Mendoza*, [2002] EWCA (Civ) 1533, [35].

66. "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." Human Rights Act, 1998, c. 42, § 3(1) (U.K.).

67. *Mendoza*, [2002] EWCA (Civ) 1533, [35]. It is not known whether the House of Lords will hear the *Mendoza* case, but if so it could, of course, be reversed.

68. The Secretary of State is a Minister given the power to promulgate regulations under the European Communities Act 1972. *See* The Employment Equality (Sexual Orientation) Regulations 2003, Preamble.

69. *See id.* §§ 3-5; *see also* Marc Jones, *Discrimination on Grounds of Sexual Orientation and Religion or Belief – A Review of the Regulations*, EMP. L. & LITIG. 9.4(13) (2004).

70. Manknell, *supra* note 52.

71. The Employment Equality (Sexual Orientation) Regulations 2003, § 7.

72. *Id.* §§ 7(2)-(3).

73. For example, an employee who, as a side job, sells bondage and sadomasochism merchandise over the internet might permissibly be subject to discrimination under the laws of the United Kingdom. *See* Jones, *supra* note 69. The Employment Appeal Tribunal so held in *Pay v. Lancashire Probation Svc.*, [2004] I.C.R. 187, on the grounds that the employee may be dealing with sex offenders. Though *Pay* came before the regulations and was based on human rights grounds, the ruling may still be justified under the regulations, the notes for which express intent not to include behavior such as sadomasochism or pedophilia under the ambit of "sexual orientation." Jones, *supra* note 69. It is difficult to tell now how this principle might apply more broadly to gay and lesbian employees, but it does indicate that an employer may be justified in scrutinizing an employee's off-the-job

In 2002, the United Kingdom legally recognized the right of same-sex couples to adopt children.[74] The Adoption and Children Act, 2002 (Adoption and Children Act) permits adoption by a single person or by a couple,[75] and defines couple to include any two people, whether of the same or opposite sexes, "living as partners in an enduring family relationship."[76] Prior to the passage of the Civil Partnership Act, this definition was problematic with regard to what constituted an "enduring family relationship" because same-sex partnerships were not yet legally recognized.[77] Now a registered civil partnership will certainly qualify.[78] However, even before same-sex partnerships were legally recognized, the Adoption and Children Act nonetheless represented the United Kingdom taking an affirmative step to treat same-sex couples equally.

Less than ten years ago, the United Kingdom was considered to be behind the curve in Europe in terms of discrimination against gays and lesbians.[79] However, it has eviscerated this reputation in the important fields of employment discrimination and adoption law. Further, the Human Rights Act, as interpreted in *Mendoza v. Ghaidan*,[80] represents an expansive possibility in statutory interpretation that could lead to further advances in other areas of law. While the shift in discrimination policy has not occurred without controversy,[81] it has occurred relatively quickly and recently.

C. Full Recognition of Partnerships: The Civil Partnership Act 2004

European countries have generally led the way in legally recognizing same-sex couples.[82] Denmark was the first country to recognize a "registered partnership"[83] and the Netherlands the first to fully legalize same-sex marriage.[84] Indeed, when scholars express concern about the state of the law on same-sex unions in the United States, it is often expressed in terms of how far behind

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practices, and at the very least the definition of "sexual orientation" under the Regulations seems a bit muddy.

74. Adoption and Children Act, 2002, c. 38 (Eng.).

75. *Id.* §§ 50-51.

76. *Id.* § 144(4).

77. *See* Angela Marshall, *Comedy of Adoption – When Is a Parent Not a Parent?*, 33 FAM. L.J. 840 (2003).

78. *See* Civil Partnership Act, *supra* note 9, § 79.

79. *See* Russell, *supra* note 51.

80. *See* Mendoza v. Ghaidan, [2002] EWCA (Civ) 1533 (Eng.).

81. For example, the Adoption and Children Act, 2002 was blocked by conservative members of Parliament before eventually being passed. Marshall, *supra* note 77.

82. *See* Polikoff, *supra* note 29, at 712.

83. *Id*. at 719.

84. *Developments in the Law*, *supra* note 14, at 2004.

Europe the law of the United States lags.[85] But the law of Europe has not developed in one consistent manner, and indeed the United Kingdom has only recently begun to recognize such rights.

The United Kingdom has decriminalized consensual sexual conduct between members of the same-sex, greatly reduced discrimination on the basis of sexual orientation, and granted same-sex couples the right to adopt children. The final step in the European model is the full recognition of same-sex marriage.[86] The United Kingdom, and most of the world, has not yet taken that final step. Only four countries have made same-sex marriage legal through legislation.[87]

But even though the United Kingdom does not yet recognize same-sex marriage, it has taken a major step with the Civil Partnership Act. In 2003, the Women and Equality Unit of the United Kingdom's Department of Trade and Industry issued a consultation document proposing that same-sex couples be given the opportunity to register to have their relationships given legal effect.[88] Late in 2003, the government announced its intention to introduce a bill legalizing the registration of same-sex partnerships.[89] True to this promise, the Civil Partnership Bill was introduced in the House of Lords in July 2004.[90] The bill received "broad political support"[91] and passed easily.[92] Receiving the Queen's approval in November 2004, the bill became law.[93]

The Civil Partnership Act provides same-sex couples with most of the same rights married couples enjoy.[94] It provides a detailed process for forming a partnership,[95] a method for dissolution,[96] provisions for custody of children,[97] and arrangement of finances and property.[98] The provisions of the Civil Partnership

85. *See, e.g., id.* at 2006; Leonard, *supra* note 12, at 356.

86. *See* MERIN, *supra* note 13, at 309.

87. *See Developments in the Law*, *supra* note 14.

88. Barry Crown, *Civil Partnership in the U.K. – Some International Problems*, 48 N.Y.L. SCH. L. REV. 697, 697 (2004).

89. *Id.* at 697 n.2.

90. Civil Partnership Bill, 2004, H.L. Bill [132] (U.K.), *available at* http://www.publications.parliament.uk/pa/cm200304/cmbills/132/2004132.htm.

91. Sparrow, *supra* note 9; *see also* Blumberg, *supra* note 10, at 1572 (noting that, after the plan to introduce the bill was announced, the British Conservative Party "immediately expressed support").

92. The Commons vote, for example, was 389-47 and was preceded by the defeat of proposed amendments designed to destroy the bill. Civil Partnership Bill, *supra* note 11.

93. *See* Explanatory Notes to Civil Partnership Act 2004, *supra* note 8.

94. Sparrow, *supra* note 9.

95. Civil Partnership Act, *supra* note 9, §§ 2-36 (Eng. & Wales); §§ 85-100 (Scot.); §§ 137-60 (N.Ir.).

96. *Id.* §§ 37-64 (Eng. & Wales); §§ 117-25 (Scot.); §§ 161-90 (N.Ir.)

97. *Id.* §§ 75-79 (Eng. & Wales); §§ 199-203 (N.Ir.).

98. *Id.* §§ 65-72 (Eng. & Wales); §§ 191-96 (N.Ir.).

Act are not without criticism,[99] but its passage represents a major move toward equal recognition of same-sex partnerships, even without calling such partnerships "marriages."

Thus, while the United Kingdom has not yet extended the title of "marriage" to same-sex couples (as has occurred in the Netherlands and Belgium), it has granted same-sex couples substantially the same rights. Perhaps because these rights exist under the name "civil partnership," political controversy over the issue seems to have been minimal.

III. APPLICATION OF THE EUROPEAN MODEL TO THE UNITED STATES

An analysis of legal recognition of same-sex couples in the United States must necessarily take into account the federalist system of the United States government.[100] While legal issues relating to recognition of same-sex relationships have certainly been addressed at the federal level,[101] family law is traditionally the domain of the states.[102] Progress–and setbacks–are likely to begin at the state level. For these reasons, this section will analyze developments at both the state and federal levels in the United States.

A. Decriminalizing Homosexual Conduct

Less than a half-century ago, all fifty states outlawed sodomy.[103] Unlike the laws at issue in *Dudgeon*, these laws prohibited all sodomy and not just that among members of the same-sex.[104] Laws aimed at same-sex relations apparently did not appear until the 1970s.[105]

In 1986, five years after the European Court of Human Rights decided *Dudgeon*, the United States Supreme Court upheld the constitutionality of anti-

99. For example, a surviving partner may not be entitled to a deceased partner's pension and would not be entitled to the inheritance tax exemption. Sparrow, *supra* note 9.

100. *See Developments in the Law*, *supra* note 14, at 2012.

101. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (holding that the constitutional right to privacy forbids a state from enacting legislation making consensual sodomy illegal); Defense of Marriage Act, Pub. L. No. 104-99, 110 Stat. 2419 (1996) (codified and amended at 1 U.S.C. § 1 and 28 U.S.C. § 1738C (2001)) [hereinafter DOMA] (defining "marriage" as a union between one man and one woman and providing that no state be required to recognize a same-sex union from another state).

102. *See, e.g.*, *Developments in the Law*, *supra* note 14, at 2014.

103. *Lawrence*, 539 U.S. at 572.

104. *Id.* at 570.

105. *Id.*

sodomy laws in *Bowers v. Hardwick*.[106] The Court held that the Constitution conferred no fundamental right to homosexual sodomy.[107] At the time *Bowers* was decided, the laws of twenty-four states forbade sodomy,[108] although those laws may not have been frequently enforced.[109] By 2003, only thirteen states prohibited sodomy, and only four of those specifically targeted same-sex couples.[110]

In 2003, the Supreme Court decided *Lawrence v. Texas* which overruled *Bowers*.[111] In *Lawrence*, petitioners alleged that a Texas statute outlawing only same-sex sodomy violated Fourteenth Amendment substantive due process and equal protection rights.[112] According to the Court, the first mistake in *Bowers* was an overly narrow framing of the liberty interest involved.[113] At issue was not "the fundamental right [of] homosexuals to engage in sodomy,"[114] but rather the fundamental right of personal intimacy.[115] The Court held that the Constitution confers such a right, and thus states cannot constitutionally prohibit sodomy among consenting adults.[116]

B. Ending Discrimination and Granting Limited Partnership Rights

1. Discrimination (and Protection from Discrimination) at the Federal Level

106. Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

107. *Id.* at 190-91. Respondents in *Bowers* argued that the substantive due process cases of the Supreme Court created a fundamental right of privacy that included the right to engage in sodomy. *Id.* at 190.

108. *Id.* at 192-93.

109. *See id.* at 197-98 (Powell, J., concurring). Indeed, the Georgia statute at issue in *Bowers* was admittedly not enforced "for decades" until the prosecution of Michael Hardwick. *See id.* at 198, n.2. For detailed background on how the Hardwick prosecution came to be, see PETER IRONS, THE COURAGE OF THEIR CONVICTIONS 392-97 (1988).

110. *Lawrence*, 539 U.S. at 573.

111. *Id.* at 578.

112. *Id.* at 563. In this way, the statute at issue in *Lawrence* was different than the statute upheld in *Bowers*. The Court could have struck down the *Lawrence* statute on equal protection grounds, and thus upheld the *Bowers* substantive due process analysis. *Id.* at 579 (O'Connor, J., concurring in the judgment). The majority, however, decided that *Bowers* "was not correct when it was decided, and it is not correct today." *Id.* at 578.

113. *Id.* at 566-67.

114. *Lawrence*, 539 U.S. at 566 (quoting Bowers v. Hardwick, 478 U.S. 186 (1986)).

115. *Id.* at 567.

116. *Id.* at 578.

No federal law in the United States prohibits discrimination on the basis of sexual orientation.[117] In fact, attempts to ban such discrimination "have repeatedly been rejected by Congress."[118] Discrimination on the basis of sexual orientation "may be the last legally acceptable workplace bias."[119] Gays and lesbians still may not openly serve in the armed forces.[120]

But not all federal treatment of discrimination based on sexual orientation has been negative. In 1996, the Supreme Court held that a state may not constitutionally prohibit its legislature, agencies, municipalities, school districts, etc., from providing protections based on sexual orientation.[121] And courts interpreting other recent Supreme Court cases have been increasingly willing to apply Title VII employment discrimination protections to people who have been subjected to discrimination on the basis sexual orientation, despite the lack of explicit protection from such discrimination in Title VII itself.[122]

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117. Courtney Joslin, *Protection for Lesbian, Gay, Bisexual, and Transgender Employees Under Title VII of the 1964 Civil Rights Act*, 31 HUM. RTS. 14, 14 (2004).

118. *Lawrence*, 539 U.S. at 603 (Scalia, J., dissenting).

119. Michael A. Woods, *The Propriety of Local Government Protections of Gays and Lesbians From Discriminatory Employment Practices*, 52 EMORY L. J. 515, 515 (2003).

120. Federal legislation requires discharge of any member of the armed forces who "has engaged in, attempted to engage in, or solicited another to engage in a homosexual act" unless the member demonstrates that he or she has satisfied one of a specific set of exceptions. 10 U.S.C. § 654(b)(1) (2001).

121. Romer v. Evans, 517 U.S. 620, 635-36 (1996). *Romer* involved a challenge to a Colorado constitutional amendment that prohibited any municipality of the state from making sexual orientation a protected status. *Id.* at 624. The Court struck down the amendment on Equal Protection grounds. *Id.* at 635-36.

122. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on "race, color, religion, sex, or national origin." Pub. L. No. 88-352, 78 Stat. 241, 255 (1964) (codified as amended at 42 U.S.C. § 2000e-2(a)(1)). While this obviously does not include a prohibition on discrimination on the basis of sexual orientation, two key United States Supreme Court cases have been held to expand Title VII protections to gays and lesbians. *See* Joslin, *supra* note 117. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), the Court held that an employer cannot discriminate based on gender stereotypes. In *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998), the Court held that a plaintiff could state a Title VII claim even if the defendant was a member of the same sex as the plaintiff. These cases suggest that Title VII protections apply to discrimination on the basis of "gender stereotypes," and could protect gays and lesbians in some cases. Joslin, *supra* note 117, at 15. The Ninth Circuit Court of Appeals has so held in three cases. Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874 (9th Cir. 2001) (the principle of *Price Waterhouse* "applies with equal force to a man who is discriminated against for acting too feminine"); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063, 1068 (9th Cir. 2002) (though an employee's sexual orientation "neither provides nor precludes a cause of action for sexual harassment" under Title VII, when a plaintiff claims that other employees inappropriately touched him and this touching was based on his sexual orientation, plaintiff states a "fairly straightforward sexual harassment claim"); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) ("[d]iscrimination because one

2. State and Local Protection from Discrimination

Federal protections–or lack thereof–do not, of course, end the inquiry. Local governments in a growing number of states provide some form of protection against discrimination on the basis of sexual orientation.[123] Currently, fifteen states and the District of Columbia prohibit discrimination on the basis of sexual orientation.[124] An additional eleven states prohibit such discrimination in public employment only.[125] Also, twenty-nine states and the District of Columbia have hate crime legislation that expressly addresses hate crimes based on sexual orientation.[126]

Perhaps even more important is the growing trend among local governments to provide legal protections where the states and the federal government have not yet done so.[127] As of late 2003, 136 cities and counties had some form of prohibition against employment discrimination applicable to the private sector.[128] An additional 106 cities and counties had similar prohibitions applicable to the public sector.[129] One scholar estimates that these local protections apply to "roughly twenty percent of the United States population."[130] These local-level protections are not as effective as federal or statewide

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fails to act in the way expected of a man or woman is forbidden under Title VII"). While the holdings in these cases do not explicitly protect gays and lesbians, protections from gender stereotyping will certainly help gays and lesbians in some cases. Joslin, *supra* note 117.

123. *See* Woods, *supra* note 119, at 515-16.

124. The fifteen states are California, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Wisconsin. Human Rights Campaign, Statewide Anti-Discrimination Laws & Policies (July 2005), http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=1482.

125. Those states are Alaska, Arizona, Colorado, Delaware, Indiana, Louisiana, Kentucky, Michigan, Montana, Pennsylvania, and Washington. *Id.*

126. The twenty-nine states are Arizona, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Washington, and Wisconsin. Human Rights Campaign, Statewide Hate Crimes Laws (May 2005), http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19445.

127. Woods, *supra* note 119, at 527.

128. *Id*.

129. *Id*.

130. *Id*.

protections might be,[131] but they seem to represent a general move toward extending protection from discrimination based on sexual orientation.

3. Adoption Rights for Same-Sex Couples

Perhaps surprisingly,[132] the United States tended to lead Europe in one important right granted to gay and lesbian couples. Adoption by gay men and lesbians has been legally endorsed in some form in much of the United States and to a greater degree than has occurred generally in Europe.[133] Gay and lesbian adoptions initially began in the 1980s, where one partner would adopt a child as a single parent and then the couple would raise the child together.[134] Understanding that this was not ideal, as the law only officially recognized one parent, lawyers began advocating for "second-parent adoptions," which gives legal recognition to both parents.[135] Of course, different states have different approaches, and some expressly or impliedly prohibit gay couples from adopting children.[136] Many, however, either by statute or by court decision, permit gays and lesbians to adopt children.[137]

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131. For example, a local ordinance might be preempted by state law, or a state court might hold that a municipality exceeded its authority in enacting a protective provision. *See id.* at 539-41.

132. The United States is typically regarded as being "out of step" with the rest of the "Western world." *Developments in the Law*, *supra* note 14, at 2006. The acceptance of adoption in the United States seems especially curious given that the argument against same-sex marriage very often centers around protection of the family. *See, e.g.*, Jane Adolphe, *The Case Against Same-Sex Marriage in Canada: Law and Policy Considerations*, 18 B.Y.U. J. PUB. L. 479, 502 (2004) ("The human person, created male and female, comes together in marriage for the good of the spouses, children, and society.").

133. Polikoff, *supra* note 29, at 734. Perhaps the reason for this is pragmatic: in the United States there is a shortage of adoptive parents and so it seems impractical to exclude any potential parents. *Id.* at 714-15.

134. *Id.* at 731.

135. *Id*.

136. *See, e.g.*, UTAH CODE ANN. § 78-30-1(b) (2000) ("A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state."); FLA. STAT. ANN. § 63.042(3) (West 2005) ("No person eligible to adopt under this statute may adopt if that person is a homosexual.").

137. Connecticut, by statute, permits gays and lesbians to adopt, but gives the child-placing agency discretion to decide not to place the child with gay or lesbian parents. CONN. GEN. STAT. ANN. § 45a-726a (West 2004). Presumably, under Connecticut's new civil union statute same-sex couples who enter a civil union will be permitted adoption rights on par with those of married couples. *See infra* note 141 and accompanying text. Courts in several states have interpreted statutes allowing any person to adopt to allow second parent adoptions. *See, e.g.*, *In re* C.M.A., 715 N.E.2d 674, 679 (Ill. App. Ct. 1999); Adoption of Tammy, 619 N.E.2d 315, 316 (Mass. 1993). In Vermont, same-sex couples

C. Full Recognition of Partnerships

While the issues of decriminalizing sodomy and extending anti-discrimination protections to gays and lesbians surely have engendered some debate in the United States, the controversy surrounding the full recognition of gay and lesbian marriages is surely much greater.[138] It was an issue of great importance in the 2004 presidential election and has led to a fracture in the Republican Party.[139]

Throughout the United States there has been some patchwork recognition of same-sex unions at the state and local level. Responding to a 1999 court decision, Vermont now grants same-sex couples civil unions that provide all the benefits of marriage without the name,[140] and in 2005, Connecticut passed similar legislation.[141] In 1999, California passed legislation creating a domestic partner registry, though it did not provide much in the way of legal benefits.[142] By 2003, California legislation provided registered same-sex couples all the rights of

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who have entered into a civil union may adopt on the same terms as married couples. VT. STAT. ANN. tit. 15, § 1204(e)(4) (2002).

138. *See* Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years From Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589, 591 (2004).

139. The Log Cabin Republicans, a group of gay Republicans, refused to support President George W. Bush in the 2004 Presidential Election because of his support for a constitutional amendment banning same-sex marriage. Press Release, Log Cabin Republicans, Log Cabin Republicans Vote to Withhold Endorsement from President Bush (Sept. 8, 2004), http://www.logcabin.org/logcabin/press_090804.html (last visited Oct. 14, 2005).

140. The Vermont Supreme Court held that the Common Benefits Clause of the Vermont Constitution requires that the state extend the benefits of marriage to same-sex couples. Baker v. State, 744 A.2d 864, 867 (Vt. 1999). The Common Benefits Clause provides that "the government is . . . instituted for the common benefit . . . of the people . . . 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 . . . ." VT. CONST. ch. I, art. 7. Rather than extending marriage to same-sex couples, the Vermont legislature passed the civil union statute. *See* VT. STAT. ANN. tit. 15, § 1204 (2002); *see also* Wojcik, *supra* note 138, at 635.

141. 2005 Conn. Legis. Serv. P.A. 05-10 (West). The Act went into effect October 1, 2005. *Id*.

142. *See* CAL. FAM. CODE § 297(a) (West 2005). California was the first state to pass any such legislation "without constitutional compulsion." Blumberg, *supra* note 10, at 1558. In 2005, the California Court of Appeals upheld the domestic partner legislation, which had been challenged on the grounds that it in effect legalized same-sex marriage. Knight v. Super. Ct., 26 Cal. Rptr. 3d 687, 689-90 (2005).

marriage except those relating to state income tax.[143] In Hawaii, "reciprocal benefits" legislation provides many of the rights of marriage to same-sex couples.[144] All four states, however, expressly bar same-sex couples from marrying.[145]

Statutes addressing the issue of same-sex partnerships or marriage often come in response to litigation. In late 2003, the Massachusetts Supreme Court issued a historic ruling in *Goodridge v. Department of Public Health*, holding that denying marriage rights to same-sex couples violated individual liberty and equal protection guarantees of that state's Constitution.[146] The plaintiffs in *Goodridge* were seven same-sex couples in long-term, committed relationships.[147] They brought suit claiming that a number of Massachusetts constitutional provisions required the state to recognize same-sex civil marriage.[148] The court held in their favor.[149] After a 180-day stay of the decision (granted so the legislature could take action based on the opinion),[150] Massachusetts issued its first marriage licenses for same-sex couples on May 17, 2004.[151]

The *Goodridge* decision and the first legal same-sex marriages in the United States created quite a bit of controversy and activity.[152] Those opposing

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143. CAL. FAM. CODE § 297.5(g) (West 2005); *see also* Blumberg, *supra* note 10, at 1561-62.

144. *See* HAW. REV. STAT. ANN. § 572C (LexisNexis 2003).

145. VT. STAT. ANN. tit. 15, § 8 (2004) ("Marriage is the legally recognized union of one man and one woman."); CAL. FAM. CODE § 308.5 (West 2004) ("Only marriage between a man and a woman is valid or recognized in California."); HAW. REV. STAT. ANN. § 572-1 (LexisNexis 2003) (marriage "shall be only between a man and a woman"); 2005 Conn. Legis. Serv. P.A. 05-10 § 14 (noting that the statute grants to couples in a civil union all the rights of couples in a marriage, "which is defined as the union of one man and one woman").

146. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003).

147. *Id*. at 948.

148. *Id.* at 950.

149. *Id.* at 968.

150. *See id.* at 970.

151. More than 600 couples, including all seven involved in the *Goodridge* suit, were married on May 17. Cooperman & Finer, *supra* note 4. The legalization of same-sex marriage in Massachusetts led to the issuance of marriage licenses in San Francisco, CA and Multnomah County, OR. *Id.* The issuance was later stopped and the licenses invalidated. *See* Li v. State, No. 0403-03057, 2004 WL 1258167 (Or. Cir.) (enjoining the issuance of marriage licenses but also holding that the legislature must pass legislation "that would balance the substantive rights of same-sex domestic partners with those of opposite-sex married couples . . ."); Lockyer v. City and County of San Francisco, 95 P.3d 459, 488 (Cal. 2004) (marriages conducted between same-sex couples in violation of the applicable statutes were void and of no legal effect). In New Paltz, NY, two ministers were criminally charged for solemnizing marriages for same-sex couples without marriage licenses. People v. Greenleaf, 780 N.Y.S.2d 899, 900 (Just. Ct. 2004). The charges were dismissed. *Id.* at 905.

152. *See, e.g.*, Cooperman & Finer, *supra* note 4; Smardz, *supra* note 12.

same-sex marriages lined up to protest the issuance of the first licenses.[153] President Bush took the opportunity to denounce "activist judges" and to press support for an amendment to the United States Constitution that would ban same-sex marriage.[154] The Massachusetts Constitution could itself be amended to ban same-sex marriage if a referendum (expected in November 2006) is successful.[155]

That the *Goodridge* decision aroused controversy is not surprising, but it is worth noting that the same result nearly occurred in two other states, starting in 1993.[156] In that year, the Hawaii Supreme Court held that while there was no fundamental right to same-sex marriage, equal protection concerns would require the state to allow same-sex couples to marry unless the state could demonstrate a compelling interest otherwise.[157] The case was remanded for such a determination.[158] On remand, the trial court rejected the state's argument, and the state appealed.[159]

Fearing that on appeal the Hawaii courts would hold the state's interest not compelling, opponents moved to amend the Hawaii Constitution, and succeeded in 1998.[160] The Hawaii Constitution now provides that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples."[161]

A similar process occurred in Alaska beginning in 1998.[162] There, two gay men challenged Alaska's prohibition of same-sex marriage.[163] The trial court held that the Alaska Constitution conferred a right to choose a life partner and that the state needed to show a compelling interest why same-sex marriages should be banned.[164] Following this ruling, opponents of same-sex marriage organized to amend the Alaska Constitution and succeeded.[165] The Alaska Constitution now provides that "a marriage may exist only between one man and one woman."[166]

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153. Cooperman & Finer, *supra* note 4.

154. *Id*.

155. *Id*.

156. *See* Wojcik, *supra* note 138, at 616-19.

157. Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993).

158. *Id*.

159. Wojcik, *supra* note 138, at 618.

160. *Id*.

161. HAW. CONST. art. 1, § 23. This provision is interesting in that it is permissive. The amendment does not ban same-sex marriage, but rather permits the legislature to ban it. *Id.* This is in stark contrast to the failed, and now again proposed, Federal Marriage Amendment, which would have expressly limited marriage to a union between "one man and one woman" and would have made clear that no other interpretation of the Constitution would permit same-sex marriages. Federal Marriage Amendment, S.J. Res. 30, 108th Cong. (2004).

162. *See* Wojcik, *supra* note 138, at 618-19.

163. Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska).

164. *Id*. at 6.

165. Wojcik, *supra* note 138, at 619.

166. ALASKA CONST. art. 1, § 25.

D. Reaction at the Federal and State Levels

The experience of the United States may be unique in that there has not only been considerable rhetorical backlash from those opposing same-sex marriage, but the legal developments discussed above (especially those achieved through litigation) have led to legal backlash.[167] This backlash has come in the form of amended state constitutions (and one failed attempt to amend the Federal Constitution) and legislation. This section will briefly analyze state legislation and then examine federal developments.

1. State Constitutional and Statutory Provisions

Perhaps the most drastic state remedy is to amend its constitution. Fifteen states currently have constitutional provisions preventing same-sex marriage[168] or permitting the legislature to do so.[169] Eleven of these constitutional

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167. *See* Cooperman & Finer, *supra* note 4.

168. Some of these constitutional provisions by their terms only prohibit same-sex marriage. ALASKA CONST. art. 1, § 25; MISS. CONST. art. 14, § 263A; MONT. CONST. art. XIII, § 7; NEV. CONST. art. 1, § 21; OR. CONST. art. XV, § 5(a). Others, however, would very clearly prohibit civil unions and domestic partnership registries also. ARK. CONST. amend. 83, § 2 (prohibiting recognition of relationships "identical or substantially similar to marital status"); GA. CONST. art. 1, § 4 (prohibiting any "union between persons of the same sex"); KY. CONST. § 233A ("A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."); LA. CONST. art. XII, § 15 (providing that "[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized"); NEB. CONST. art. 1, § 29 (nullifying all same-sex partnerships); N.D. CONST. art. XI, § 28 ("Marriage consists only of the legal union between a man and a woman. No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect."); OKLA. CONST. art. II, § 35 ("Marriage in this state shall consist only of the union of one man and one woman. Neither this Constitution nor any other provision of law shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."); OHIO CONST. art. XV, § 11:

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

provisions were passed by voters in the November 2004 election, clearly in retaliation of the *Goodridge* ruling legalizing same-sex marriage in Massachusetts.[170] Of the other four constitutional bans, all were adopted since 1998 and two–Alaska's and Hawaii's–were direct responses to court rulings that the constitutions of those states required some recognition of same-sex unions. Louisiana passed an amendment banning same-sex marriage and civil partnerships by a wide margin, and a court challenge to that amendment was unsuccessful.[171]

The number of states that statutorily prohibit same-sex marriage is even more staggering. Including those eleven states constitutionally addressing the issue, forty-one states have statutes limiting marriage to a union between a man and a woman.[172] While four of these laws existed prior to 1996, it seems clear that virtually all of them were passed as a response to the increase in litigation over same-sex marriages.[173] As of 2001, thirty-seven states had laws on the books that would prevent the state from being required to recognize a same-sex marriage from another state.[174] Only five states have not addressed the issue of same-sex marriage at all.[175]

2. Federal Statutory Provisions and the Proposed Federal Marriage Amendment

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UTAH CONST. art. 1, § 29 ("(1) Marriage consists only of the legal union between a man and a woman. (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.").

169. HAW. CONST. art. 1, § 23.

170. *See* Rosenberg & Breslau, *supra* note 7.

171.The amendment, referred by the legislature for a statewide vote, passed by a majority of seventy-eight percent on September 18, 2004. Ed Anderson, *Same-Sex Amendment Gets Date in High Court*, NEW ORLEANS TIMES-PICAYUNE, Oct. 15, 2004, at A3, *available at* 2004 WLNR 1501964. A trial court initially struck it down, reasoning that, because it would ban both same-sex marriage and civil partnerships, it was unconstitutional. Forum For Equality, P.A.C. v. McKeithen, 893 So. 2d 715 (La. 2005); *see also* LA. CONST. art. XIII, § 1(b) (requiring that any "proposed amendment . . . shall be confined to one object . . ."). The Louisiana Supreme Court reversed, holding that the "amendment contain[ed] a single plan to defend [Louisiana's] civil tradition of marriage." Forum for Equality, 893 So. 2d at 736. The amendment is now in effect. *See* LA. CONST. art. XII, § 15.

172. Human Rights Campaign, *Statewide Marriage Laws* (April 2005), http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19449.

173. *Id*.

174. Nancy K. Kubasek et al., *Civil Union Statutes: A Shortcut to Legal Equality for Same-Sex Partners in a Landscape Littered with Defense of Marriage Acts*, 15 U. FLA. J.L. & PUB. POL'Y 229, 232 n.11 (2004).

175. *Statewide Marriage Laws*, *supra* note 172.

At the federal level, the first real retaliation came in 1996. That year, Congress approved the Defense of Marriage Act (DOMA), which defines marriage for the purposes of federal law as a union between one man and one woman and provides that no state be required to recognize a same-sex marriage from another state.[176] DOMA apparently arose out of a fear that judicial decisions granting rights to same-sex couples would lead to the legalization of same-sex marriage in a minority of states thus forcing the majority to give legal recognition to those marriages.[177] DOMA was signed into law by President Bill Clinton after a lopsided victory in Congress.[178] The constitutionality–and necessity–of DOMA has been challenged,[179] but it stands as the first Congressional attempt to federally limit recognition of same-sex unions.

Two more developments have come in the wake of *Goodridge*. First, President Bush supported–and Congress introduced–an amendment to the Federal Constitution defining marriage as a union between one man and one woman.[180] The Federal Marriage Amendment drew controversy but ultimately failed to draw the necessary two-thirds support of the House, disappointing President Bush.[181]

Legislation in this area may be more successful. In 2003, H.R. 3313 was introduced into the United States House of Representatives.[182] This Resolution would strip the Supreme Court and lower federal courts of jurisdiction to interpret the DOMA.[183] The Resolution has passed the House of Representatives and, as of November 2005, is pending in the Senate.

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176. DOMA, Pub. L. No. 104-99, 110 Stat. 2419 (1996) (codified and amended at 1 U.S.C. § 1 and 28 U.S.C. § 1738C (2001)).

177. The direct impetus for DOMA seems to have been the Hawaii Supreme Court ruling in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Patrick J. Shipley, *Constitutionality of the Defense of Marriage Act*, 11 J. CONTEMP. LEGAL ISSUES 117, 117 (2000). For an example of some strong opinions on the matter, see *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. On the Judiciary*, 104th Cong. 22 (1996) (statement of Gary L. Bauer, President, Family Research Council), *available at* 1996 WL 387291 ("The Defense of Marriage Act is a powerful antidote to the destructive trend that has gripped this country at the hands of some injudicious judges.").

178. Shipley, *supra* note 177, at 117.

179. *See, e.g.*, Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2688 (2004) (arguing that "DOMA violates principles of equal protection and due process" and perhaps "abuses the Full Faith and Credit Clause and contravenes fundamental principles of federalism"); Shipley, *supra* note 177, at 120 (arguing that DOMA's choice of law provision is probably not unconstitutional, but probably also not necessary).

180. Federal Marriage Amendment, S.J. Res. 30, 108th Cong. (2004).

181. *See* Press Release, The White House, Statement by the President (Sept. 30, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/09/20040930-10.html.

182. H.R. 3313, 108th Cong. (2003).

183. *Id.* § 2(a).

IV. COMPARING THE UNITED KINGDOM AND THE UNITED STATES

A. Pace of Reform and Adherence to the "European Model"

Perhaps the most obvious similarity between the United States and United Kingdom is that recognition of rights for same-sex couples has come slowly and in patchwork fashion. This could be dismissed as something peculiar about the cultures of the United States and the United Kingdom but, as noted above, change is hardly uniform throughout Europe or the rest of the world and the pace of reform is, more often than not, anything but speedy.[184] It would be a mistake to simply dismiss the European model as inapplicable to the United States or the United Kingdom merely because these countries have moved more slowly and irregularly toward full recognition of same-sex marriages.

Rather, as explained above, both countries have generally followed the framework of step-by-step reform that has been common in European countries. In the United Kingdom, repeal of sodomy laws took place first, though it took judicial action applicable to all states party to the Convention to do so.[185] This judicial determination brought uniformity to sodomy regulation in Europe, where sodomy laws–even those within the United Kingdom–had previously varied.[186] Later, the United Kingdom with relative quickness began to move away from its reputation for discrimination against gays and lesbians, first through creative statutory interpretation,[187] and later through regulations designed to end employment discrimination based on sexual orientation.[188] In 2004, the United Kingdom as a whole took an important step by passing the Civil Partnership Act, providing not only official recognition but also substantial legal rights to same-sex unions.[189]

Progress in the United States has not been all that different. Though the Supreme Court initially upheld the constitutionality of sodomy laws in *Bowers*,[190] that decision was reversed seventeen years later.[191] Further, this reversal probably did not have much practical effect, as sodomy laws, even at the time of *Bowers*,

184. *See Developments in the Law*, *supra* note 14, at 2009-10.

185. *See* Dudgeon v. U.K., 45 Eur. Ct. H.R. (ser. A) 149, 168 (1981).

186. *See* Sexual Offences Act, 1967, c. 60 (U.K.); *Dudgeon*, 45 Eur. Ct. H.R. (ser. A) at 150-58.

187. *See* Mendoza v. Ghaidan, [2002] EWCA (Civ) 1533, [35] (Eng.); *see also Same-Sex Partners and Succession to Rent Act Tenancies*, HOUS. L. MONITOR 9.12(1) (2002) (Eng.).

188. *See* The Employment Equality (Sexual Orientation) Regulations 2003; *see also* Jones, *supra* note 69.

189. Civil Partnership Act, *supra* note 9.

190. Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986).

191. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

were rarely enforced.[192] In the area of discrimination, the United States remains behind the curve.[193] At the very least, however, local governments cannot be prohibited from extending protections to gays and lesbians,[194] and there are now ample examples of state and local governments putting such protections into practice.[195]

Finally, while the same-sex marriage issue is indeed bitter and contentious in the United States, the civil union issue may not be. Recent polls show that about half of the United States populace supports civil unions for same-sex couples.[196] Though the Republican Party officially opposes civil unions, President George W. Bush, in late 2004, announced his disagreement with this particular plank of the Republican platform.[197] Statutes in several states legally recognize same-sex partnerships,[198] with varying legal effect,[199] and several local governments around the country provide opportunities for same-sex couples to officially register, though these registries may not provide much in the way of

192. *See* Bowers, 478 U.S. at 197-98 (Powell, J., concurring). Indeed, critics of the *Lawrence* decision have been much more concerned with the logical extension of the privacy right to other areas of law than with the legalization of same-sex sodomy. *See, e.g.*, *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting) ("The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts–and may legislate accordingly."). In a controversial interview with the Associated Press, Rick Santorum, a Republican United States Senator from Pennsylvania, expressed concern that a constitutional "right to privacy" might legitimize bigamy, bestiality, same-sex marriage, and pedophilia. Interview by Associated Press with Sen. Rick Santorum (Apr. 7, 2003), http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2003/04/22/national1737EDT0668.DTL (last visited Oct. 12, 2005).

193. *See generally* Woods, *supra* note 119, at 515.

194. Romer v. Evans, 517 U.S. 620, 635-36 (1996).

195. *See* Woods, *supra* note 119, at 524.

196. Smardz, *supra* note 12.

197. Elizabeth Bumiller, *Bush Says His Party is Wrong to Oppose Gay Civil Unions*, N.Y. TIMES, Oct. 26, 2004, at A21. President Bush clarified that while he "strongly believe[s] that marriage ought to be defined as a union between a man and a woman," he wouldn't "deny people rights to a civil union, a legal arrangement, if that's what a state chooses to do so [sic]." *Id.*

198. *See, e.g.*, CAL. FAM. CODE § 297(a) (West 2004); HAW. REV. STAT. ANN. § 572C (LexisNexis 2003); ME REV. STAT. ANN. tit. 22, § 2710 (2004); VT. STAT. ANN. tit. 15, § 1204 (2002).

199. For example, civil unions in Vermont provide all the legal rights of marriage without the name, but the domestic partnership registry in Maine does little more than extend portions of the state's probate code to domestic partners. *See* Virginia F. Coleman, *Married in Massachusetts: Now What? Status of Same-Sex Couples under Federal Law, Laws of Other States, and a Few Planning Thoughts*, A.L.I.-A.B.A. Course of Study 279, 304, 307 (Sept. 9-10, 2004).

substantial legal rights.[200] Thus it is possible that at least several states are close to taking the position the United Kingdom does on same-sex unions.

B. The Role of the Judiciary

One argument that the development of legal rights in the United States cannot follow a European model is that the judiciary plays a more important role in the United States than it does in Europe.[201] This comparison seems most apt when the United States is compared to countries like Belgium and the Netherlands, which extended to same-sex couples the right to marry by legislative act, with little controversy.[202] But as discussed above, those countries are in the minority, even in Europe, where the pace of change has been much more varied than some authorities would suggest.[203] In fact, the judicial role in the legal recognition of same-sex partnerships has been more important in the United Kingdom than in other European countries.

It is true that the judiciaries of the United Kingdom and United States are, at least theoretically, quite different. Most notably, the courts of the United Kingdom do not have the power to strike down an Act of Parliament,[204] while United States courts may strike down Acts of Congress deemed violative of the Constitution.[205] Even if the courts of the United Kingdom had the power to strike down Acts of Parliament, this power would not mean all that much in terms of

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200. Currently, at least fifty-two counties and municipalities have some form of domestic partner registry for same-sex couples. Unmarried America, *Municipalities with Domestic Partner Registries*, http://www.unmarriedamerica.org/dp-reg.html (last visited Oct. 15, 2005).

201. *See Developments in the Law*, *supra* note 14, at 2012-13.

202. *See id.* at 2009-10.

203. *See id.*

204. Under the constitutional system in the United Kingdom, "whatever Parliament does is constitutionally correct." Sir Peter North, *The United Kingdom–An Era of Constitutional Change*, 2000 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 99, 102 (2000). Thus, United Kingdom courts are limited to an interpretative and advisory role when dealing with Acts of Parliament. *Id.* at 101-02.

> [While a] handful of judicial activists have expressed the tentative view that the courts would not be bound to enforce legislation inconsistent with the basic concepts of a democratic state . . . [the] overwhelming body of opinion still adheres to the basic concept that the validity of an Act of Parliament cannot be challenged on the grounds that it is unconstitutional or infringes upon fundamental human rights.

Lord Browne-Wilkinson, *A Bill of Rights for the United Kingdom – The Case Against*, 32 TEX. INT'L. L.J. 435, 435-36 (1997).

205. Marbury v. Madison, 5 U.S. 137, 178 (1803).

individual rights, as there is nothing in the United Kingdom's governmental system comparable to the Bill of Rights in the United States Constitution.[206] In fact, the United Kingdom does not have a written Constitution to speak of,[207] and prior to the Human Rights Act, there was no particular importance given to statutes dealing with individual rights.[208]

All of this does not suggest, however, that there is no judicial involvement in protecting individual rights in the United Kingdom. As noted above, the ECHR interprets laws in light of the Convention, and it has the power to strike down any law that violates the Convention.[209] The Convention protects individual rights[210] and provides a judicial body to enforce them.[211] If the ECHR should decide that a law of the United Kingdom is inconsistent with the Convention, Parliament is bound by treaty to bring the law in line with the Convention.[212] In this way, the ECHR plays a largely similar role to the judiciary of the United States in adjudicating the validity of legislation dealing with individual rights.

With the passage of the Human Rights Act, Parliament largely extended the power of the ECHR to certain courts of the United Kingdom.[213] These courts may now entertain claims that a "public authority" has "act[ed] in a way which is incompatible with a Convention right."[214] Although this does not give the courts of the United Kingdom the power to strike down an Act of Parliament,[215] it requires the courts, "so far as it is possible to do so," to "read and give[] effect to

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206. Vincent P. Pace, *Partial Entrenchment of a Bill of Rights: The Canadian Model Offers a Viable Solution to the United Kingdom's Bill of Rights Debate*, 13 CONN. J. INT'L. L. 149, 154 (1998).

207. The two "constitutional documents" of the United Kingdom, the Magna Carta and the Bill of Rights 1688, serve as "constitutional guidelines rather than black letter law." Browne-Wilkinson, *supra* note 204, at 435.

208. Pace, *supra* note 206, at 154.

209. European Court of Human Rights, Basic Information on Procedures, (Sept. 2003), http://www.echr.coe.int/ECHR/EN/Header/The+Court/Procedure/Basic+information+on+procedures/.

210. The Convention, for example, protects a person's right to life (art. 2), liberty (art. 5), fair trial (art. 6), privacy (art. 8), religious freedom (art. 9), free expression (art. 10), and free assembly (art. 11). Eur. Conv. on H.R., *supra* note 38.

211. *Id.* art. 19.

212. Browne-Wilkinson, *supra* note 204, at 436. Though the ECHR has the power to adjudicate the claims of United Kingdom citizens under the Convention, it may not do so until all domestic remedies have been exhausted. Pace, *supra* note 206, at 158.

213. Michael H. Lee, *Revolution, Evolution, Devolution: Confusion? The Erosion of the "Supremacy of Parliament" and the Expanding Powers of the Courts in the United Kingdom*, 23 SUFFOLK TRANSNAT'L. L. REV. 465, 471-72 (2000).

214. Human Rights Act, 1998, c. 42, §§ 6(1), 7(1) (U.K.).

215. Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2003, n.93 (2004).

[legislation] in a way which is compatible with the Convention rights."[216] Certain courts, however, may declare that a "provision is incompatible with a Convention right."[217] While this declaration "does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given,"[218] the Human Rights Act does explicitly forbid a "public authority . . . [from] act[ing] in a way which is incompatible with a Convention right,"[219] and thus probably gives some incentive to Parliament to ensure that proposed legislation is compatible with Convention rights.[220]

So the ECHR and the Human Rights Act provide some judicial authority in dealing with individual rights issues. In fact, the judiciary has played an important role in the expansion of rights for same-sex couples, sometimes in a similar way to that of the United States.[221] Judicial involvement has tended to manifest itself in two slightly different ways.

First, courts sometimes apply broad rights to same-sex couples that previously belonged only to straight couples. In Europe this occurred most notably in *Dudgeon v. U.K.*,[222] with *Lawrence v. Texas* as its United States analogue.[223] One will find more of these "activist" decisions in the United States at the state level, with most involving equal protection challenges to state-level bans on same-sex unions.[224] These are the decisions that, at least in the United States, seem to arouse the most controversy because they tend to be "dramatic decisions that la[y] down the law in sharp relief, le[ave] little room for compromise, and foster[] tremendous popular discontent."[225]

Second, courts sometimes extend rights on a case-by-case basis, often utilizing creative statutory interpretation. Again this has occurred in both the

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216. Human Rights Act, 1998, c. 42, § 3(1) (U.K.).

217. *Id.* § 4(2). Section 4(5) delineates which courts have the power to make a declaration of incompatibility.

218. *Id.* § 4(6)(a).

219. *Id.* § 6(1).

220. *See id.* § 19 (requiring that any Bill introduced by either House of Parliament be accompanied by a statement of its compatibility with Convention rights).

221. While both countries' judiciaries have played a similar role, the judiciaries of some states in the United States have probably been involved a bit more proactively in the area of equal protection, perhaps helping fuel the fire of anti-gay-marriage sentiment. *See Developments in the Law*, *supra* note 14, at 2015-20.

222. 45 Eur. Ct. H.R. (ser. A) 149, 158 (1981).

223. The *Lawrence* opinion makes extensive reference to *Dudgeon* in support of its conclusion that consenting, adult, same-sex couples enjoy a constitutional right to privacy in their intimate relations. Lawrence v. Texas, 539 U.S. 558, 576 (2003).

224. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (requiring the state to recognize same-sex marriages); Baker v. State, 744 A.2d 864 (Vt. 1999) (the impetus for Vermont's civil union statute); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (equal protection challenge to same-sex marriage ban); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska) (same).

225. *See Developments in the Law*, *supra* note 14, at 2013.

United States and the United Kingdom. In the United States perhaps the most notable decisions are those of the Ninth Circuit, reading a protection from discrimination into Title VII of the Civil Rights Act of 1964.[226] In the United Kingdom, the *Mendoza v. Ghaidan* decision involved reading a statute that said "as husband and wife" to apply to same-sex couples, an example that explicitly changed statutory language.[227]

Thus, while the extent of judicial involvement in the United States may be greater than in European nations, it certainly is not the only nation in which the judiciary plays an important role in the development of legal recognition of same-sex unions.

C. Tacit Recognition of Same-Sex Families Before Legal Recognition of Same-Sex Couples

A third argument for the misapplication of the European model to the United States is the failure of the United States to grant rights in the same order as they were granted in Europe.[228] The most glaring example is adoption rights, which were essentially recognized in the United States prior to their acceptance in most of Europe.[229] But this trend may be changing. As noted, the United Kingdom now grants same-sex couples adoption rights that are very nearly equivalent to those of married couples,[230] and certainly superior to at least some states in the United States.[231]

Also, while the United Kingdom was noticeably behind the curve in granting gays and lesbians protection from discrimination,[232] recently passed regulations have helped shed this reputation rather quickly.[233] In the United States the same thing may be happening, at least at the local level. Protected by a constitutional rule in their favor, "local governments have spearheaded the

226. *See* Joslin, *supra* note 117.

227. Mendoza v. Ghaidan, [2002] EWCA (Civ) 1533, [35] (Eng.).

228. *See Developments in the Law*, *supra* note 14, at 2012-13.

229. Polikoff, *supra* note 29, at 734.

230. Adoption and Children Act, 2002, c. 38 (Eng.).

231. There are still states that expressly prohibit gays and lesbians from adopting children. *See, e.g.*, UTAH CODE ANN. § 78-30-1(b) (2000); FLA. STAT. ANN. § 63.042(3) (West 2005). On January 10, 2005, the United States Supreme Court declined to review *Lofton v. Sec'y. of Dep't. of Children & Family Servs.*, 358 F.3d 804 (11th Cir. 2004), which held the Florida statute constitutional. *See* Joanna Grossman, *Why The U.S. Supreme Court Should Have Chosen to Review a Florida Gay Adoption Case* (Jan. 12, 2005), http://writ.news.findlaw.com/grossman/20050112.html.

232. *See* Russell, *supra* note 51.

233. The Employment Equality (Sexual Orientation) Regulations 2003, §§ 3-5; s*ee also* Jones, *supra* note 69.

movement toward equality for gays and lesbians in this country," protecting gays and lesbians from employment discrimination.[234]

V. A PROPOSAL FOR THE UNITED STATES

The major difference between the United Kingdom and United States in terms of advancing legal recognition of same-sex partnerships may be the sharp retaliation these advances have drawn in the United States.[235] Since litigation for same-sex marriage was first successful in 1993,[236] legislative and constitutional retaliation has been plentiful.[237] Given the current political climate, same-sex marriage advocates face an important strategic choice in attempting to secure partnership rights for same-sex couples. They can continue to challenge the validity of laws that prevent same-sex couples from marrying, or they can blend a more moderate litigation strategy with attempts to lobby for legislative change, perhaps in the process accepting civil partnership in lieu of marriage, at least for the time being. In taking the next steps in this process, advocates may do well to examine the development of law in the United Kingdom in this area. This section will propose a strategy for such an analysis.

While there may be many personal and emotional reasons that people oppose same-sex marriage, legal arguments in opposition tend to fall into two categories. The first is essentially procedural, arguing that decisions regarding the legality of same-sex marriage should be made by the people, not the courts.[238] The second is substantive, focusing on the history and tradition of marriage and family, often invoking religious authority in support.[239]

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234. Woods, *supra* note 119, at 516.

235. *See* Kevin J. Worthen, *Who Decides and What Difference Does it Make?: Defining Marriage in "Our Democratic, Federal Republic,"* 18 B.Y.U. J. PUB. L. 273, 273 (2004) ("Judicial decisions seemingly indicating a favorable view toward same-sex marriage have prompted a firestorm of legislative and constitutional activity in several states . . .").

236. The first noteworthy decision on granting partnership rights to same-sex couples was in Hawaii. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). The *Baehr* decision was the impetus for the federal Defense of Marriage Act. Shipley, *supra* note 177, at 117.

237. This reaction, as noted above, has occurred at the federal and state levels. *See* Cooperman & Finer, *supra* note 4.

238. *See* Worthen, *supra* note 235, at 306 (concluding that the method of dealing with the same-sex marriage issue that would be the most consistent with our federalist system would be a state constitutional amendment).

239. *See* George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 B.Y.U. J. PUB. L. 419, 428 (2004) (arguing that, of the "social institutions . . . found in all cultures throughout history . . . [h]eterosexual marriage is one of the few."). Dent describes marriage as "one of the traditional Christian sacraments" and argues that "[m]ost Americans would consider gay marriage a caricature of the real thing or even an insult to a

A. The Judicial Overreaching Objection

The first objection described above–that the people should decide whether to recognize same-sex partnerships–will be termed the "judicial overreaching objection," as its proponents often express a disdain for "activist judges"[240] who "re-define[]" a "sacred institution."[241] The judicial overreaching objection is pervasive in the rhetoric surrounding the failed–and now again proposed–Federal Marriage Amendment.[242]

1. The Effect of the Judicial Overreaching Objection on the Current Political Climate

Whether the judicial overreaching objection is politically valid can be debated, but it is not as important as evaluating the importance the objection has played in shaping people's political response to the idea of same-sex marriage. It appeals to a person's sense that decisions on divisive issues ought to be made by the people, rather than a person or group of people charged with interpreting laws created by the democratic process.[243] People often fear that broad judicial rulings–even those striking down laws that are rarely enforced, as was the case in *Lawrence*–will throw into question all sorts of laws that the people still find quite appropriate.[244]

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relationship that they consider to have a sacred as well as a legal dimension." *Id.* at 425 & n.30.

240. *See, e.g.*, John Bash, *Abandoning Bedrock Principles?: The Musgrave Amendment and Federalism*, 27 HARV. J.L. & PUB. POL'Y. 985, 985 (2004) (characterizing the recent court rulings in favor of gay rights advocates as "a surge of judicial activism").

241. President George W. Bush, State of the Union Address (Feb. 2, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html [hereinafter State of the Union Address]. It should be noted that there are other reasons to oppose judicial imposition of same-sex marriage, including the possibility that it does not produce equitable results for gays and lesbians. Sharmila Roy Grossman, Note, *The Illusory Rights of* Marvin v. Marvin *for the Same-Sex Couple Versus the Preferable Canadian Alternative* – M. v. H., 38 CAL. W. L.R. 547, 568 (2002) (arguing that judicial solutions are inherently vague and give judges opportunities to impose "personal beliefs" rather than free gays and lesbians from "oppress[ion] and . . . discrimination").

242. *E.g.*, State of the Union Address, *supra* note 241.

243. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 603-04 (Scalia, J., dissenting) (criticizing the majority for being "impatient of democratic change" and asserting that decisions regarding whether sodomy laws are proper anymore ought "to be made by the people, and not imposed by a governing caste that knows best").

244. *See supra* note 192 and accompanying text.

These concerns may or may not be well-founded,[245] but the fears people have about judicial overreaching are certainly real. The problem for same-sex marriage advocates is that this fear has helped spur the passage of state constitutional amendments banning same-sex marriage (and in some cases all same-sex partnerships) in fifteen states.[246] At the very least, it can be said that the use of the courts as a major avenue to equal rights has led to substantial backlash.

2. A Plausible Response to the Judicial Overreaching Objection

Given the intensity of the judicial overreaching objection, how can same-sex marriage advocates respond? A two pronged approach seems the most viable option. First, advocates should focus on pushing for legislative change at the state level, though this admittedly might necessitate an incremental strategy, at least temporarily.[247] Second, advocates and judges should be mindful of the broad consequences of judicial decisions, and should attempt to temper the results accordingly.

a. Legislative Change

It may seem strange to suggest that same-sex marriage advocates lobby for legislative change at a time when public opinion is so divided and opposition to same-sex marriage is overwhelming,[248] but prior to court decisions in the United States and Canada on gay issues,[249] public support for civil unions had been at an all-time high.[250] Support for civil unions has almost doubled in the past

245. For example, the likelihood that the Supreme Court's reasoning in *Lawrence* leads inevitably to a decision mandating same-sex marriage across the nation seems doubtful. *See* Ball, *supra* note 3, at 1185; Vikram Amar & Alan Brownstein, *More On President Bush's Proposed Same-Sex Marriage Amendment: Part Two of a Series on Wise and Unwise Constitutional Amendments* (Feb. 18, 2005), http://writ.news.findlaw.com/commentary/20050218_brownstein.html#bio.

246. *Supra* notes 168-71 and accompanying text.

247. *See infra* note 274 and accompanying text (on the merits and desirability of an incremental strategy).

248. *See* Smardz, *supra* note 12.

249. Those decisions are Lawrence v. Texas, 539 U.S. 558 (2003) (holding anti-sodomy statutes unconstitutional), and Halpern v. Toronto, [2003] O.A.C. 276, ¶¶ 108, 154 (Can.) (holding that the common law prohibition on same-sex marriage violated the Canadian Charter of Rights and Freedoms, § 15(1) and that the appropriate remedy was a mandamus order requiring the issuance of marriage licenses to the couples involved in the case).

250. In 1996, only twenty-eight percent of those polled by Gallup favored civil unions. B.A. Robinson, Ontario Consultants on Religious Tolerance, Longitudinal U.S. Public Opinion Polls: Same-Sex Marriage and Civil Unions (Aug. 17, 2003),

ten years,[251] and some form of civil partnership is already recognized in many states.[252]

Importantly, those who object to same-sex marriage only on the grounds of judicial overreaching cannot object to successful legislation. Whether it is enacted by the people directly, or by their legislative representatives, legislation does not represent the imposition of one person's–or one small group of people's–will on the masses. Thus, strange as it may sound, lobbying for legislative change, probably in the form of civil partnerships, may be a desirable choice for same-sex rights advocates in the wake of the constitutional amendments of 2004.[253]

b. Consequences of Judicial Decisions: Concern over the Remedy

As discussed above, judicial decisions on the issue of same-sex legal rights tend to be "dramatic," and they engender controversy because they can have such broad consequences.[254] But, especially at the state level, they may not always have to have such consequences. Decisions in the United States, Canada, and even the United Kingdom illustrate that judges, mindful of the dramatic consequences of these types of decisions, may not only be able to grant same-sex rights advocates the relief they seek, but they may also craft remedies that quell some of the potential controversy surrounding the issue.

In *Baker v. State*, for example, the Vermont Supreme Court held that restricting marriage to same-sex couples violated the Common Benefits Clause of the state constitution.[255] In doing so, it rejected the state's arguments in favor of restricting the benefits of marriage to straight couples, the main one being that it promotes the state's interest in procreation.[256] The court, however, took a

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http://www.religioustolerance.org/hom_poll5.htm [hereinafter Longitudinal Polls]. By May 2003, forty-nine percent of those polled favored civil unions and forty-nine percent opposed them. *Id.* By August 2003, a similar poll by the *Washington Post* suggested support for civil unions had dropped to thirty-seven percent. *Id.* However, it appears that by May 2004, the divide on civil unions was back to about half-and-half, with perhaps a slight majority favoring them. Smardz, *supra* note 12.

251. *See* Longitudinal Polls, *supra* note 250; Smardz, *supra* note 12.

252. *Supra* notes 141-45, 198 and accompanying text.

253. Of course, in those states that amended out of their constitutions even the possibility of civil partnerships, *see supra* note 168 and accompanying text, advocates do not have this option. They may, however, choose to pursue state or local protections of rights in a piecemeal fashion, and then lobby for amendment to the state's constitution when the controversy regarding the issue dies down.

254. *Developments in the Law*, *supra* note 14, at 2013.

255. Baker v. State, 744 A.2d 864, 886 (Vt. 1999).

256. *Id.* at 881-86.

restrained approach when it came to crafting the appropriate remedy. Rather than drastically redefining the term "marriage" to include same-sex couples,[257] the Vermont court held that the appropriate remedy was to allow the legislature time to fashion appropriate legislation that extended the rights of married couples to same-sex couples.[258] The result was Vermont's civil union statute.[259] The Supreme Court of Canada reached a similar result in interpreting the Ontario Family Leave Act.[260] The Court held that a portion of that Act that restricted relief only to spouses violated § 15(1) of the Canadian Charter of Rights and Freedoms, but held that the appropriate remedy was legislative.[261] Finally, it is important to note that *any* case regarding the rights of same-sex couples decided by the ECHR or the courts of the United Kingdom under the Human Rights Act will necessarily come with legislative remedy.[262]

Contrast this approach with cases in both the United States and Canada that imposed the more drastic remedy of requiring the issuance of marriage licenses to same-sex couples.[263] In those cases, political reaction seems to have been swift and severe. It was probably *Baehr* that led to the passage of DOMA,[264] and largely *Goodridge* that led to the introduction of the Federal Marriage Amendment and the jurisdiction-stripping provisions of H.R. 3313.[265] It was *Halpern*, not *M. v. H.*, that drew the ire of Justice Scalia in his *Lawrence*

257. Courts in Ontario, Canada, and Massachusetts held that this redefinition was the appropriate remedy. Halpern v. Toronto, [2003] O.A.C. 276, ¶ 154 (Can.); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

258. *Baker*, 744 A.2d at 887.

259. VT. STAT. ANN. tit. 15, § 1204 (2002).

260. M v. H., [1999] S.C.R. 3.

261. *Id.* at ¶¶ 74, 145-47. *See also* Grossman, *supra* note 241, at 565-68 (arguing that the approach in *M. v. H.* was the correct one because it allowed the legislature to craft a remedy defined clearly enough to provide same-sex couples with equal treatment).

262. *See supra* notes 209-20 and accompanying text. In *Dudgeon* (probably the most notable case out of the United Kingdom in this area), for example, the ECHR declared that sodomy laws violated the Convention, and it was up to Parliament to legislate accordingly. Dudgeon v. U.K., 45 Eur. Ct. H.R. (ser. A) (1981). Even though Parliament was somewhat hamstrung by the *Dudgeon* decision, it is important that it had at least some authority to legislate on the issue (such as fixing the age of consent), rather than the ECHR merely striking the legislation from the books.

263. Baehr v. Lewin, 852 P.2d 44, 57 (Haw. 1993) (requiring the state to allow same-sex couples to marry unless the state could demonstrate a compelling contrary interest); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska) (same); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 953-69 (Mass. 2003) (rejecting the state's advanced interests and holding that same-sex couples must be granted the right to marry); Halpern v. Toronto, [2003] O.A.C. 276, ¶ 154 (Can.) (holding that same-sex couples must have the right to marry).

264. *See* Shipley, *supra* note 177.

265. *Supra* notes 180-83 and accompanying text.

dissent.[266] And it was largely *Goodridge* and the fear that the *Lawrence* reasoning might extend to same-sex marriage that led to the proposal and passage of eleven state constitutional amendments banning same-sex marriage in November 2004.[267]

All of this suggests that drastic remedies arouse bitter controversy. This is not to suggest that decisions imposing less drastic remedies do not also lead to controversy; they surely do. But apparently these less drastic decisions do not lead to retaliatory legislation and/or constitutional provisions. Because of this, judges and advocates should use caution in imposing remedies, and should look to authority both within and without the United States (including particularly the system in the United Kingdom). It may be that a remedy that gives lawmakers some flexibility is the best choice.

B. The Tradition Objection and a Plausible Response

Beyond objecting to judges deciding the issue, people, politicians, and state governments object to same-sex marriage on a more substantive ground: the tradition of marriage requires that it be limited to heterosexual couples.[268] A tradition argument was at the heart of the Supreme Court's decision in *Bowers* and much of the *Lawrence* opinion focuses on debunking the *Bowers* Court's historical analysis.[269] The tradition argument was implicit in the Massachusetts Department of Public Health's procreation and family argument in *Goodridge*, and was explicitly utilized by the trial judge in ruling against the plaintiffs in that case.[270] And the tradition argument is pervasive in the political debate on the issue.[271]

Whether or not the tradition objection is a valid reason to restrict marriage to heterosexual couples, it is certainly true that there is no longstanding tradition of state-sanctioned same-sex marriage in the United States or anywhere else.[272] The tradition argument, however, loses much of its force when applied to other types of legal recognition of same-sex partnerships because it permits "marriage" to retain its singular, traditional status. This may well be why public support for civil unions is higher than that for same-sex civil marriage.[273]

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266. "The Court today pretends that [its ruling does not logically require the legal recognition of same-sex marriage], as has recently occurred in Canada . . . ." Lawrence v. Texas, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (citing *Halpern*).

267. Rosenberg & Breslau, *supra* note 7.

268. *Supra* note 239 and accompanying text.

269. *See Lawrence*, 539 U.S. at 568-72.

270. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003).

271. *See, e.g.*, State of the Union Address, *supra* note 241.

272. *See* Dent, *supra* note 239.

273. President Bush acknowledges as much by supporting the Federal Marriage Amendment on tradition grounds but admitting that he would not object to a state's right to create civil unions. Bumiller, *supra* note 197.

Because same-sex civil unions are not subject to the tradition argument, and because they seem to be less controversial, civil unions may be a suitable goal for same-sex marriage advocates in the short run. This is not to suggest that gays and lesbians should ultimately "settle for less," but a practical solution may be to seek substantially similar rights to those of marriage while avoiding the controversy that comes with arguing for extension of the marital tradition.[274] This seems to be what happened in the United Kingdom, where the Civil Partnership Act passed with little opposition[275] and the issue of marriage was not really discussed.

Whether it is right to defend marriage merely on tradition grounds is not the subject of this analysis, but the tradition objection is the reality of public discourse on the issue. Seeking legal civil partnerships for same-sex couples does not seem to offend notions of tradition that some attach to the institution of marriage. It may thus be a beneficial strategy for advocates of same-sex rights.

C. A Unified Approach

Combining the responses to the judicial overreaching objection and the tradition objection, a unified approach emerges, under which advocates of legal same-sex unions would pursue some sort of civil partnership legislation and advocates and judges would try to avoid drastic remedies that subvert the will of the majority. The limitations of this suggested approach are apparent: certainly not all same-sex couples will be satisfied with a strategy that ultimately seeks rights under a name other than "marriage." It may be, however, that this limitation is a product of the political and cultural climate and will die away with time. In the interim, it may be preferable to avoid letting "the perfect be the enemy of the good."[276]

VI. CONCLUSION

The evolution of law in the United Kingdom with regard to the rights of gays and lesbians provides a good comparison with that of the United States. A few key differences may counsel in favor of adopting an approach more in line with that of the United Kingdom, in which legislative change is a major goal and

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274. There is certainly not agreement that an incremental strategy (seeking civil unions first, marriage later) is desirable or even rationally defensible. For a thorough review of the argument against the incremental strategy, see James M. Donovan, *Baby Steps or One Fell Swoop?: The Incremental Extension of Rights Is Not a Defensible Strategy*, 38 CAL. W. L. REV. 1 (2001).

275. *Supra* notes 92-93 and accompanying text.

276. Senator Hillary Rodham Clinton used this language in explaining her opposition to same-sex marriage, but support for civil partnerships. Donovan, *supra* note 274, at 5.

the severe effects of judicial rulings are tempered at least slightly. This admittedly may lead to the avoidance (at least temporarily) of same-sex "marriage," but it may be the only response in the United States that does not create bitter controversy and legal backlash.