

## Chapter 4: Same Sex Marriage and the First Amendment By Robert Brandon Anderson, Research Director

*“Ages of experience have taught us that the commitment of a husband and wife to love and to serve one another promotes the welfare of children and the stability of society... Government, by recognizing and protecting marriage, serves the interests of all.”*  
- President George Bush, Weekly radio address.<sup>1</sup>

In this segment of our report, I focus on the role religion plays on same-sex marriages. Moreover, this segment will explore the implications that the First Amendment has on the issue of same-sex marriage. Throughout America, gay marriage is a hot button issue pressed on the floor of the U.S. Congress and in many election campaigns. In 2003, the Massachusetts Supreme Judicial Court incited a national debate when it ruled that the state must allow gay and lesbian couples to marry.<sup>2</sup> Overnight, same-sex marriage became a national issue, pitting religious and social conservatives against gay-rights advocates and their allies.

Moreover, the debate over same-sex marriage shows no signs of coming to an end. Those who argue for a constitutional amendment banning same-sex marriage contend that same-sex marriages would start us down a "slippery slope" towards legalized incest, bestial marriage, polygamy and all kinds of other horrible consequences. Whereas, those on the opposite side of the debate argue that same-sex marriage would simply offer important civil rights that should be offered to any two people that are committed to each other.<sup>3</sup> Still, courts throughout the U.S. struggle with the concept of same-sex marriage. As revealed by Justice Kennedy's stance that granting gays the right to marry, is a "special" right. Kennedy observed in his opinion overturning Colorado's infamous Amendment 2, that many gay and lesbian Americans, under current law, are denied civil rights protections that others either don't need or assume that everyone else along with themselves, already have.<sup>4</sup> However, the debate goes much deeper than special rights; it concerns basic human civil rights. Still, even though there are many rational arguments surrounding this issue, the debate often encompasses theology as well.

Given this context, it is clear that same-sex marriages fall under the scope and protection of the First Amendment and which is then applied against the states through the equal protection clause of the Fourteenth Amendment. This became apparent on May 16, 2008 when California became the second state, after Massachusetts, to allow same-sex couples to marry. The California Supreme Court ruled that the state's constitution guarantees gays and lesbians the right to wed.<sup>5</sup> Voters in California now face Proposition 8, an attempt to overturn the court's ruling. In fact, states wishing to replicate the actions of Massachusetts and California face an uphill battle. Therefore, this study first examines the religious dilemmas surrounding the same-sex marriage debate. Next, the paper explores the myriad

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<sup>1</sup> President Calls for Constitutional Amendment Protecting Marriage, Office of the press secretary, (Feb 24, 2004).

<sup>2</sup> 798 N.E.2d 941 (Mass. 2003)

<sup>3</sup> Civil rights such as: power of attorney, courtroom protection, and personal equality.

<sup>4</sup> See *Romer v. Evans*, 517 U.S. 620 (1996), was a United States Supreme Court case dealing with civil rights and state laws. The Court gave its ruling on May 20, 1996 against an amendment to the Colorado state constitution that would have prevented any city, town or county in the state from taking any legislative, executive, or judicial action to protect homosexual citizens from discrimination on the basis of their sexual orientation.

<sup>5</sup> re Marriage Cases 43 Cal.4th 757 [76 Cal.Rptr.3d 683, 183 P.3d 384] (2008)

court cases that have attempted to brake down the same-sex barrier, before finally examining a solution that may help to ease the tensions surrounding this question.

### **Religious Dilemmas**

Many social conservatives and religious groups who oppose same-sex unions assert that marriage between a man and a woman is the bedrock of a healthy society because it leads to stable families and to children who grow up to be productive adults.<sup>6</sup> Allowing gay and lesbian couples to wed, many argue, “will radically redefine marriage and further weaken it at a time when the institution is already in deep trouble due to high divorce rates and the significant number of out-of-wedlock births.”<sup>7</sup> Moreover, many assert that giving gay couples the right to marry will ultimately lead to granting people in polygamous and other nontraditional relationships the right to marry as well.<sup>8</sup> The debate took an even graver tone when President George W. Bush reaffirmed his beliefs on the subject. “I believe marriage has served society well, and I believe it is important to affirm that — that marriage between a man and a woman is the ideal,” furthermore, Bush stated, “the job of the president is to drive policy toward the ideal.” Bush continued by stating that, “It’s an issue that’s very sensitive, and the voice of the people needed to be heard. And the constitutional process is the best way to do such.”<sup>9</sup> Obviously, the President’s message has a theoretical foundation. With the backing of the President, those opposing same-sex marriages now have important support for their constitutional ban.

Aside from political foes of same-sex marriage, proponents also face significant religious resistance. The U.S. Conference of Catholic Bishops opposes gay marriage on the ground that “marriage is a faithful, exclusive and lifelong union between one man and one woman.” In 2003, the conference’s Administrative Committee stated that “what are called ‘homosexual unions’ [cannot be given the status of marriage] because they do not express full human complementarity and because they are inherently nonprocreative.”<sup>10</sup> Similarly, in 2003, the Southern Baptist Convention issued a statement confirming its opposition to gay marriage. It called on “Southern Baptists not only to oppose same-sex unions, but to demonstrate our love for those practicing homosexuality by sharing with them the forgiving and transforming power of the gospel of Jesus Christ (1 Corinthians 6:9-11).”<sup>11</sup> Mormonism, Judaism, Islam, United Methodists, Lutherans and the National Association of Evangelicals have issued statements referring to the sinful nature of same-sex marriages because marriage is solely between a man and a woman.<sup>12</sup> While religions insist on protecting the sanctity of marriage, they must reconcile this belief with the guarantees provided by the First Amendment.

### **U.S. History of Same-Sex Marriages**

Gay Americans have been calling for the right to marry, or at least to create more formalized relationships, since at least the 1960s, but same-sex marriage has only emerged as a national

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<sup>6</sup> See “Religious Groups’ Official Positions on Same-Sex Marriage.” *Pew Forum on Religion & Public life*. 1 April 2008.

<sup>7</sup> See Congregation for the doctrine of the faith: Considerations regarding proposals to give legal recognition to unions between homosexual persons. *Pew Forum on Religion & Public life*. April 1, 2008.

<sup>8</sup> Republican platform, (2004) pg 83, retrieved on August 20, 2008

<sup>9</sup> Bush said these remarks during a White House appearance with German Chancellor Gerhard Schroeder on February 27, 2004.

<sup>10</sup> U.S. Catholic Bishops’ Administrative, Committee Calls for Protection of Marriage (2003)

<sup>11</sup> Transcripts of the Southern Baptist Convention 2003. retrieved on www.sbc.net on August 20, 2008

<sup>12</sup> See “Religious Groups’ Official Positions on Same-Sex Marriage.” *Pew Forum on Religion & Public life*. 1 April 2008.

issue in the last 15 years.<sup>13</sup> The spark that started the debate came from Hawaii in 1993 when the state's Supreme Court ruled that an existing law banning same-sex marriage would be unconstitutional unless the state government could show that it had a compelling reason for discriminating against gay and lesbian couples.<sup>14</sup>

However, that decision did not immediately lead to the legalization of gay marriage within the state; instead it sparked a nationwide backlash.<sup>15</sup> Over the following decade, legislatures in more than 40 states passed Defense of Marriage Acts (DoMAs), which define marriage solely as the union between a man and a woman.<sup>16</sup> Moreover, in 1996, the U.S. Congress passed and President Clinton signed a federal DoMA that defines marriage for purposes of federal law as the union between a man and a woman. The law also asserts that no state can be forced to legally recognize a same-sex marriage performed in another state.<sup>17</sup> Following the signing of the federal DoMA, many states elected to interpret the laws as they wished.<sup>18</sup>

Beginning in the late 1990s, Alaska, Nebraska and Nevada amended their state constitutions to prohibit same-sex marriage. These constitutional changes aimed at taking the issue out of the hands of judges. Social conservatives, in particular, feared that without constitutional language specifically defining marriage, many judges would take it upon themselves to read other constitutional provisions broadly and "create" a right to same-sex marriage.

Amid widespread efforts by many states to prevent same-sex marriage, there was one victory for gay-rights advocates in the late part of the decade. In 1999, the Vermont Supreme Court ruled that gay and lesbian couples are entitled to all of the rights and protections associated with marriage.<sup>19</sup> In *Baker v. Vermont*, three same-sex couples filed suit after they were denied marriage licenses. The couples subsequently sued their respective towns, and the state of Vermont, requested a declaratory judgment that the license refusal violated Vermont's marriage statutes and Constitution.

The state, along with two of the towns, moved to dismiss the lawsuit on the grounds that no relief could be legally granted for the plaintiffs' grievances. The trial court granted the defendants' motion, ruling that the marriage statutes could not be construed to allow same-sex marriages and that the statutes were constitutional because they served the public interest by promoting "the link between procreation and child rearing".<sup>20</sup> However, the court determined there was no issue of administrative necessity or pragmatism that justified the arbitrary exclusion of certain individuals from the rights and privileges accorded by marriage. Therefore, the legislature pushed for civil unions as a way around the issue.

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<sup>13</sup> See *Id.*

<sup>14</sup> *Baehr v. Lewin* 74 Haw. 645, 852 P.2d 44 (1993)

<sup>15</sup> Rather than risk a state Supreme Court decision in favor of gay unions, Hawaiian voters in 1998 rewrote their state constitution to give lawmakers, not the courts, the right to define marriage, and lawmakers subsequently voted to prohibit gay nuptials.

<sup>16</sup> Public Law No. 104-199, 110 Stat. 2419, 1 U.S.C. § 7 and 28 U.S.C. § 1738C

<sup>17</sup> 1 U.S.C. § 7 and 28 U.S.C. § 1738C

<sup>18</sup> Five states recognize some alternative form of same-sex union, twelve states ban any recognition of any form of same-sex unions including civil unions, twenty-five states have adopted amendments to their state constitution prohibiting same sex marriage, and another twenty states have enacted statutory DoMAs.

<sup>19</sup> *Baker v. Vermont* (1993)

<sup>20</sup> See *Id.*

The court allowed the state legislature to determine how to grant these rights to same-sex couples. The following year, the Vermont legislature approved a bill granting gay and lesbian couples the right to form civil unions.<sup>21</sup> Under Vermont's law, same-sex couples who enter into a civil union accrue all the rights, benefits and responsibilities of marriage, though they are not technically married.

In 2003 the courts began to address the high stakes of actual same-sex marriages. The Massachusetts Supreme Judicial Court held that a state law limiting marriage to opposite-sex unions violated the Massachusetts Constitution. *Goodridge v. Department of Public Health* re-ignited a national debate on the what exactly was the meaning of marriage.<sup>22</sup> In *Goodridge*, the Massachusetts Supreme Judicial Court held by a vote of 4-3 that the state's constitution requires the government to offer "the protections, benefits and obligations conferred by civil marriage to two individuals of the same sex who wish to marry."<sup>23</sup> The case arose after Julie and Hillary Goodridge, a lesbian couple, sought a marriage license from the Massachusetts Department of Health. The department quickly denied the request, claiming that Massachusetts did not recognize same-sex marriage. The Goodridges then sued the department, alleging that this denial violated their right to individual liberty and legal equality as guaranteed by the Massachusetts Constitution.

Chief Justice Margaret Marshall held that denying marriage benefits to same-sex couples violated the Massachusetts Constitution because it did not accomplish a legitimate government goal.<sup>24</sup> Moreover, the court reasoned, that the rationale given by the government for banning same-sex marriage would not be promoted by prohibiting same-sex couples from marrying.<sup>25</sup> Thus, the only basis for the state's decision to exclude same-sex couples from the institution of marriage was a disapproval of their lifestyle. Because the court concluded that condemning a lifestyle is not a "constitutionally adequate reason" for denying marriage benefits, it held that the state must permit same-sex couples to marry.<sup>26</sup> Governor Mitt Romney, a Mormon, responded to the *Goodridge* decision by proposing an amendment to the Massachusetts Constitution that defined marriage as including only one man and one woman.<sup>27</sup> After a prolonged quarrel on the floor of the legislature, it finally approved a compromise amendment in 2004 that prohibited gay marriage but created civil unions for same-sex couples. The Massachusetts decision was a landmark case that made strides toward establishing a precedent for gay and lesbian citizens in the United States. Nevertheless, same-sex individuals were still not offered full equal protection and rights.

However, in May 2008, the California Supreme Court held, 4-3, that state laws limiting marriage to opposite-sex couples violated the state constitution.<sup>28</sup> In *re Marriage Cases* (2008), the California Supreme Court consolidated six individual cases, and found that same-sex

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<sup>21</sup> Unlike traditional marriages, civil unions and domestic partnerships are invalid outside the state in which they are granted - except in states that expressly accept them - moreover they do not provide any federal marriage benefits. Federal protections conferred by marriage include 1,138 laws and policies, such as Social Security, family medical leave, federal taxation and immigration policy.

<sup>22</sup> 798 N.E.2d 941 (Mass. 2003),

<sup>23</sup> See Id.

<sup>24</sup> See Id.

<sup>25</sup> The reasons given were promoting procreation, ensuring a good child-rearing environment and preserving state financial resources.

<sup>26</sup> See Id.

<sup>27</sup> Mooney, B. The making of Mitt Romney. *The Boston Globe*. (2006)

<sup>28</sup> *re Marriage Cases*, 43 Cal.4th 757 [76 Cal.Rptr.3d 683, 183 P.3d 384],

couples are constitutionally entitled to the identical marital rights and privileges as opposite-sex couples. The opinion, written by Chief Justice Ronald George, cited the court's 1948 decision that reversed the state's interracial marriages ban. The court found that "equal respect and dignity" of marriage is a "basic civil right" that cannot be withheld from same-sex couples, that sexual orientation is a protected class like race and gender, and that any classification or discrimination on the basis of sexual orientation is subject to strict scrutiny under the Equal Protection Clause of the California State Constitution.<sup>29</sup> The California courts were the first state courts in the country to offer marriage protection to same sex individuals.

Thus, the reasoning in the *Goodridge* decision and California decision differed in one fundamental respect. The Massachusetts court established a right to same-sex marriage on the ground that there is no rational basis for denying marital rights to same-sex couples, whereas the California court established an important landmark by elevating gays and lesbians to the same protected legal status as racial minorities and women.<sup>30</sup> Moreover, the California decision was a major disappointment to same-sex marriage opponents, who subsequently asked the court to reconsider its decision. If the court would not accept this request, the opponents argued, the court should at least postpone the decision's effectiveness until after the November 2008 election, when voters would have a chance to overrule the decision by approving a referendum prohibiting same-sex marriage. On June 4, 2008, the California Supreme Court issued a resolution refusing both requests, and immediately counties within the state began marrying same-sex couples on the evening of June 16.<sup>31</sup>

### Solution

Following the ruling of the California Supreme Court, gay rights advocates will almost certainly continue to file lawsuits at the state level. However, if this legal battle migrates to the federal courts, where the issue would be whether the U.S. Constitution guarantees gay and lesbian couples the right to wed, the gay marriage movement faces a major challenge, since it would give the U.S. Supreme Court the ultimate say on the issue. An unfavorable outcome in the high court would prevent gay couples from arguing for a right to same-sex marriage under the U.S. Constitution, leaving only state constitutions, and thus state courts, as the only means by which same-sex couples could secure a constitutional right to same-sex marriage.

Conversely, if the fight continues to the U.S. Supreme Court, the California decision may force the highest court to examine gay and lesbian rights once more, as they did in *Lawrence v. Texas*, a major victory for gay rights because it overturned the ruling in *Bowers v. Hardwick* which left the matter in state hands.<sup>32</sup> The next rulings must address the fundamental issue at stake: the people in these cases are humans that deserve equal rights, and the California courts recognized this. The benefit of the California ruling is that the state constitution generally forbids any distinction whatsoever between same-sex and opposite-sex unions, whether in benefits or merely in name. Any law that discriminates against one of these protected groups is constitutional only if it can justify such discrimination on the basis of a compelling

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<sup>29</sup> See *Id*

<sup>30</sup> See *id.* The California Supreme Court held that sexual orientation is a "suspect class" under the California Equal Protection Clause, and state laws limiting marriage to opposite-sex unions therefore violate the state constitution.

<sup>31</sup> McKinley, Jesse. "Court Won't Delay Same-Sex Marriages." *The New York Times*. 5 June 2008.

<sup>32</sup> *Bowers v. Hardwick* 478 U.S. 186 (1986); *Lawrence v. Texas* 539 U.S. 558 (2003)

government need. For example, polygamy has been outlawed since the 1860s because of the need for proper parenting of children.

Thus, the juxtaposition of the California decision and the rhetoric from the opponents of the same-sex marriage opens the discussion to the validity of whether protection through the First Amendment is pertinent. Since marriage is not simply a civil or secular association, asking for legal recognition of religious marriages has constitutional implications. "Because state supports religious marriage and because those communities have a place in defining public policy," Alpert says, "it is imperative that religious liberty claims be considered."<sup>33</sup>

The First Amendment of the U.S. Constitution prohibits the federal government from making a law "respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>34</sup> This provision was later expanded to state and local governments, through the incorporation of the Fourteenth Amendment. Moreover, the *Establishment Clause* of the First Amendment prohibits the Federal government from establishing a national church or excessively involving itself in religion, particularly to the benefit of one religion over another. This clause when applied against the states through the Fourteenth Amendment grants protection to gay and lesbian marriages throughout the United States. If the government places a ban on same-sex marriages, it preserves the "sanctity of marriage" while also keeping gays and lesbians second-class citizens. Furthermore, the government would inherently be placing the religious belief that marriage is between a man and a woman, above any other religious or personal beliefs.<sup>35</sup> This is problematic, considering that not every person in the United States attends to the tenants of the Judeo-Christian-Islamic faiths.

There is another major issue involved in this debate. The *Free Exercise Clause* states that Congress cannot "prohibit the free exercise" of religious practices.<sup>36</sup> This clause suggests that the state must make accommodation to religion for a sincerely held and established religious belief, unless there is some compelling government interest that overrides such practices. Same-sex marriage proponents have argued that state and federal governments have no compelling interest in prohibiting same-sex marriage, claiming that the marriages would harm no one in society, nor require any cost to the government. These marriages would even support government interests in the stability and support of children, and provide an efficient way to distribute health care benefits.<sup>37</sup> However, the Supreme Court has consistently held that even though the First Amendment guarantees the right to free exercise, this right is not absolute.<sup>38</sup> Therefore, if the highest court in the country finds that there is a compelling

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<sup>33</sup> Rebecca T. Alpert, *Religious Liberty, Same-Sex Marriage, and the Case of Reconstructionist Judaism* 125, in *God Forbids Religion and Sex*. In *American Public Life*, (Kathleen M. Sands ed., 2000).

<sup>34</sup> *Reynolds v. United States*, 98 U.S. 145 (1878)

<sup>35</sup> As reviewed earlier when discussing religious stances on same-sex marriage.

<sup>36</sup> *Reynolds v. United States*, 98 U.S. 145 (1878). The Court in *Reynolds* distinguished between religious belief and religious conduct or action, stating that Congress was "deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive to good order." Recognizing the religious defense, the Court said, would "permit every citizen to become a law unto himself." While the government could not punish citizens because of their religious beliefs, it could regulate religiously motivated conduct, provided that it had a rational basis for doing so.

<sup>37</sup> See *Id.*

<sup>38</sup> See *Id.*

government interest – such as preserving social values – the California ruling could be overturned.<sup>39</sup>

Some in the gay rights movement believe that instead of risking a Supreme Court ruling, it would be more advantage to follow the path in the California case: that it is a states' rights issue. In *re Marriages*, the California Supreme Court made a landmark decision by expanding the scope and protection of the religious rights in their state. The Court first examined the decision in *American Academy of Pediatrics v. Lungren*, which affirms that California may choose to provide greater protection under their own Constitution than is provided under the national Constitution, even if the two constitutions were to have identical wording in a given area.<sup>40</sup> Therefore, the California Court determined that at any time that it chooses, it could take back the power to provide greater protection under the state's *Establishment Clause* than is recognized by the U.S. Supreme Court. In fact, that Court has clearly concluded that a state is permitted to provide, in its own constitution, "individual liberties more expansive than those conferred by the Federal Constitution."<sup>41</sup> Moreover, in *Catholic Charities of Sacramento, Inc., v. Superior Court*, the California Court's majority opinion held that with respect to the *Free Exercise Clause*, the Court is not bound by the national Supreme Court's interpretation of the *Free Exercise Clause* of the *First Amendment*.<sup>42</sup> California's broad interpretation of the *Establishment Clause* has established a precedent that many states may choose to follow. Obviously, if the states remain the battleground, opponents of same-sex marriage have an opportunity to impede the process. Even in California in November, voters will have the opportunity to repeal the decision and reinstate the ban on same-sex unions. However, the California Supreme Court has given supporters of same-sex marriage hope. It is up to the voters to determine if uninhibited equality to every adult who chooses to love another.

Throughout this chapter, I have explored the constitutionality of same-sex marriages in the United States. No court decision concerning the marriage of two same-sex people will ever be able to please all sides unless major educational efforts are undertaken on this issue. However, the California Supreme Court decision sets a precedent that shifts the burden of proof to those opposed to same-sex marriages. Aren't these unions protected by the First and Fourteenth Amendments? Don't states have the right to extend more rights than are provided in the U.S. Constitution? And if they do, will President Bush's call for constitutional amendment on this issue be the only way to reverse current trends? It is fair to say that same-sex marriage rights are in flux. The question is whether reform will continue in the way it was advanced in California or whether reform will be reversed by further court rulings and popular referenda.

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<sup>39</sup> Justice Kennedy could be the swing vote concerning this issue. He has shown some sympathy with the gay rights movement in *Lawrence*. However, at the same time he emphasized that the right of gay and lesbian couples to engage in intimate conduct is very different, from a right to a same-sex marriage when examined as a constitutional matter. The Supreme Court has used social values as a compelling government interest in cases involving obscenity and indecency.

<sup>40</sup> 16 Cal. 4th 307, 325-326 (1997)

<sup>41</sup> *Pruneyard Shopping Centers v. Robbins*, 447 U.S. 74, 81 (1980).

<sup>42</sup> 32 Cal. 4th 527, 560-561 (2004)