


6-21-2011

# Referenda and the District of Columbia's Human Rights Act: Voting on Same-Sex Marriage in the Nation's Capital

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### Recommended Citation

Stewart, Jacob (2011) "Referenda and the District of Columbia's Human Rights Act: Voting on Same-Sex Marriage in the Nation's Capital," *Legislation and Policy Brief*: Vol. 3: Iss. 2, Article 4.

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REFERENDA AND THE DISTRICT OF COLUMBIA'S HUMAN  
RIGHTS ACT:  
VOTING ON SAME-SEX MARRIAGE IN THE NATION'S  
CAPITAL

JACOB A. STEWART<sup>1</sup>

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<sup>1</sup> Many thanks to Professor Lynn Wardle for guiding me to this topic and for his help and encouragement along the way, and to Professor Helen Alvaré for adding her invaluable insights to my work, as well as for her mentorship throughout law school. Thanks also to my parents, to Mrs. Unold, and to other teachers, family members, and friends who got me to this point in the first place, and to the staff of the Legislation and Policy Brief for preparing my Comment for publication. A special thanks to my Heavenly Father for His perfect plan, His inspiration, tender mercies and blessings, and to my wife and personal editor-in-chief, Tirsia, for her editing help, love, patience, and support throughout this entire process.

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### INTRODUCTION

Beginning with Massachusetts in 2003,<sup>2</sup> the courts and legislatures of many states have had to decide whether same-sex marriage is or should be a fundamental right under their respective constitutions.<sup>3</sup> Although only five states and the District of Columbia legally perform same-sex marriages,<sup>4</sup> a few other jurisdictions are in the process of proposing laws moving in that direction.<sup>5</sup> However, the vast majority of states are holding fast to the traditional heterosexual definition of marriage. Thirty-eight states have adopted some sort of Defense of Marriage Act, constitutional amendment, or similar measure that defines marriage as the union between one man and one woman.<sup>6</sup>

In May 2009, the D.C. Council passed a law requiring the District to recognize same-sex marriages performed in other jurisdictions.<sup>7</sup> Within a few weeks after the Council vote, a group of ministers and other same-sex marriage opponents formally approached the D.C. Board of Elections and Ethics with a referendum designed to block the city from recognizing such marriages.<sup>8</sup> However, D.C. referendum law prohibits referenda that authorize unlawful discrimination under the

<sup>2</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003) (declaring a prohibition on same-sex marriage to be contrary to the Massachusetts constitution, but granting a 180-day stay for purposes of legislative review of the decision).

<sup>3</sup> See, e.g., *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (arguing that a state bar against same-sex marriage is discriminatory because it violates a fundamental right); *In re Marriage Cases*, 183 P.3d 384, 427 (Cal. 2008) (holding that because marriage is a fundamental right, marriage should be available to all couples regardless of sexual orientation), *superseded by constitutional amendment*, CAL. DECLARATION OF RIGHTS CODE § 7.5 (West 2008) (containing a note that the statute was held unconstitutional by *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010)); *Dean v. District of Columbia*, 653 A.2d 307, 331 (D.C. 1995) (stating that same-sex marriage is not a fundamental right).

<sup>4</sup> Maria Godoy, *State by State: The Legal Battle Over Gay Marriage*, NPR, <http://www.npr.org/templates/story/story.php?storyId=112448663> (last visited Jan. 18, 2010) (listing Massachusetts, Vermont, Connecticut, Iowa, and New Hampshire as states where gay marriages are currently legally performed).

<sup>5</sup> *Id.*

<sup>6</sup> See *id.*

<sup>7</sup> Nikita Stewart, *How Gay Marriage Recognition Works*, WASH. POST, July 7, 2009, at B02.

<sup>8</sup> Tim Craig, *Group Aims to Block D.C. Marriage Bill; Same-Sex Union Foes Seek Referendum*, WASH. POST, May 28, 2009, at B01.

D.C. Human Rights Act (the “Human Rights Act” or the “Act”).<sup>9</sup> On June 15, 2009, a two-member D.C. elections board blocked the referendum proposal, claiming that same-sex marriage is protected under the Human Rights Act.<sup>10</sup> The proponents of the referendum appealed the decision to the D.C. Superior Court.<sup>11</sup> The Superior Court upheld the Board’s decision and declined to delay enactment of the controversial bill, reasoning that the ballot initiative process was still an option even after the time for a referendum had lapsed.<sup>12</sup> The law, therefore, went into effect on July 7, 2009.<sup>13</sup>

On September 1, 2009, several D.C. residents filed the “Marriage Initiative of 2009” with the Board.<sup>14</sup> The initiative sought to codify the traditional definition of marriage in order to overturn the law recognizing same-sex marriages performed in other jurisdictions, and to prevent the District from altering the definition of marriage in the future.<sup>15</sup> Both the Board and the Superior Court denied this second petition, again reasoning that a popular vote on the issue would be contrary to the Human Rights Act protections.<sup>16</sup>

In the following months, the D.C. Council and Mayor instituted an additional bill that would allow same-sex marriages to be performed *within* the District.<sup>17</sup> Traditional marriage proponents again attempted to propose a referendum designed to prevent the bill from taking effect.<sup>18</sup> For the third time, both the D.C. Board of Elections and Ethics and the D.C. Superior Court declared that allowing a popular vote on the same-sex marriage issue would condone unlawful discrimination on the basis of sexual orientation under the D.C. Human Rights Act.<sup>19</sup> Since the Court was not willing to stay its decisions on the two proposed referenda, appealing those decisions became moot once the laws took effect, and defenders of traditional marriage were only able to appeal the Superior Court’s decision regarding the Marriage Initiative

<sup>9</sup> D.C. CODE § 1-1001.16(b)(1)(C) (2001).

<sup>10</sup> Tim Craig, *Same-Sex Marriage Gains Traction; Council, Not Voters, Gets Say-So on Non-D.C. Unions*, WASH. POST, June 16, 2009, at A01.

<sup>11</sup> D.C. CODE § 1-1001.16(b)(3) (2001) (permitting an appeal to the D.C. Superior Court for a writ of mandamus); Keith L. Alexander, *Judge Asked to Block Decision; D.C. Residents Fight Board’s Ruling Against Referendum*, WASH. POST, June 18, 2009, at B02.

<sup>12</sup> See *Jackson v. D.C. Bd. of Elections & Ethics (Jackson I)*, No. 2009 CA 004350 B at 1-2, 10-11 (D.C. Super. Ct. 2009), available at [http://www.dccourts.gov/dccourts/docs/09-4350\\_Jackson\\_v\\_DCBOEE.pdf](http://www.dccourts.gov/dccourts/docs/09-4350_Jackson_v_DCBOEE.pdf).

<sup>13</sup> Stewart, *supra* note 6.

<sup>14</sup> *In Re: Marriage Initiative of 2009: Hearing Before the District of Columbia Board of Elections and Ethics*, No. 09-006 at 1, 4 (D.C. 2009), available at [http://www.dcboee.org/pdf\\_files/nr\\_227.pdf](http://www.dcboee.org/pdf_files/nr_227.pdf).

<sup>15</sup> *Id.* at 1-2.

<sup>16</sup> *Id.* at 12; *Jackson v. D.C. Bd. of Elections & Ethics*, No. 2009 CA 008613 B at 14-15 (D.C. Super. Ct. Jan. 14, 2010), available at <http://www.dccourts.gov/dccourts/docs/2009CA008613B.pdf>.

<sup>17</sup> Tim Craig, Nikita Stewart & Michelle Boorstein, *Message Appended to Marriage Bill; At Signing, Fenty Notes Gays’ Religious Support and Struggle for Rights*, WASH. POST, Dec. 19, 2009, at B01.

<sup>18</sup> *In Re: Referendum on the Religious Freedom and Civil Marriage Equality Amendment Act of 2009: Hearing Before the District of Columbia Board of Elections and Ethics*, No. 10-001 at 1-2 (D.C. 2010).

<sup>19</sup> *Id.* at 17; Tim Craig, *Same-Sex Marriage Ruling Upheld by Judge*, WASH. POST, Feb. 20, 2010, at B06.

of 2009. In *Jackson II*, the D.C. Court of Appeals upheld the Superior Court's ruling regarding the proposed initiative, and an application for certiorari was denied by the Supreme Court.<sup>20</sup>

Because much of the Board's, the Superior Court's, and the Court of Appeals' reasoning in subsequent decisions depends on and largely follows the Board's and Superior Court's analysis of the permissibility of the original proposed referendum,<sup>21</sup> this Note focuses on the litigation surrounding that referendum. In doing so, this Note analyzes the District's voting laws and the Human Rights Act, concluding that, despite the courts' rhetoric, neither D.C. law nor judicial precedent prevent any registered, qualified elector or electors from the District of Columbia from ordering a referendum or an initiative for the purpose of overturning, by popular vote, unwanted same-sex marriage legislation.

Part I discusses the background and specific provisions of D.C. voting laws that apply to the same-sex marriage issue. Part II examines the language and purposes of the D.C. Human Rights Act to determine whether it expressly or implicitly protects same-sex marriage. Part III analyzes the Board's and the D.C. Superior Court's decisions regarding the original proposed referendum, and supports the legality of allowing the voters in the District of Columbia to have the final say in their jurisdiction on the same-sex marriage issue. Part IV summarizes the same-sex marriage debate, and discusses some implications and consequences of legalizing same-sex marriage in order to highlight some of the more prudential reasons for allowing the voters to avail themselves of the referendum/initiative process to preserve or abandon the traditional definition of marriage.

## I. REFERENDA: PURPOSES AND PROCEDURES

### A. HISTORIC PURPOSES OF REFERENDA

Fueled by the Populist and Progressive movements in the late 1800s, states began to add the referendum and initiative processes to their constitutions because they distrusted state governments, which were often influenced by big business.<sup>22</sup> "Generally speaking, the referendum enables citizens to ratify or reject statutes passed by a legisla-

<sup>20</sup> *Jackson v. D.C. Bd. of Elections & Ethics (Jackson II)*, 999 A.2d 89, 91-93 (D.C. 2010), *cert. denied*, 131 S. Ct. 1001 (2011).

<sup>21</sup> The initiative case includes an additional lengthy discussion of whether the Human Rights Act provision should have been added to the D.C. Charter in the first place. See *Jackson II*, 999 A.2d at 91-115. The D.C. Court of Appeals held in a 5-4 vote that adding the Human Rights provision to the District's voting laws did not amount to reversible error. *Jackson II*, 999 A.2d at 12. This argument, although it could provide the Supreme Court with an avenue to review the D.C. courts' decision without reaching the merits of the Human Rights violation claim, does not change the Courts' substantive analysis of the general permissibility of a popular vote on the same-sex marriage issue under D.C.'s Human Rights and voting laws, as discussed in this Note.

<sup>22</sup> Bryan L. Page, *State of Emergency: Washington's Use of Emergency Clauses and the People's Right to Referendum*, 44 GONZAGA L. REV. 219, 227-28 (2009) (describing the implementation of direct

ture, while the initiative enables citizens to draft laws themselves and put them before the populace for a vote.”<sup>23</sup> Populists and Progressives hoped that the referendum and initiative processes would allow them to monitor the state governments through an established system of direct democracy.<sup>24</sup> Referenda and initiatives have historically been used to overturn unfavorable legislation, to decide a controversial issue that the legislature chooses to refer to the electorate for a vote, or to approve a state constitutional amendment, special tax, or other important measure.<sup>25</sup> For example, the California Supreme Court upheld an initiative allowing local voters to alter zoning designations, despite objections by adversely-affected land owners in the area.<sup>26</sup> In addition, thirty-one states have allowed citizens access to either referendum or ballot initiative processes within their respective states to preserve the traditional definition of marriage by popular vote, despite objections from same-sex marriage proponents.<sup>27</sup>

There are no provisions for either the referendum or the initiative processes at the federal level, but both are widely available within the United States at the state or local level.<sup>28</sup> While some jurisdictions allow unfettered access to the referendum and initiative processes, most states prohibit direct democracy where it might endanger one of the branches of state government, disrupt vital tax and appropriation measures, or limit the police power as it relates to emergency situations, public peace, health, or safety.<sup>29</sup> The District of Columbia, which codified its referendum and initiative laws in 1978 with the Initiative, Referendum, and Recall Charter Amendments Act,<sup>30</sup> further prohibits referenda and initiatives that would effectively authorize unlawful forms of discrimination.<sup>31</sup>

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democracy at the state level as a means to make state governments more responsive to the will of the people).

<sup>23</sup> Ethan L. Leib, *Interpreting Statutes Passed Through Referendums*, 7 ELECTION L. J. 49, 49 (2008).

<sup>24</sup> See Page, *supra* note 21, at 227-28 (“Populists supported direct democracy as a means to solve the problem of unresponsive state governments by putting in place a political scheme whereby the people could make and reject laws on their own. Likewise, Progressives also had a disdain for political machinery that failed to respond to the will of the people.”).

<sup>25</sup> See *Referendum: Acts, Bills, and Laws, Direct Democracy Reforms*, U-S-HISTORY.COM, <http://www.u-s-history.com/pages/h880.html> (last visited Feb. 22, 2011) (defining petition referendum, optional referendum, and constitutional (or statutory) referendum as the three main types of referenda practiced in the United States).

<sup>26</sup> *DeVita v. County of Napa*, 889 P.2d 1019, 1023-24 (1995).

<sup>27</sup> See Doug Mainwaring, *The Wrong Way to Win the Right to Marry*, WASH. POST, Nov. 15, 2009, at C07 (“Same-sex marriage has been defeated by popular vote in 31 states, most recently in Maine.”). This article, written by a gay man, argues that legalizing same-sex marriage by legislative act or by judicial decree is the wrong way for homosexuals to win the right to marry and that the right should be obtained through popular vote if at all. *Id.*

<sup>28</sup> Leib, *supra* note 23, at 49.

<sup>29</sup> WEST’S ENCYCLOPEDIA OF AMERICAN LAW 288-89 (2d ed. 2005).

<sup>30</sup> D.C. LAW 2-46, 24 D.C. REG. 199 (1978) (codified as amended at D.C. CODE § 1-204.101 *et seq.*).

<sup>31</sup> D.C. CODE § 1-1001.16(b)(1)(C) (2001).



## B. REFERENDUM LAW AND ITS PRECEDENT IN D.C.

In the District, a provision does not become law until it has been (a) approved by a majority of the Council, (b) expressly or implicitly approved by the mayor within ten business days of the Council giving the measure to him or her, or approved over the mayor's disapproval of the bill by a two-thirds majority of the Council, and (c) expressly or implicitly approved by the President of the Senate and the Speaker of the House within 30 business days of receiving the measure.<sup>32</sup> If D.C. voters wish to propose a referendum, they must do so within that narrow time frame.<sup>33</sup> Once a measure becomes law, the voters' only recourses are to pursue an initiative on the measure or to "seek redress through the political process by lobbying the Council and by exercising their right to vote."<sup>34</sup>

Before a proposed referendum is placed on a voting ballot, it is reviewed and then approved or rejected by the D.C. Board of Elections and Ethics.<sup>35</sup> The pertinent provisions of the law regarding the referendum review process state the following:

(b)(1) Upon receipt of each proposed initiative or referendum measure, the Board shall refuse to accept the measure if the Board finds that it is not a proper subject of initiative or referendum, whichever is applicable, . . . upon any of the following grounds: . . . (C) The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2 [the Human Rights Act]. . . . (3) If the Board refuses to accept any initiative or referendum measure submitted to it, the person or persons submitting such measure may apply . . . to the Superior Court of the District of Columbia for a writ in the nature of mandamus to compel the Board to accept such measure . . . If the Superior Court of the District of Columbia determines that the issue presented by the measure is a proper subject of initiative or referendum . . . and that the measure . . . does not authorize discrimination as prescribed in paragraph (1)(C) of this subsection . . . it shall issue an order requiring the Board to accept the measure . . . .

Thus, the courts act as a check on the voting process in case the Board wrongly denies a valid referendum.

<sup>32</sup> D.C. CODE § 1-204.04(e) (2001); D.C. CODE § 1-206.02(c) (2001).

<sup>33</sup> See D.C. CODE § 1-204.102(b)(2) (2001) ("No act is subject to referendum if it has become law according to the provisions of § 1-204.04.").

<sup>34</sup> *Jackson I*, No. 2009 CA 004350 B at 12.

<sup>35</sup> D.C. CODE § 1-1001.16 (2001).

“[A]bsent express or implied limitation, the power of the electorate to act by initiative is *coextensive* with the power of the legislature to adopt legislative measures.”<sup>36</sup> Because of the important role of initiatives and referenda in government, D.C. courts are “required to construe the right of initiative *liberally*, and may impose only those limitations expressed in the law or clearly and compellingly implied.”<sup>37</sup> The same or similar standards apply to referenda.<sup>38</sup> Based upon these principles, the Board, and especially the courts, should not refuse a referendum request under D.C. Code Section 1-1001.16(b)(1)(C) unless the Human Rights Act expressly prohibits the discriminatory action, or unless the referendum in question would authorize prohibited discrimination “clearly and compellingly implied” within the Act.<sup>39</sup> Therefore, to determine whether the proposed referendum would violate Section 1-1001.16(1)(C), the reviewing body must determine whether any language contained in the Human Rights Act either explicitly or “clearly and compellingly” prohibits some form of discrimination that the referendum might authorize.

## II. THE HUMAN RIGHTS ACT AND THE DISTRICT OF COLUMBIA’S SAME-SEX MARRIAGE DEBATE

### A. SCOPE OF THE D.C. HUMAN RIGHTS ACT

This Section argues that: (1) the D.C. Human Rights Act was designed to prevent only negative forms of discrimination that would infringe on an individual’s fundamental rights; (2) same-sex marriage has never been recognized as a fundamental right in D.C.,<sup>40</sup> but even if it were, federal and local laws support or at least condone a wide variety of exceptions to fundamental rights, including the right to marry, as a necessary means of protecting compelling social and moral interests; (3) the Human Rights Act, which has previously been interpreted as not protecting same-sex marriage,<sup>41</sup> also permits several other forms of discrimination relating to fundamental rights, including marriage, and

<sup>36</sup> *Convention Ctr. Referendum Comm. v. D.C. Board of Elections and Ethics*, 441 A.2d 889, 897 (D.C. 1981) (emphasis added).

<sup>37</sup> *Hessey v. Burden*, 584 A.2d 1, 3 (D.C. 1990) (emphasis added and internal citations omitted); see also *Citizens Against Legalized Gambling v. D.C. Bd. of Elections and Ethics*, 501 F. Supp. 786, 789 (D.C. 1980) (“Initiative legislation should be liberally construed to extend its operation rather than to reduce it.”).

<sup>38</sup> See *Hessey*, 584 A.2d at 3 (D.C. 1990) (quoting *Convention Ctr. Referendum Comm.*, 441 A.2d at 924 (Gallagher, J., dissenting) (The “charter grants of authority for the exercise of the *initiative and referendum* are to be liberally construed”) (emphasis added)).

<sup>39</sup> *Id.* at 3 (internal citations omitted); see also *Citizens Against Legalized Gambling*, 501 F. Supp. at 789 (“Initiative legislation should be liberally construed to extend its operation rather than to reduce it.”).

<sup>40</sup> See *Dean*, 653 A.2d at 333 (contemplating marriage as a fundamental right only in its relation to procreation between the opposite sexes).

<sup>41</sup> See *Dean*, 653 A.2d at 309-10.



should not have been able to preclude a referendum on the same-sex marriage issue without explicitly stating that intent.<sup>42</sup>

#### 1. FORMS OF PROHIBITED DISCRIMINATION ARE DESIGNED TO PROTECT FUNDAMENTAL RIGHTS

The District originally passed its Human Rights Act in 1977 “to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit.”<sup>43</sup> The word “discrimination,” standing alone, is a neutral term meaning “distinguishing in favor of or against.”<sup>44</sup> The common usage of the word, however, has a negative connotation.<sup>45</sup> Because the D.C. Human Rights Act could not have meant to end all “distinguishing in favor of or against,”<sup>46</sup> the Act must limit its prohibition of discrimination to those categories which are legally, or at least popularly, defined. In the context of the legal and common uses of the word discrimination, the content of the Act provides a clear understanding of its meaning and scope.

Examining the Act's content and organization reveals that it is referring to the common categories in which the law and society have condemned differential treatment of protected groups.<sup>47</sup> With few or no exceptions, United States laws protect racial, gender, and other enumerated groups from discrimination in the negative sense only when unequal treatment occurs in relation to employment, housing, public accommodations, and educational institutions.<sup>48</sup> In enacting the Human Rights Act, the D.C. Council intended to end “discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an

<sup>42</sup> The inability of the Human Rights Act to include same-sex marriage, without explicit language to that effect, is discussed in Section B of this Part, and in Part III of this Note.

<sup>43</sup> D.C. CODE § 2-1401.01 (2007).

<sup>44</sup> BLACK'S LAW DICTIONARY 534-35 (9th ed. 2009).

<sup>45</sup> Curtis Crawford, *Rescuing the Concept of Discrimination*, 14 ACAD. QUESTIONS, Summer 2001, at 47, 48-49.

<sup>46</sup> BLACK'S LAW DICTIONARY 534-35 (9th ed. 2009). Several D.C. laws and court decisions make or allow rational-basis distinctions between people on the basis of gender, age, and other physical or behavioral attributes. See, e.g., *NOW v. Mut. of Omaha Ins. Co.*, 531 A.2d 274, 276 (D.C. 1987) (holding that the D.C. Human Rights Act did not apply to gender-discriminatory actuarial pricing by insurance companies); D.C. CODE § 46-403(4) (2009) (distinguishing between ages for marriage purposes); D.C. CODE § 7-1703 (2009) (distinguishing between smokers and non-smokers to promote public health).

<sup>47</sup> See D.C. CODE § 2-1402.01 (2007) (recognizing “[e]very individual shall have an equal opportunity to participate fully in . . . the District and . . . in all aspects of life. . . .”). See also 18 U.S.C. § 245 (1996) (prohibiting willful or unwillful injury to persons in employment, public services and accommodations, and education based upon their race or religion); Adam A. Milani, *Living in the World: A New Look at the Disabled in the Law of Torts*, 48 CATH. U. L. REV. 323, 331 (1999) (discussing the common forms of discrimination prohibited by civil rights legislation).

<sup>48</sup> See *id.*

intrafamily offense, and place of residence or business.”<sup>49</sup> This same or similar grouping of protected classes is repeated in eleven other places within the main body of the Act, under the headings of Employment, Housing and Commercial Space, Public Accommodations, Educational Institutions, and Miscellaneous Provisions.<sup>50</sup>

Later provisions of the Act actually limit the functions of the Office of Human Rights to receiving, reviewing, and investigating “*unlawful* discrimination in *employment, housing, public accommodations, or educational institutions*.”<sup>51</sup> By so doing, the Act limits its enforcement power to these four categories. These categories seem to focus on securing already-recognized fundamental rights to a previously segregated racial minority, where the term “separate but equal” prevailed before civil rights legislation took effect,<sup>52</sup> rather than on expanding the District’s definition of fundamental rights. The above categories are not a random enumeration of areas of protection; rather, they are a premeditated outline of areas of life directly related to fundamental rights.<sup>53</sup> They affect an individual’s rights to live, work, and operate freely and equally in society.

Some of the wording in the Act may suggest that its intended scope includes broader protections, however: Part A of the Act calls for an “equal opportunity to participate in *all* aspects of life,” and states that its prohibition of discrimination is “not limited to” the above four categories.<sup>54</sup> Despite this wording, practicality, the structure, enforcement limitations,<sup>55</sup> and prior judicial interpretation of the Act,<sup>56</sup> and the existence of other D.C. laws that violate the broad wording of the Act,<sup>57</sup> all reaffirm the notion that the Act is more limited in its application than some of its language suggests in theory.

<sup>49</sup> D.C. CODE § 2-1401.01 (2007).

<sup>50</sup> D.C. CODE §§ 2-1402.11(a), 2-1402.11(a)(4)(B), 2-1402.11(b), 2-1402.21(a), 2-1402.21(b), 2-1402.31(a), 2-1402.31(b), 2-1402.41(1), 2-1402.41(2), 2-1402.71, 2-1402.73 (2007).

<sup>51</sup> D.C. CODE § 2-1411.03 (2007) (emphasis added).

<sup>52</sup> For a general discussion of racial segregation in the United States, see Jennifer Blue, *An Analysis of Jim Crow Laws and Their Effects on Race Relations*, available at <http://www.yale.edu/ynhti/curriculum/units/1996/1/96.01.01.x.html> (last visited Jan. 18, 2010).

<sup>53</sup> See, e.g., 18 U.S.C. § 245 (1996) (describing standard categories of protected rights); Milani, *supra* note 48, at 331 (discussing the common forms of discrimination prohibited by civil rights legislation).

<sup>54</sup> D.C. CODE § 2-1402.01 (2007) (emphasis added).

<sup>55</sup> See D.C. CODE § 2-1411.03 (2007) (specifying the functions of the Office of Human Rights).

<sup>56</sup> See *Dean*, 653 A.2d at 319 (“The Council . . . did not intend the Act to prohibit every discriminatory practice.”).

<sup>57</sup> See, e.g., *NOW*, 531 A.2d at 276 (holding that the D.C. Human Rights Act did not apply to gender-discriminatory actuarial pricing by insurance companies); D.C. CODE § 46-403(4) (2009) (distinguishing between ages for marriage purposes); D.C. CODE § 7-1703 (2009) (distinguishing between smokers and non-smokers to promote public health).

## 2. FUNDAMENTAL RIGHTS AND THEIR EXCEPTIONS

It is important to note that, although fundamental rights are virtually universally protected within the U.S., “the word ‘right’ is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified.”<sup>58</sup> The Supreme Court has defined fundamental rights as those “deeply rooted in this Nation’s history and tradition.”<sup>59</sup> In 1894, John Dillon listed the most prominent fundamental rights in the United States: namely life, liberty, contracts, and property.<sup>60</sup> Courts have also recognized marriage, voting, and interstate travel as fundamental rights.<sup>61</sup> The following paragraphs discuss these rights and point out some of the moral, social, and political views that often qualify them to promote compelling state interests.

The Fifth and Fourteenth Amendments to the U.S. Constitution, in addition to Article I, Section 10, clause 1, support Dillon’s 1894 definition of “fundamental rights” (*i.e.*, life, liberty, contracts, and property).<sup>62</sup> The Supreme Court has marginally added to that list throughout the nation’s history,<sup>63</sup> but we need only list exceptions to Dillon’s four original fundamental rights to demonstrate that most if not all rights are limited in certain important ways.

First, federal statutes and Supreme Court decisions have held that the right to life does not apply to unborn children<sup>64</sup> or to certain criminals.<sup>65</sup> Furthermore, there is no equivalent right to end one’s life at will.<sup>66</sup> These limitations primarily stem from a judicially or publically-determined recognition that in certain instances, other rights (*i.e.*, indi-

<sup>58</sup> *Am. Bank & Trust Co. v. Fed. Res. Bank of Atlanta*, 256 U.S. 350, 358 (1921).

<sup>59</sup> *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 503 (1977).

<sup>60</sup> See David A. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 34 (2003) (“[T]he ‘great fundamental rights guaranteed by [American] constitutions are life, liberty, contracts, and property.’”) (quoting John F. Dillon, *THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA* 212 (1894)).

<sup>61</sup> BLACK’S LAW DICTIONARY 744 (9th ed. 2009) (“As enunciated by the Supreme Court, fundamental rights include voting, interstate travel, and various aspects of privacy (such as marriage and contraception rights).”).

<sup>62</sup> “No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1. “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” U.S. CONST. art. I, § 10, cl. 1.

<sup>63</sup> See, *e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (declaring that marriage is a fundamental right).

<sup>64</sup> See *Roe v. Wade*, 410 U.S. 113, 164-65 (1973) (authorizing abortion).

<sup>65</sup> See *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976) (upholding the legality of the death sentence for committing murder).

<sup>66</sup> See *Vacco v. Quill*, 521 U.S. 793, 808-09 (1997) (upholding New York laws that made physician-assisted and other forms of suicide illegal); 42 U.S.C. § 14401(a)(2) (2006) (recognizing that suicide is a criminal offense in many states and stating that it would be unlawful for the federal government to support illegal activities).

vidual autonomy, the good of the community, or public safety) may supersede the right to be born or to continue living.<sup>67</sup>

Second, United States statutes and common law limit the right to liberty in many ways. For example, the U.S. government either mandates or supports age limitations on voting,<sup>68</sup> smoking,<sup>69</sup> driving,<sup>70</sup> consuming alcoholic beverages,<sup>71</sup> sex,<sup>72</sup> marriage,<sup>73</sup> and so on. Public nudity is prohibited.<sup>74</sup> Women are limited in their freedom to breastfeed in public.<sup>75</sup> There are places where people are not allowed to bicycle, certain times of year that people cannot hunt, areas where swimming is prohibited, and the list goes on. The government also lawfully discriminates based upon social or financial status, such as with welfare programs and graduated income taxes, thus stripping the wealthy of some of their liberty to use their resources as they please. Clearly, liberty is a heavily limited fundamental right in the United States. The government elects to limit the liberty rights of one group to serve the greater interests of community safety, order, and peace.

Third, the nation's laws limit the freedom to contract.<sup>76</sup> Minors often cannot enter into binding contractual agreements.<sup>77</sup> Businesses cannot create monopolies and cannot operate in certain ways that would damage the environment. The government sometimes imposes rent

<sup>67</sup> See *Roe*, 410 U.S. at 162-63 (implying that a mother's right to autonomy and health supersede a fetus's right to continue living). Furthermore, the fact that the public may elect to terminate the life of certain individuals who have murdered others implies that general public safety and order supersede a murderer's right to continue living. See *Gregg*, 428 U.S. at 179-81 (describing overwhelming public support of capital punishment).

<sup>68</sup> U.S. CONST. amend. XXVI, § 1 (setting the minimum voting age at 18).

<sup>69</sup> See 42 U.S.C. § 300x-26 (2006) (withholding grants from states that allow minors to purchase tobacco).

<sup>70</sup> See V. Nathaniel Ang, Comment, *Teenage Employment Emancipation and the Law*, 9 U. PA. J. LAB. & EMP. L. 389, 389 (2007) (stating that "[t]he minimum driving age is sixteen in most states.").

<sup>71</sup> See 23 U.S.C. § 158 (2006) (withholding funds from states that allow persons under the age of 21 to purchase or publically possess alcoholic beverages).

<sup>72</sup> See 42 U.S.C. § 14016 (2006) (encouraging laws that prohibit adults from having sex with minors (statutory rape laws)).

<sup>73</sup> Ang, *supra* note 71, at 389 (stating that states have minimum marriage age laws).

<sup>74</sup> *S. Fla. Free Beaches, Inc. v. City of Miami*, 734 F.2d 608, 610 (11th Cir. 1984) (stating that public nudity is not constitutionally protected).

<sup>75</sup> See Elizabeth Hildebrand Matherne, *The Lactating Angel or Activist? Public Breastfeeding as Symbolic Speech*, 15 MICH. J. GENDER & L. 121, 122 (2008) (lamenting that it is often taboo to breastfeed in public).

<sup>76</sup> *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 392 (1937) ("There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards.") (internal citation omitted).

<sup>77</sup> See E. ALLAN FARNSWORTH, *CONTRACTS* § 4.3 (4th ed. 2004) (stating that most, if not all jurisdictions allow minors to disaffirm a contract.) Although this does not directly prohibit contracting with a minor, most businesses are obviously not willing to take the risk of doing so for fear that the minor will later shirk his or her obligations at the expense of the business. This safeguard is actually a limitation on a minor's ability to contract because the minor cannot contract out of his or her ability to disaffirm a contract in order to convince an auto dealership to allow him to buy a car without a co-signer, for instance.

controls, prohibits contractual prostitution or slavery, and mandates a minimum wage.

All of these limitations on the freedom to contract again serve important state and social interests. The right of minors to contract is limited because society does not want them entering unawares into binding obligations.<sup>78</sup> The government imposes environmental regulations to protect the larger societal interests of health and enjoyment of nature.<sup>79</sup> It prohibits monopolies because the rights of individuals to conduct business and to produce market competition are important for the overall financial welfare of the nation and its citizens.<sup>80</sup> It establishes the minimum wage and rent controls to prevent large businesses from exploiting their workers or tenants.<sup>81</sup> Society supports these government controls because it feels that some rights and protections are more important than the unlimited ability to form contracts.

Fourth, the right to obtain and keep property is limited in several ways. As with the other enumerated rights, minors often do not enjoy the full range of property rights available to adults.<sup>82</sup> Society is also subject to government-imposed zoning laws and the government's power of eminent domain. These police powers sacrifice some rights of private individuals for the overall public good.<sup>83</sup>

Finally, the Supreme Court has recognized marriage as a fundamental right.<sup>84</sup> However, the fundamental right to marry is "inextricably linked to [the] fundamental rights of procreation, childbirth, and child-rearing," and "is not absolute."<sup>85</sup> Thus, marriage is primarily impor-

<sup>78</sup> See Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minors' Incapacity to Contract Through the Cyberscope*, 43 GONZ. L. REV. 239, 240 (2008) ("The long-accepted rationale for the minority incapacity doctrine has been that children lack the ability to understand and appreciate the consequences of their acts, and thus should not be inextricably bound by the consequences of their youthful follies.").

<sup>79</sup> David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis*, 24 ECOLOGY L.Q. 545, 554 (1997) ("Most public health and environmental statutes have the goal of protecting public health and the environment, rather than balancing that protection against economic interests.").

<sup>80</sup> See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940) (stating that the purpose of anti-monopoly legislation was to "[prevent] restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.").

<sup>81</sup> See *Parrish*, 300 U.S. at 398-99 (upholding a minimum wage law in order to protect an underprivileged class of workers from exploitation by their employers); *Pennell v. San Jose*, 485 U.S. 1, 13 (1988) (stating that "a legitimate and rational goal of price or rate regulation is the protection of consumer welfare," and upholding a rent control provision based on that goal).

<sup>82</sup> See, e.g., D.C. CODE §§ 21-301 to -324 (2009) (limiting the immediate availability of gifted or transferred property to minors, and appointing a custodian over the property until the minor reaches the age of majority).

<sup>83</sup> See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (using the condemnation of land for a public railroad as a legitimate reason for taking private property).

<sup>84</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>85</sup> Alison Lorenzo, *Constitutional Law - Equal Rights Amendment, Equal Protection, and Due Process - The Right of Same-Sex Marriage is Not Fundamental, Prohibiting Same-Sex Marriage Does Not*



tant because it serves to further the order, existence, and perpetuation of civilization through procreation.<sup>86</sup> In that light, the United States and D.C. governments have refused to recognize forms of marriage that, in their judgment, would be harmful to society, or that would not serve healthy procreation-related ends.<sup>87</sup> Same-sex marriage is among those forms of marriage explicitly rejected by the federal government.<sup>88</sup>

### 3. PERMITTED DISCRIMINATION DESPITE THE D.C. HUMAN RIGHTS ACT

In the District of Columbia, discrimination, even in employment, housing and commercial space, public accommodations, and educational institutions, has an accepted and important place. D.C. laws necessarily permit some forms of discrimination in those categories in order to give way to more compelling social and moral interests, even though discrimination in the absence of those interests is strictly prohibited. For example, minors cannot exclusively manage, buy, or sell real property, work in certain capacities, or vote, even though the Act prohibits age discrimination involving housing<sup>89</sup> and employment.<sup>90</sup> Women and men are either socially or legally unauthorized to enter one another's public bathroom facilities, even though the Act prohibits gender discrimination in public accommodations.<sup>91</sup> Single people, in contrast to married couples, who have lived together for many years do not automatically inherit their roommate's property when that roommate dies, even though the Act prohibits housing discrimination based upon marital status.<sup>92</sup>

Marriage is also subject to important limitations. It would be unwise, in the name of eliminating discrimination or as public policy in general, to allow children to marry one another or adults to marry children (age discrimination), to allow married people to remarry without first obtaining a divorce (marital status discrimination), or to

*Constitute Gender-Based Discrimination, and Restrictions on the Right of Marriage are Rationally Related to the State's Interest in Regulation of Marriage - Conway v. Deane*, 39 RUTGERS L.J. 1003, 1012 (2008) (citing multiple Supreme Court decisions that have emphasized the vital role of procreation in upholding the fundamental right to marry).

<sup>86</sup> See Margo Wilson & Martin Daly, *Marital Cooperation and Conflict*, in *EVOLUTIONARY PSYCHOLOGY, PUBLIC POLICY AND PERSONAL DECISION* 197, 203 (Charles Crawford and Catherine Salmon eds., 2004) (concluding that marriage is "fundamentally a reproductive alliance"); *Loving*, 388 U.S. at 12 ("Marriage is one of the basic civil rights of man, fundamental to our very existence and survival.") (internal citation omitted); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (stating that marriage is "fundamental to the very existence and survival of the race").

<sup>87</sup> See 1 U.S.C. § 7 (2006) (federal statute excluding same-sex marriage and polygamy by limiting the definition to only cover the union of one man with one woman); 18 U.S.C. § 3509 (2006) (including incest and sex with minors within its criminal acts, thus inferring that marriage to siblings, parents, or minors is prohibited by federal laws); D.C. CODE § 46-401 (2001 & Supp. 2010) (prohibiting marriage to several types of family members).

<sup>88</sup> See 1 U.S.C. § 7 (2006).

<sup>89</sup> D.C. CODE § 2-1402.21 (2007).

<sup>90</sup> D.C. CODE § 2-1402.11 (2007).

<sup>91</sup> D.C. CODE § 2-1402.31 (2007).

<sup>92</sup> D.C. CODE § 2-1402.21 (2007).



allow near-blood relations to marry each other (genetic discrimination). Even if marriage were one of the “aspects of life” included in the Act, and thus protected from discrimination, the right to marry would necessarily be subject to these and other limitations in order to protect compelling state, social, and moral interests.<sup>93</sup>

Until recently, judicial precedent in the District of Columbia has included preventing same-sex marriage among its limitations on the right to marry, *specifically excluding it from protection under the Human Rights Act*.<sup>94</sup> Setting aside the recent decision by the D.C. Court of Appeals,<sup>95</sup> these considerations and others that will be discussed point to the unlikelihood that protection of same-sex marriage is “clearly and compellingly implied” by the Human Rights Act. Since it is also not expressly stated in the Act, one would think that the voters’ coextensive power to legislate should be allowed to operate unhindered. Additional analysis will further illuminate this point.

#### B. DEAN V. DISTRICT OF COLUMBIA: DOES DIFFERENTIATION CONSTITUTE UNLAWFUL DISCRIMINATION?

In 1995, the Clerk of the D.C. Superior Court denied a homosexual couple in D.C. a marriage license.<sup>96</sup> The District Court upheld the Superior Court’s decision, granting summary judgment against the couple.<sup>97</sup> The couple appealed the decision.<sup>98</sup> The highest court in D.C. held that summary judgment was proper in this case, because same-sex marriage is not a fundamental right protected by the U.S. Constitution, and because refusing the couple a marriage license did not constitute discrimination under the Human Rights Act.<sup>99</sup> Although *Jackson II* effectively overruled *Dean*’s holding regarding the Human Rights Act because “the landscape has changed dramatically” since then,<sup>100</sup> the arguments in *Dean*, coupled with a discussion of subsequent changes to D.C. law, are still persuasive evidence that *Jackson II* got it wrong. Furthermore, *Dean*’s constitutional holdings were left untouched by *Jackson II*, and remain good law.

<sup>93</sup> See *infra* Part IV for a discussion of these interests.

<sup>94</sup> *Dean v. District of Columbia*, 653 A.2d 307, 309 (D.C. 1995), *overruled by Jackson II*, 999 A.2d at 91-93 (holding that proposed initiative defining marriage as between one man and one woman would have had the effect of authorizing discrimination in violation of the Human Rights Act).

<sup>95</sup> *Jackson II*, 999 A.2d at 91-93.

<sup>96</sup> *Dean*, 653 A.2d at 309.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Jackson II*, 999 A.2d at 118-19 (noting that because “the landscape has changed dramatically” since *Dean*, an initiative denying same-sex couples the right to marry would be unlawfully discriminatory under the Human Rights Act). The merits of this statement will be addressed in Parts II.B.2 and III of this Note.

### 1. SAME-SEX MARRIAGE AS A FUNDAMENTAL RIGHT

In its analysis of same-sex marriage, the D.C. Court of Appeals concluded that same-sex marriage was not protected by the Due Process Clause of the Fifth and Fourteenth Amendments, or by any other provisions of the Constitution.<sup>101</sup> Writing for the majority in *Dean*, Judge Ferren first discussed the definition of constitutionally protected fundamental rights as described by the U.S. Supreme Court.<sup>102</sup> His analysis of why same-sex marriage cannot be classified as a fundamental right was brief: as the definitional, traditional, and legislative histories of both the United States and the District of Columbia have shown, same-sex marriage is simply not “deeply rooted in this Nation’s history and tradition,” and is therefore not a fundamental right protected by the Due Process Clause.<sup>103</sup> Because same-sex marriage is not a fundamental right, the D.C. Court of Appeals dismissed the couple’s constitutional claim.<sup>104</sup>

### 2. SAME-SEX MARRIAGE AND THE HUMAN RIGHTS ACT

Because the Human Rights Act was primarily intended to address the main categories of fundamental rights discussed in Section A of this Part, and because, as shown above, same-sex marriage is not a fundamental right recognized by the District of Columbia, it is unlikely that same-sex marriage is actually protected by the Human Rights Act. Furthermore, the Act could not have been meant to “change the ordinary meaning of the word ‘marriage’” without specifically mentioning that intention within the Act itself.<sup>105</sup> For the sake of argument, however, the D.C. Court of Appeals addressed the issue in *Dean* to determine whether the Clerk of the Superior Court’s refusal to issue a marriage license to a same-sex couple unlawfully denied an equal opportunity to homosexuals, in violation of the express or implied provisions of the Act.<sup>106</sup>

The court held that the Human Rights Act was never intended to prohibit every discriminatory practice, including the District’s authority to maintain the traditional definition of marriage.<sup>107</sup> However, both parties seemed to agree that denial of same-sex marriage would fall under the “place of public accommodation” provision of the Human

<sup>101</sup> *Dean*, 653 A.2d at 331.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 333 (quoting *Moore*, 431 U.S. at 503).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 319-20. See also *NOW v. Mut. of Omaha Ins. Co.*, 531 A.2d 274, 276 (D.C. App. 1987) (“Significantly, . . . the [D.C. Human Rights Act] contains no language purporting explicitly to regulate insurance premium practices. If the Council had intended to effect such a dramatic change in insurance rate-setting practices, it is reasonable to assume that there would have been at least some specific reference to it in the language of the Act or, at least, within its legislative history.”).

<sup>106</sup> *Dean*, 653 A.2d at 318.

<sup>107</sup> *Id.* at 319-20.

Rights Act, if it fell under any of the categories contained within the Act at all.<sup>108</sup> It is important to note that neither the court nor the parties seemed to suggest that discretionary governmental issuance of marriage licenses was or could have been included in any other part of the Act as an impliedly prohibited discriminatory practice. Thus, for purposes of its argument, the government accepted as true, and the court assumed without formally deciding, that the Marriage License Bureau was a “place of public accommodation” as defined by the former section 1-2502(24) of the Human Rights Act.<sup>109</sup> The analysis necessarily following that assumption focused on determining whether denying marital status to homosexual couples constituted an unlawful discriminatory practice within that “place of public accommodation.”

According to the D.C. Council, “the Human Rights Act should... be read in harmony with and as supplementing other laws of the District.”<sup>110</sup> For thousands of years prior to, and certainly during and following the enactment of the Human Rights Act of 1977, the widely recognized definition of marriage, including the legal definition of marriage within the District of Columbia, limited marriage to the union of opposite sexes.<sup>111</sup> Even more convincingly, the D.C. Council “consciously chose not to make the language of the Human Rights Act applicable to the regulation of the marital relationship.”<sup>112</sup> As evidence of this, only a few months before passing the Human Rights Act, the City Council expressly rejected a proposed marriage provision that would permit same-sex marriages.<sup>113</sup> Therefore, the D.C. Council could not have meant to radically redefine the institution of marriage by enacting the Human Rights Act of 1977, nor should it be able to do so in the absence of express legislation to that effect.<sup>114</sup> The “place of public accommodation” provision did not protect same-sex marriage, and the discriminatory issuance of marriage licenses could not have fallen under any other express or implied provision of the Act.<sup>115</sup> As

<sup>108</sup> *Id.* at 318-19.

<sup>109</sup> *Id.* The definition of “place of public accommodation” is currently found in section 2-1401.02 of the 2007 amended version of the Act.

<sup>110</sup> *Dean*, 653 A.2d at 319 (quoting COMM. ON PUBLIC SERVICES AND CONSUMER AFFAIRS, REPORT ON BILL NO. 2-179, THE HUMAN RIGHTS ACT OF 1977, at 3 (July 5, 1977)).

<sup>111</sup> *See Dean*, 653 A.2d at 309-10 (reviewing the findings of the District Court, which explained that “all definitional sources for ‘marriage’-the legislative history of the Marriage and Divorce Act, D.C. LAW 1-107, 1977 D.C. STAT. 114; the various references to gender in relevant provisions of the District of Columbia Code; the common law of the District of Columbia; decisions of appellate courts in other states; references to marriage in the Bible; and dictionary definitions of ‘marriage’-show that marriage inherently requires one male and one female participant.”).

<sup>112</sup> *Id.* at 310 (quoting the unpublished opinion of Judge Bowers of the D.C. Superior Court).

<sup>113</sup> *See id.* at 311-12 (describing a proposed bill, which would have sanctioned same-sex marriages within the District, that was rejected and replaced with legislation known as the Marriage and Divorce Act of 1977. This legislation only made minor changes to the already existing marriage laws and did not include any language about same-sex marriage.).

<sup>114</sup> *See id.* at 318 (citing *NOW v. Mut. of Omaha Ins. Co.*, 531 A.2d 274, 276 (D.C. App. 1987)).

<sup>115</sup> *See id.* at 318-20 (explaining that there is no mention within the Act, or within the legislative history of the Act, of any intention to “change the ordinary meaning of the word ‘marriage’ simply

the *Dean* court rightly decided, denying same-sex marriages was not a form of sexual orientation discrimination contemplated by or included in the Human Rights Act of 1977.<sup>116</sup>

Despite the *Dean* decision, supporters of gay marriage legislation claim that the D.C. Council has revised marriage laws since 1995 to make them more gender-neutral,<sup>117</sup> and has also revised the language of the “Human Rights Act to include references to same-sex couples married elsewhere.”<sup>118</sup> As discussed below, the first of these claims is immaterial and the second is simply not true. Furthermore, the D.C. Court of Appeals’ claim that there have been dramatic changes in D.C. marriage laws since the time of the *Dean* decision is a legal conclusion based almost completely on the very statutes at issue.<sup>119</sup>

At the time of the *Dean* decision, only one provision of the pertinent marriage laws contained gender-specific language.<sup>120</sup> The applicable paragraphs of that law stated:

The following marriages are prohibited in the District of Columbia and shall be absolutely void ab initio, without being so decreed, and their nullity may be shown in any collateral proceedings, namely: (1) The marriage of a man with his grandmother, grandfather’s wife, wife’s grandmother, father’s sister, mother’s sister, mother, stepmother, wife’s mother, daughter, wife’s daughter, son’s wife, sister, son’s daughter, daughter’s daughter, son’s son’s wife, daughter’s son’s wife, wife’s son’s daughter, wife’s daughter’s daughter, brother’s daughter, sister’s daughter; (2) The marriage of a woman with her grandfather, grandmother’s husband, husband’s grandfather, father’s brother, mother’s brother, father, stepfather, husband’s father, son, husband’s son, daughter’s husband, brother, son’s son, daughter’s son, son’s daughter’s husband, daughter’s daughter’s husband, husband’s son’s son, husband’s daughter’s son, brother’s son, sister’s son.<sup>121</sup>

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by enacting the Human Rights Act,” and that the Act, therefore, could not have been meant to cover same-sex marriage, which did not, by definition, exist).

<sup>116</sup> See *id.* at 320 (upholding the District Court’s grant of summary judgment on the Human Rights Act claim).

<sup>117</sup> Tim Craig, *Same-Sex Marriage Foes Vow Court Fight; Referendum Sought* *Conservative Groups to Offer Support, Funds*, WASH. POST, Oct. 27, 2009, at B02.

<sup>118</sup> Alexander, *supra* note 10.

<sup>119</sup> See *Jackson II*, 999 A.2d at 118-19 (citing JAMA and the Marriage Equality Act as the chief evidence for their claim).

<sup>120</sup> See *Dean*, 653 A.2d at 313 (citing D.C. CODE § 30-101 (1981), and noting that the only other provision containing “husband and wife” language was repealed by the Marriage and Divorce Act of 1977 because the provision discussed slave marriages).

<sup>121</sup> D.C. CODE § 30-101 (1981).

That section of the law remained intact until the Jury and Marriage Amendment Act of 2009, which repealed the gender-specific paragraphs quoted above, and added a new gender-neutral paragraph.<sup>122</sup> The new paragraph prohibits: "(2A) The marriage of a person with a person's grandparent, grandparent's spouse, spouse's grandparent, parent's sibling, parent, step-parent, spouse's parent, child, spouse's child, child's spouse, sibling, child's child, child's child's spouse, spouse's child's child, sibling's child."<sup>123</sup>

These changes should not invalidate the ruling in *Dean*. First, the reasoning in the case largely remains intact even with the changes. Second, these changes did not take place until the same time that the D.C. Council approved an additional provision recognizing same-sex marriages from other jurisdictions,<sup>124</sup> which was the very subject of the referendum that the D.C. Board of Elections and Ethics rejected on the grounds that it violated the Human Rights Act.

In *Dean*, the D.C. Court of Appeals reasoned that the paragraphs known as the consanguinity provision did more than prohibit genetically detrimental relationships (i.e. incest), because they also prohibited non-genetic relationships such as people marrying their step-parents or spouse's parents.<sup>125</sup> Instead, the provision was created to reflect social taboos, or moral judgments, that transcended genetic concerns.<sup>126</sup> Although the Court used this information to reason that the gender-specific language in the statute was proof that marriage was understood to be an inherently male-female relationship, its underlying argument, that D.C. marriage laws can and do reflect moral judgments and social views, remains the same even with gender-neutral language.<sup>127</sup>

Imagine a scenario, for example, where a youthful 50-year-old widower meets an enchanting 25-year-old woman at a local charity event. The two individuals are assigned to work together, and they find that they have a lot in common. They begin dating and are later married. Despite their age difference, the man and woman have a happy marriage, and enjoy the stability and companionship they bring to one another. Unfortunately, the man suffers an untimely death a year later, leaving his new bride a wealthy but lonely widow. Imagine that the man has a 26-year-old son from his first marriage, who was serving overseas in the military during his father's recent courtship and marriage. When the son hears of his father's death, he receives an honorable discharge to return home to attend his father's funeral and to help

<sup>122</sup> Jury and Marriage Amendment Act, D.C. LAW 18-9 (2009).

<sup>123</sup> D.C. CODE § 46-401 (2009).

<sup>124</sup> See Jury and Marriage Amendment Act, D.C. LAW 18-9 (2009) (effecting both the gender-neutral change and the recognition of same-sex marriages performed in other jurisdictions together in the same law).

<sup>125</sup> *Dean*, 653 A.2d at 313.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*



manage his father's estate. Because the son is much like his father, when he and his stepmother finally meet, they become quick friends. Although he owns a home on the other side of town, the son goes to visit his stepmother several times a week in order to help her with the family business. Over the course of the next year, their friendship develops into a romantic interest, and they decide to marry. However, current and prior D.C. law, reflecting the city's moral ideals, forbids their union and they can never enjoy a legal marriage unless the law is repealed.

If the Human Rights Act were meant to include discriminatory issuance of marriage licenses, then the hypothetical but plausible scenario just described would violate the Human Rights Act just as surely as a prohibition on gay marriage. The only difference between this hypothetical, which demonstrates the District's codified discrimination of prospective couples based upon their marital status (marriage to the son's father created the step-relationship that now precludes the son's ability to marry his widowed step-mother),<sup>128</sup> and a prohibition on same-sex marriage, is that the first social taboo is not actively contested, while the second has recently received more public attention. If the Human Rights Act includes discrimination of marital relationships, then prohibiting people from marrying their step-parents or spouse's parents, as codified in the newly-drafted paragraph 2(a) of D.C. Code Section 46-401 (2009), violates the Human Rights Act just as conclusively as a prohibition on same-sex marriage supposedly would. For that matter, even the genetic-based relationship prohibitions in the D.C. marriage laws<sup>129</sup> would constitute "genetic information"<sup>130</sup> discrimination if the Act covered the District's definition of marriage. Clearly, the Human Rights Act cannot contemplate socially-determined marriage regulations as a form of discrimination unless it includes specific provisions to that effect.

The second reason why the new gender-neutral provisions of D.C. Code Section 46-401 are immaterial to *Dean's* holding on the inapplicability of the Human Rights Act to marriage laws, is that those provisions were added at the same time as the provisions recognizing same-sex marriages from other jurisdictions,<sup>131</sup> and were added without parallel changes in the wording of the Human Rights Act.<sup>132</sup> As discussed

<sup>128</sup> D.C. CODE § 46-401(2)(a) (2009).

<sup>129</sup> See D.C. CODE § 46-401(2)(a) (2009) (prohibiting marriages between parents, grandparents, and siblings, but not marriages between cousins, who share the same genetic correlation as grandparents, indicating that the difference is social preference, not genetics).

<sup>130</sup> See D.C. CODE § 2-1402.31 (2007) (stating that it is unlawful to discriminate in public accommodations "based on the actual or perceived . . . genetic information . . . of any individual").

<sup>131</sup> See 56 D.C. REG. 003797 (May 6, 2009 ) (simultaneously changing D.C. CODE § 46-401 and adding D.C. CODE § 46-405.01).

<sup>132</sup> 53 D.C. REG. 14 (Jan. 6, 2006) (showing the last changes to the Human Rights Act in any way related to sexual orientation, approved in December of 2005, almost four years before the most recent changes to D.C. marriage laws).



previously, the gender-neutral provisions in Section 46-401 in no way condone or legalize same-sex marriage, nor do they make reference to either the Human Rights Act or to D.C. Code Section 46-405.01, the section recognizing same-sex marriages from other jurisdictions. D.C. Code Section 46-405.01 states:

A marriage legally entered into in another jurisdiction between 2 persons of the same sex that is recognized as valid in that jurisdiction, that is not expressly prohibited by §§ 46-401 through 46-404, and has not been deemed illegal under § 46-405, shall be recognized as a marriage in the District.

Thus, Section 46-405.01 refers back to Section 46-401 to clarify that the same-sex marriage provision does not change the meaning of Section 46-401, and that the types of marriages that Section 46-401 prohibits are to remain illegal under D.C. marriage laws. As discussed earlier, because Section 46-401 prohibits certain socially taboo marriages such as marriage to a person's step parents or in-laws, it would be inconsistent to say that the Human Rights Act prevents a marriage prohibition based upon sexual orientation but does not include similar protections for marital status or genetic information discrimination. In order for the D.C. marriage laws to operate as intended, there can be no correlation between those laws and the Human Rights Act. Recent additions and changes to the marriage laws, without any parallel amendments to the Human Rights Act, could not have established that correlation or materially affected the *Dean* decision.

Finally, the claims that recent changes to the Human Rights Act contain references to same-sex marriage or somehow protect same-sex marriage are not true. In 2005, the D.C. Council enacted D.C. Code Section 16-58 "to amend the Human Rights Act of 1977 to prohibit discrimination based on gender identity or expression." The law removed the phrase "sexual orientation" and replaced it with "sexual orientation, gender identity or expression" in several places throughout the Human Rights Act.<sup>133</sup> These terms do not alter or refer to the institution of marriage in any way. They certainly protect those who change their gender or dress in a manner contrary to their sex from any housing, employment, or other forms of discrimination covered under the Act, but they cannot and should not be understood to "change the fundamental definition of marriage."<sup>134</sup> There have been no amendments to the Act even remotely referring to sexual orientation or marriage since 2005; any claims to the contrary are ill-founded. For all of these reasons, the Court of Appeals' interpretation of the Human Rights Act in *Dean* should have remained the definitive law in the District of

<sup>133</sup> 53 D.C. Reg. 14 (Jan. 6, 2006).

<sup>134</sup> See *Dean*, 653 A.2d at 320. (stating that the HRA does not change the definition of marriage).

Columbia unless and until the Human Rights Act is altered to abrogate that interpretation.

### III. THE BOARD AND COURT DECISIONS ON THE PROPOSED SAME-SEX MARRIAGE REFERENDUM

After same-sex marriage opponents discovered that the D.C. Jury and Marriage Act of 2009 was pending Congressional approval, they submitted the following referendum proposal entitled “A Referendum Concerning the Jury and Marriage Amendment Act of 2009”<sup>135</sup> in accordance with D.C. Code Section 1-1001.16:

The D.C. Council approved “The Jury and Marriage Amendment Act of 2009.” The Act would recognize as valid a marriage legally entered into in another jurisdiction between 2 persons of the same-sex. The “Referendum Concerning the Jury and Marriage Amendment Act of 2009” will allow voters of the District of Columbia the opportunity to decide whether the District of Columbia will recognize as valid a marriage legally entered into in another jurisdiction between 2 persons of the same-sex. A “No” vote to the referendum will continue the current law of recognizing only marriage between persons of the opposite sex.<sup>136</sup>

The D.C. Board of Elections and Ethics rejected the proposal, however, because they claimed that the proposed referendum would authorize discrimination prohibited by the Human Rights Act:

[The proposed referendum would] strip same-sex couples of the rights and responsibilities of marriage that they were afforded by virtue of entering into valid marriages elsewhere, and that the Council intends to clearly make available to them here in the District, simply on the basis of their sexual orientation. Because the Referendum would authorize discrimination prohibited by the HRA, it is not a proper subject for referendum, and may not be accepted by the Board.<sup>137</sup>

In order to reach this conclusion, the Board reasoned that conditions and laws in the District had moved towards eradicating discrimination against same-sex couples, and that the *Dean* case was no longer applicable in light of recent gender-neutral legislation in the District and the legalization of gay marriage in a few other jurisdictions.<sup>138</sup>

<sup>135</sup> *Jackson I*, D.C. Super. LEXIS 9 at \*3.

<sup>136</sup> *Id.* (quoting the proposed referendum).

<sup>137</sup> *In Re: Referendum Concerning the Jury and Marriage Amendment Act of 2009*, District of Columbia Board of Elections and Ethics, No. 09-004 at 12 (June 5, 2009) [hereinafter *Board Referendum Hearing*].

<sup>138</sup> *See id.* at 9-11 (holding that the proposed referendum would violate the Human Rights Act).

Both the D.C. Superior Court and the D.C. Court of Appeals upheld the Board's decision.<sup>139</sup>

#### A. THE BOARD OF ELECTIONS AND ETHICS DECISION

Although facially persuasive, the Board's reasoning was misleading and fundamentally flawed. First, the Board pointed to only one specific act, the Domestic Partnership Judicial Determination of Parentage Amendment Act of 2009 (DPJDPAA), to show the Council's "recent efforts" to eradicate same-sex discrimination.<sup>140</sup> When the Board issued its memorandum on June 15, 2009,<sup>141</sup> the DPJDPAA was not yet law.<sup>142</sup> In fact, the Council did not approve the DPJDPAA until two weeks after it approved the Jury and Marriage Act.<sup>143</sup> Clearly, a bill that had not yet become law at the time of the Board's decision could not have provided any valid foundation upon which the Board could justify denial of the referendum.

The Board listed one other source to try to show the Council's "recent efforts" to change public treatment of same-sex marriage.<sup>144</sup> The Board referred to a letter, from Brian Flowers of the D.C. General Counsel to Kenneth McGuire of the Board's General Counsel, which stated that *several* statutory provisions "have been amended by the Council to remove the gender-specific references as part of a systemic effort to employ gender-neutral language throughout the D.C. Official Code statutes pertaining to marriage and the rights, benefits, and obligations incident to marriage."<sup>145</sup> The Board cited no references or laws in support of that statement. The statement possibly refers to the gender-neutral changes to D.C. Code Section 46-401, which were discussed in Part II of this Note. If so, then it is clear that those changes were not material to the issue at hand because they in no way changed the meaning of the Human Rights Act, and thus added no additional preclusions under Section 1-1001.16(b)(1)(C) of D.C. referendum law.

Second, the Board conclusively stated without substantive support that the Jury and Marriage Act "effectively add[ed] discrimination against same-sex couples who have entered into valid marriages in other jurisdictions to the list of acts of discrimination prohibited under the HRA."<sup>146</sup> How could the Jury and Marriage Act have added anything to the Human Rights Act without explicitly stating so, if the Act

<sup>139</sup> *Jackson I*, D.C. Super. LEXIS 9 at \*2; *Jackson II*, 999 A.2d at 92.

<sup>140</sup> See *Board Referendum Hearing*, *supra* note 137, at 10 (using the DPJDPAA's goal of acknowledging that there is no difference between same-sex families and any other family recognized under District law to illustrate the Council's desire to eliminate same-sex discrimination).

<sup>141</sup> *Id.* at 12.

<sup>142</sup> See 56 D.C. Reg. 4269 (July 18, 2009).

<sup>143</sup> See 56 D.C. Reg. 003797 (July 7, 2009).

<sup>144</sup> *Board Referendum Hearing*, *supra* note 137, at 10.

<sup>145</sup> *Id.*, *supra* note 32, at 9, and note 36, at 10.

<sup>146</sup> *Id.* at 10.

did not prohibit the discretionary issuance of marriage licenses in the first place? Furthermore, as discussed in Part II of this Comment, the Jury and Marriage Act continues to authorize discriminatory issuance of marriage licenses based upon marital status (prohibiting marriage to step-parents and in-laws) and genetic information (prohibiting all forms of incest). If the D.C. Council wants the Human Rights Act to prohibit discriminatory marriage laws, it must draft a specific provision to that effect. Despite the recent D.C. Court of Appeals' recent holding to the contrary,<sup>147</sup> the two-member Board of Elections and Ethics should have no authority to change existing law, especially in light of clear judicial precedent stating the opposite interpretation of the law.<sup>148</sup>

The Board also reasoned that the *Dean* decision did not apply in this case.<sup>149</sup> Again, the Board's logic lacked any substantive support. The Board simply stated that, because same-sex marriage is now an actual, legal possibility in a few jurisdictions, whereas it was universally non-existent in 1995, the *Dean* decision was "not controlling in this matter."<sup>150</sup> The Board also noted that the Council, "through the [Jury and Marriage Amendment] Act, expressed its determination to clearly state that discrimination against same-sex couples who are validly married elsewhere is prohibited," and then tried to conclude from that single premise that same-sex marriages from other jurisdictions were therefore added to the list of categories protected by the Human Rights Act.<sup>151</sup>

Again, the Board's logic is flawed. First, the Board reasoned that, because such a thing as same-sex marriage now exists, whereas it did not when *Dean* was decided, the *Dean* holding no longer precluded gay marriage from the Human Rights Act.<sup>152</sup> Specifically, the Board stated that, since 1995, same-sex marriage had been legalized, or was set to be legalized in Massachusetts, Connecticut, Iowa, Maine, Vermont, New Hampshire, Belgium, Canada, the Netherlands, Norway, South Africa, Spain, and Sweden.<sup>153</sup> The Board quoted the following excerpt from the *Dean* decision to justify its conclusion that, because same-sex marriage existed in other jurisdictions, it would constitute unlawful discrimination under the Human Rights Act to continue to refuse to recognize those marriages in D.C.:

<sup>147</sup> *Jackson II*, 999 A.2d at 120 (stating that the Board acted lawfully when it refused the proposed initiative).

<sup>148</sup> See *Dean*, 653 A.2d at 319 (holding that same-sex marriage is not protected under the HRA).

<sup>149</sup> *Board Referendum Hearing*, *supra* note 137, at 11.

<sup>150</sup> See *id.* at 11 (finding *Dean* uncontrolling because of a change in societal conditions and the HRA amendments).

<sup>151</sup> See *id.* ("[T]he HRA now requires the District . . . to refrain from discriminating against same-sex couples who are validly married elsewhere . . .").

<sup>152</sup> See *id.* (discussing the recent legal possibility of same sex-marriage).

<sup>153</sup> *Id.* at 8-9; see also Editorial, *Maine Defended Marriage by Drawing a Line in the Sand; Voters Here Joined Those in 30 Other States in a National Expression of Popular Will*, PORTLAND PRESS HERALD, NOV. 6, 2009, at A11 (providing that Maine also has banned same-sex marriage by popular vote).

Had the Council intended to effect such a major definitional change, counter to common understanding, we would expect some mention of it in the [Human Rights Act] or at least in its legislative history . . . . There is none . . . . This is not surprising, however, for by legislative definition – as we have seen – “marriage” requires persons of opposite sexes; there cannot be discrimination against a same-sex marriage if, by independent statutory definition extended to the [HRA], there can be no such thing.<sup>154</sup>

While focusing on the less important fact that such a thing as same-sex marriage now exists in some jurisdictions, the Board completely overlooked the first part of Judge Ferren's reasoning. If “the Council intended to effect such a major . . . change” to the Human Rights Act, “we would expect some mention of it in the [Act] or at least in its legislative history.”<sup>155</sup> As discussed previously, “there is none”<sup>156</sup> either in the Human Rights Act or in the Jury and Marriage Amendment Act.

Furthermore, whether or not other jurisdictions have legalized gay marriage should have nothing to do with whether the District is obligated to do so. D.C. has never based its marriage laws upon what other jurisdictions thought was appropriate.<sup>157</sup> Indeed, even the statute in question, the recently enacted Jury and Marriage Amendment Act of 2009, only recognizes marriages “that [are] not expressly prohibited by Sections 46-401 – 46-404, and [have] not been deemed illegal under § 46-405.” Interestingly, the above quoted provisions render all marriages to step-parents, in-laws, and persons under sixteen years of age illegal within the District,<sup>158</sup> even when those marriages are valid in other states.<sup>159</sup> Thus, a young couple who legally marries in Alaska, where a fourteen year-old person can legally marry with parental and judicial consent,<sup>160</sup> would not enjoy married status within the District. A person who lawfully marries his step-parent or spouse's parent in New Hampshire<sup>161</sup> would likewise be deprived of that status should he move to D.C., as would a Muslim man who has lawfully married four

<sup>154</sup> *Board Referendum Hearing*, *supra* note 137, at 11 (quoting *Dean*, 653 A.2d at 320).

<sup>155</sup> *Dean*, 653 A.2d at 320.

<sup>156</sup> See 2009 District of Columbia Laws 18-9 (Act 18-70) (adopting no explicit definitional change of marriage from a man and a woman).

<sup>157</sup> See D.C. CODE §§ 46-401 through 46-405.01 (2009) (listing all of the types of marriages that are not recognized in D.C. and more or less have been prohibited since the marriage statutes were first codified in 1901, including some marriages which may have been legally entered into in other jurisdictions).

<sup>158</sup> D.C. CODE §§ 46-401.1–403 (2009) (prohibiting a person from marrying their step-parent or in-law, and setting the age of consent at sixteen).

<sup>159</sup> D.C. CODE § 46-405 (2009).

<sup>160</sup> See ALASKA STAT. § 25.05.171(b) (2009) (prescribing that fourteen year olds may marry with parental consent).

<sup>161</sup> See N.H. REV. STAT. ANN. § 457:2 (2010) (listing prohibited marriages, which do not include marriages to step-parents or spouse's parents).



women in one of several predominantly Islamic nations.<sup>162</sup> Notably, polygamy is legal in far more places around the world than same-sex marriage,<sup>163</sup> yet D.C. does not recognize polygamous marriages legally performed in other jurisdictions.<sup>164</sup> If all of these otherwise valid marriages can be expressly prohibited in the District, it naturally follows that D.C. at least statutorily maintains the right to discriminate in these broad marriage categories. Therefore, it is inconsistent to say that the Human Rights Act, without any explicit statement to that effect, prohibits marriage status discrimination in reference to same-sex marriages, but does not protect other controversial categories of marriage.

In addition to the fact that local law does not require the District to recognize all types of marriages validly performed in other jurisdictions, the federal Defense of Marriage Act explicitly states that individual jurisdictions are not required to recognize same-sex marriage laws of other jurisdictions:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>165</sup>

It seems odd that the D.C. Board should come to a conclusion so strikingly in contrast to this clear statement of federal law ratified within the same city limits. Despite all of the above reasons, the Board still concluded that a same-sex marriage referendum was improper under the Human Rights Act,<sup>166</sup> and Judge Retchin of the D.C. Superior Court agreed.<sup>167</sup>

Second, the premise that the Council intended to prohibit discrimination against same-sex couples who are validly married elsewhere cannot, by itself, mean that such discrimination automatically falls under the Human Rights Act. It is circular to say that the Human Rights Act prevents the voters from holding a referendum regarding new same-sex marriage provisions because the new provisions intend

<sup>162</sup> See Claire A. Smearman, *Second Wives' Club: Mapping the Impact of Polygamy in U.S. Immigration Law*, 27 BERKELEY J. INT'L L. 382, 384-86 (2009) (discussing polygamous marriage laws and practices in several African and Middle Eastern countries, including Nigeria, Ethiopia, Egypt, Ghana, Kenya, Somalia, Iran, Iraq, Afghanistan, Jordan, Yemen, Kuwait, Saudi Arabia, and several others).

<sup>163</sup> Compare *id.* (listing at least 13 countries where polygamy is explicitly legal and broadly referring to several others where it is at least accepted by the government), with *Board Referendum Hearing*, *supra* note 137, at 8-9 (listing only four states and seven countries where same-sex marriage was legally performed as of June 2009).

<sup>164</sup> D.C. CODE §§ 46-401.1(3)-405 (2009).

<sup>165</sup> 28 U.S.C. § 1738C (1997).

<sup>166</sup> *Board Referendum Hearing*, *supra* note 137, at 11.

<sup>167</sup> *Jackson I*, 2009 D.C. Super. LEXIS 9 at \*2.



to change the meaning of the Human Rights Act. This is especially true in light of the fact that none of the provisions in the Jury and Marriage Amendment Act mention or even allude to the Human Rights Act. Furthermore, at the time of the board decision, clear precedent within the District specifically stated that the Human Rights Act does not establish a right to same-sex marriage.<sup>168</sup> Until the present case was upheld at the D.C. Court of Appeals,<sup>169</sup> no statute or court decision had either overruled *Dean* or specifically stated any provision that would validate same-sex marriage, except the same-sex marriage law itself.<sup>170</sup>

Because neither the words “Human Rights Act” nor “discrimination” are ever mentioned within the Jury and Marriage Amendment Act, it would be a significant stretch to say that the new provision was meant to fall under the Human Rights Act, which is primarily about unlawful discrimination. As discussed in Part II, the Human Rights Act was and is primarily meant to prevent discrimination of certain enumerated rights, namely equal access to housing, employment, education, and public facilities. To infer that it also prevents socially and morally founded discriminatory restrictions on access to the institution of marriage would require the District to accept marriage to step-parents and in-laws, polygamy, incestuous marriage, and marriage between adults and minors, because denying marriage licenses to those groups would constitute discrimination based upon marital status, genetic information, and age. Clearly, valid state and social interests (discussed in Part IV), determined by the moral beliefs of the citizens, prevent the District from opening marriage up to all couples who want access to that status. In light of the standard to “liberally” construe initiative and referendum measures,<sup>171</sup> it is clear that the Board overstepped its bounds by trying to fit an otherwise valid referendum into the prohibited Human Rights Act category of referendum law.

#### B. THE D.C. SUPERIOR COURT'S DECISION

Following the Board's decision, the referendum in question was brought before the judiciary. In its analysis of the referendum, the D.C. Superior Court first addressed the Human Rights Act as interpreted in the *Dean* decision and as viewed through other applicable statutory construction and evolution.<sup>172</sup> After holding that the *Dean* decision did not protect initiatives or referenda that would ban same-sex marriage,

<sup>168</sup> See *Dean*, 653 A.2d at 320 (holding that same-sex marriage is not protected under the Human Rights Act).

<sup>169</sup> See *Jackson II*, 999 A.2d at 91-93 (holding that proposed initiative defining marriage as between one man and one woman would have had the effect of authorizing discrimination in violation of the Human Rights Act).

<sup>170</sup> See 56 D.C. Reg. 003797 (May 6, 2009) (recognizing same-sex marriages lawfully performed in other jurisdictions).

<sup>171</sup> *Hessey*, 584 A.2d at 3 (“We are required to construe the right of initiative liberally.”).

<sup>172</sup> *Jackson I*, 2009 D.C. Super. LEXIS 9 at \*7.

and that several statutory changes since the *Dean* decision had altered the meaning of the Human Rights Act to cover same-sex marriage, the Court focused on public policy and prudential reasons for preventing a referendum on the controversial subject.<sup>173</sup>

#### 1. THE PROPOSED REFERENDUM AND THE D.C. HUMAN RIGHTS ACT

The D.C. Superior Court first discussed and then dismissed the *Dean* case in order to support its modern interpretation of the Human Rights Act.<sup>174</sup> Like the Board, the Court ignored the substantive arguments in *Dean*, and emphasized the fact that same-sex marriage, although a legal impossibility at the time of the *Dean* decision, was now lawful in four states and a handful of countries.<sup>175</sup> For the same reasons discussed in Parts I and II, however, a change in the marriage laws of other jurisdictions could not have effected a change in the D.C. Human Rights Act or election laws, and certainly could not have overruled the *Dean* decision.

The Court also relied on dicta in *Dean* to support its assertion that changing conditions in the world, and changing laws in the District, required the Human Rights Act to evolve to include same-sex marriage within its list of protections.<sup>176</sup> Although the 1995 D.C. Court of Appeals stated in passing “that the elimination of discrimination within the District of Columbia should have the highest priority”<sup>177</sup> and that “[t]he Council undoubtedly intended the Human Rights Act to be a powerful, flexible, and far-reaching prohibition against discrimination of many kinds, including sex and sexual orientation,”<sup>178</sup> the *Dean* court solidly held that the Human Rights Act did not require the District to legalize same-sex marriages.<sup>179</sup> As discussed in Part II of this Note, the D.C. Council consciously refused to include references to same-sex marriage when it first enacted the Human Rights Act.<sup>180</sup>

<sup>173</sup> See *id.* at \*7-13 (analyzing *Dean* and stating that the JMA’s enactment means that it is D.C.’s public policy to recognize marriages performed in other jurisdictions).

<sup>174</sup> See *id.* at \*5-11 (finding that *Dean* does not support the argument that the proposed referendum is consistent with the Human Rights Act).

<sup>175</sup> See *id.* at 10 (noting that the *Dean* court could not have addressed same-sex marriage because same-sex marriage was a factual impossibility at the time and continuing that 6 states and 7 countries have since recognized same-sex marriage).

<sup>176</sup> See *id.* at 8-9 (quoting *Dean*) (“[T]he Council undoubtedly intended the Human Rights Act to be a powerful, flexible, and far-reaching prohibition against discrimination of many kinds, including sex and sexual orientation.”).

<sup>177</sup> *Dean*, 653 A.2d at 319.

<sup>178</sup> *Id.*

<sup>179</sup> See *id.* at 320 (emphasizing the fact that neither the Human Rights Act nor the legislative history of the Act contained any intent to re-define marriage to include same-sex marriage).

<sup>180</sup> See *id.* at 310-12 (describing a proposed bill, which would have sanctioned same-sex marriages within the District, that was rejected and replaced with legislation known as the Marriage and Divorce Act of 1977, which only made minor changes to the already existing marriage laws and did not include any language about same-sex marriage, and was passed the same year as the Human Rights Act, demonstrating a conscious choice not to include marital relationships within its purview).

The Court was correct, however, in stating that the *Dean* court “did not consider whether the government could refuse to recognize the legal right of persons to remain married solely because of their sexual orientation,” because same-sex marriage did not legally exist at the time *Dean* was decided.<sup>181</sup> Even if *Dean* does not provide conclusive legal precedent in this situation, current D.C. laws, which would directly contradict the Human Rights Act if it were meant to include marital relationships, require the District to void marriages prohibited under Sections 46-401–405,<sup>182</sup> including those marriages lawfully performed in other jurisdictions.<sup>183</sup> However, the *Dean* Court *did* declare that the Human Rights Act *did not* cover same-sex marriage,<sup>184</sup> which means that a referendum or an initiative seeking to protect the traditional definition of marriage should not be precluded under current D.C. Code Section 1-1001.16(b)(1)(C). As this Note has repeatedly reasoned, the Human Rights Act cannot cover same-sex marriage until it explicitly states that intent.

Although since the *Dean* decision, the Council has not added any express references to the Human Rights Act regarding same-sex marriage, the Superior Court reasoned that other changes to the D.C. marriage laws and to the Human Rights Act implicitly prevent the District from denying marital status to homosexual couples.<sup>185</sup> Other than the gender-neutral changes to D.C. marriage laws that this Comment previously discussed and dismissed as immaterial, the Court cited only two changes to the Human Rights Act in support of its view that the Act was expanded to protect same-sex marriage.<sup>186</sup>

First, the Court claimed that the Council strengthened the Human Rights Act because it “now proscribes discrimination based upon a person’s ‘perceived or actual’ membership in a protected category.”<sup>187</sup> It is hard to see how this admittedly stronger language could have any impact upon the same-sex marriage question, if same-sex marriage was not protected under the Act in the first place. If actual same-sex marriage was not included within the purview of the Human Rights Act, a perceived marriage between homosexuals would certainly not fall under one of the protected categories. Thus, this change in the Act is irrelevant to the determination of whether same-sex marriage is itself contemplated within the Act.

<sup>181</sup> *Jackson I*, 2009 D.C. Super. LEXIS 9 at \*10.

<sup>182</sup> See D.C. CODE §§ 46-401–405 (2009) (listing prohibited types of marriages).

<sup>183</sup> See D.C. CODE § 46-405.01 (2009) (providing that marriages that entered into legally in other jurisdictions are void in the District if it could not have been legally entered into in the District). See *infra* Part II.

<sup>184</sup> *Dean*, 653 A.2d at 320.

<sup>185</sup> See *Jackson I*, 2009 D.C. Super. LEXIS 9 at \*9-10 (quoting the amended Human Rights Act).

<sup>186</sup> See *id.* at \*9 (citing the amended language of the Human Rights Act, which now includes “perceived or actual” membership in a protected category and a prohibition from denying government services and benefits based on membership in a protected category).

<sup>187</sup> *Id.*

Second, the Court pointed to the fact that the Act now prevents the government from denying individuals “services or benefits based on membership in a protected category.”<sup>188</sup> Assuming that issuing a marriage license is a service or a benefit included within the “Miscellaneous Provisions” section of the Act,<sup>189</sup> it is still clear that the District reserves the right, under the same provision, to establish and enforce *reasonable* laws that discriminatorily deny those services or benefits to any individual.<sup>190</sup> Furthermore, the law is silent as to whether an entire group of people may be precluded from certain services or benefits. For at least those reasons, it is lawful under the Human Rights Act for the District to refuse to recognize or issue licenses for incestuous marriages, marriages to step-parents, marriages to in-laws, marriages to persons under 16 years of age, and polygamous marriages,<sup>191</sup> so long as those laws were enacted and are maintained for reasonable purposes.<sup>192</sup> Likewise, as Part IV demonstrates, laws denying same-sex couples access to the institution of marriage, whether enacted by the Council, through a ballot initiative, or through the referendum process, also pass the “reasonableness” standard in the face of the otherwise “powerful, flexible, and far-reaching” provisions of the Human Rights Act.<sup>193</sup> That being the case, a referendum or initiative to that effect is not precluded by D.C. Code Section 1-1001.16(b)(1)(C), whether or not *Dean* applies to this case.

## 2. PUBLIC POLICY AND REFERENDA

The D.C. Superior Court next addressed the District’s public policy as it related to the proposed referendum.<sup>194</sup> It admitted that, although the District generally “recognizes marriages valid at their place of celebration,”<sup>195</sup> D.C. law does not recognize marriages that are (1) “between persons domiciled in the District at the time of their marriage and the marriage would have been prohibited by one of the provisions public policy’ of the District.”<sup>196</sup> However, the court cited two cases,

<sup>188</sup> *Id.*

<sup>189</sup> D.C. CODE § 2-1402.73 (2009).

<sup>190</sup> See D.C. CODE § 2-1402.73 (2009) (“Except as otherwise provided for by District law or when otherwise lawfully and reasonably permitted, it shall be an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program or benefit to any individual on the basis of an individual’s actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business.”) (emphasis added).

<sup>191</sup> See D.C. CODE §§ 46-401–405.01 (2009) (prohibiting and refusing to recognize all referenced types of marriages, even if lawfully performed in other jurisdictions).

<sup>192</sup> D.C. CODE § 2-1402.73 (2009).

<sup>193</sup> *Dean*, 653 A.2d at 319.

<sup>194</sup> *Jackson I*, No. 2009 CA 004350 B at 8-9.

<sup>195</sup> *Id.* at 8 (citing *Rosenbaum v. Rosenbaum*, 210 A.2d 5, 7 (D.C. 1965)).

<sup>196</sup> *Id.* at 8-9 (citing *Hitchens v. Hitchens*, 47 F. Supp. 73 (D.D.C. 1942); *Rhodes v. Rhodes*, 96 F.2d 715 (D.C. Cir. 1938); *McConnell v. McConnell*, 99 F. Supp. 493 (D.D.C. 1951)).

one of which relied only on a concurring opinion, to point out that it was the lawmakers' responsibility to determine public policy.<sup>197</sup> Based on this assertion, the court reasoned that by approving the Jury and Marriage Amendment Act, District legislators conclusively declared that the District's public policy was "to recognize same-sex marriages performed in other jurisdictions."<sup>198</sup> Thus, according to the court, same-sex marriage did not fall under either of the categories of unrecognized marriages within the District, and could not be precluded on those grounds.<sup>199</sup>

First of all, whether or not same-sex marriage is contrary to public policy has little or nothing to do with whether it is protected under the Human Rights Act, because the Act protects fundamental rights, not other policy concerns.<sup>200</sup> Even though the public policy matter does not affect the legality of banning same-sex marriage by initiative or referendum, it is important to understand the voters' role in establishing public policy. The court summarily dismissed the question by stating that lawmakers determine public policy,<sup>201</sup> inferring that voters have no say in the matter. However, as discussed in Part I of this Comment, D.C. Initiative and Referendum Laws were meant to give the voters powers "coextensive" with those of the legislators, thus allowing the voters almost unlimited discretion to alter unfavorable laws or public policy.<sup>202</sup> Furthermore, neither of the cases cited by the court precludes voters, as well as legislators from determining public policy.<sup>203</sup> A referendum (or an initiative) reversing D.C. legislators' determination of public policy, so long as it would not violate one of the provisions of D.C. Code Section 1-1001.16(b), is therefore not precluded by any of the District's laws or judicial decisions.

<sup>197</sup> *Jackson I*, No. 2009 CA 004350 B at 9 (citing *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 357 (1931); *Bond v. Serano*, 566 A.2d 47, 54 (D.C. 1989) (Farrell, J., concurring)).

<sup>198</sup> *Jackson I*, No. 2009 CA 004350 B at 9.

<sup>199</sup> *Id.* at 8-9.

<sup>200</sup> See *supra* Part II.

<sup>201</sup> *Jackson I*, No. 2009 CA 004350 B at 9.

<sup>202</sup> See *Convention Ctr. Comm.*, 441 A.2d at 897 ("Absent express or implied limitation, the power of the electorate to act by initiative is coextensive with the power of the legislature to adopt legislative measures."); *Hessey v. Burden*, 584 A.2d 1, 3 (D.C. 1990) (requiring D.C. courts "to construe the right of initiative liberally, and may impose on the right only those limitations expressed in the law or clearly and compellingly implied.").

<sup>203</sup> The Supreme Court opinion, regarding a corporate contract question, states that "[p]rimarily, it is for the lawmakers to determine the public policy of the state," but states that public policy questions should only be determined after considering "the Constitution, laws, and judicial decisions of that state, and [also] the applicable principles of the common law." *Twin City Pipe Line Co.*, 283 U.S. at 357. With a qualifying, "[i]n my view," Judge Farrell's concurring opinion merely acknowledges that certainty and finality determinations in statutes of limitations are "question[s] of 'public policy,' and one[s] for the legislature to decide." *Bond*, 566 A.2d at 54 (Farrell, J., concurring).



### 3. PRUDENTIAL CONCERNS

Finally, the court weighed the parties' prudential arguments in its discussion of whether an injunction preventing the enactment of the Jury and Marriage Amendment Act was proper.<sup>204</sup> In its determination, it discussed whether the Petitioners had demonstrated "(1) a substantial likelihood of success on the merits; (2) danger of suffering irreparable harm; (3) that more harm [would] result to them from the denial of the injunction than from granting it; and (4) that the public interest [would] not be disserved by issuance of the injunction."<sup>205</sup> The merits of the Petitioners' claim have already been discussed with the court's analysis of the Human Rights Act.<sup>206</sup> The other three prongs are addressed in the next part of this Note.

## IV. THE REASONABLENESS OF A REFERENDUM IN THE SAME-SEX MARRIAGE DEBATE

"In every state where the [same-sex marriage] issue has been put before the voters as a referendum, it has been squarely defeated."<sup>207</sup> Naturally, many same-sex marriage supporters do not want the matter to come before the voters in D.C. for fear that District residents will likewise outlaw gay marriage by popular vote. This Note already addressed the legal reasons why an initiative or referendum on the issue would be proper under D.C. law, but it is also important to understand the more prudential and moral reasons for allowing the voters to decide whether or not they are willing to radically change the traditional definition of marriage in the nation's capital. An examination of the opposing views on the same-sex marriage issue will provide the material with which to reassess Judge Retchin's balancing test.<sup>208</sup>

### A. TWO OPPOSING VIEWS

Few matters rise to the level of drastically and irrevocably altering the "most basic institution of society."<sup>209</sup> To better understand why a change in the traditional definitions of marriage and family should not be forced upon the public by judicial decree or by the decisions of elected officials, it is important to weigh the arguments for and against such a dramatic change in our society.

#### 1. ARGUMENTS FOR GAY MARRIAGE

Proponents of same-sex marriage argue that the traditional definition of marriage is unjust because: (a) it "denies same-sex couples

<sup>204</sup> *Jackson I*, No. 2009 CA 004350 B at 9-14.

<sup>205</sup> *See Id.*

<sup>206</sup> *See supra*, Parts III.A-B.

<sup>207</sup> Mainwaring, *supra* note 26.

<sup>208</sup> *Jackson I*, No. 2009 CA 004350 B at 9-14.

<sup>209</sup> David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 53 (1997).



access to marriage's unique social value;" (b) it undercuts the "worth of same-sex couples relative to different-sex couples;" and (c) it denies same-sex couples the same rights and benefits enjoyed by heterosexual couples.<sup>210</sup> This subpart will describe those arguments and provide some responses countering the arguments in opposition to same-sex marriage.

#### A. SOCIAL VALUE OF MARRIAGE

Marriage "is a social institution of the highest importance."<sup>211</sup> According to the Massachusetts Supreme Court, marriage "is central to the way the Commonwealth identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data."<sup>212</sup> In short, it "anchors an ordered society by encouraging stable relationships over transient ones."<sup>213</sup> Some supporters of gay marriage claim that, for this reason, legalizing same-sex marriage would encourage homosexual couples to give up high-risk sexual lifestyles for more stable family values, thus benefiting society as a whole.<sup>214</sup> Gay marriage activists feel that, because the states control legal access to the unique social benefits of marriage, it is their responsibility to equally disperse those benefits among couples who wish to marry, regardless of sexual orientation.<sup>215</sup> Withholding those benefits from homosexual couples, they argue, is unconstitutionally discriminatory.<sup>216</sup>

#### B. MARRIAGE AFFECTS A COUPLE'S RELATIVE WORTH

In the days of the Civil Rights movement, the Supreme Court ruled that "separate but equal" educational facilities were "inherently unequal."<sup>217</sup> Gay marriage activists seek to analogize state distinctions between heterosexual marriage and homosexual civil unions with the race and gender-based segregation historically practiced in the United States.<sup>218</sup> They claim that by distinguishing between two similarly situated groups (homosexual couples versus heterosexual couples), a state

<sup>210</sup> Brief in Support of Respondents Challenging the Marriage Exclusion by Amicus Curiae the National Gay and Lesbian Task Force Foundation at 1, In re Marriage Cases, 183 P.3d 384 (2007) (No. S147999) [hereinafter *NGLT Brief*]; see also Joe Messerli, Should Same-Sex Marriages be Legalized?, BALANCED POLITICS.ORG [http://www.balancedpolitics.org/same\\_sex\\_marriages.htm](http://www.balancedpolitics.org/same_sex_marriages.htm) (outlining the arguments for and against same-sex marriage).

<sup>211</sup> French v. McAnarney, 290 Mass. 544, 546 (1935).

<sup>212</sup> Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass.2003).

<sup>213</sup> *Id.*

<sup>214</sup> Messerli, *supra* note 211.

<sup>215</sup> *NGLT Brief*, *supra* note 211, at 6.

<sup>216</sup> *Id.*

<sup>217</sup> Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

<sup>218</sup> *NGLT Brief*, *supra* note 211, at 7-9.

“necessarily conveys [its] position that same-sex and different-sex couples are not of equal worth.”<sup>219</sup>

#### C. MARRIAGE INCLUDES IMPORTANT RIGHTS AND BENEFITS

As of December 31, 2003, 1,138 federal statutory provisions included marriage as a factor for determining who would receive certain benefits, rights, and privileges.<sup>220</sup> Some of the privileges accorded to married couples include joint adoption, next-of-kin status for hospital visitation, social security benefits, joint filing for tax returns, judicial protections and immunity, and joint insurance plans.<sup>221</sup> Because the federal government has limited the definition of marriage to “a legal union between one man and one woman as husband and wife,”<sup>222</sup> those same benefits, rights, and privileges are unavailable to same-sex couples. Furthermore, even if one state grants certain benefits, rights, or privileges to homosexual couples, those provisions do not necessarily apply when couples travel or move to a different jurisdiction.<sup>223</sup> Proponents of gay marriage argue that privileges currently enjoyed only by heterosexual married couples should be made available to all couples, regardless of sexual orientation.<sup>224</sup>

#### D. RESPONSES TO ARGUMENTS OPPOSING GAY MARRIAGE

Those opposing same-sex marriage often argue that legalizing same-sex unions would harm marriage, harm children, and harm the health and wellbeing of society.<sup>225</sup> Same-sex marriage proponents have responded to each of those arguments.

Jonathan Rauch, a strong supporter of same-sex marriage, has recognized that marriage is in trouble: “Whatever else marriage may or may not be, it is certainly falling apart. Half of today’s marriages end in divorce, and, far more costly, many never begin - leaving mothers poor,

<sup>219</sup> *Id.* at 11.

<sup>220</sup> U.S. GENERAL ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT, GAO-04-353R (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

<sup>221</sup> Kathy Belge, *What are the Legal Benefits of Marriage?*, ABOUT.COM (April, 1, 2011, 6:56 p.m.), <http://lesbianlife.about.com/od/wedding/f/MarriageBenefit.htm> (listing 25 of nearly 1400 state and federal benefits enjoyed by married people).

<sup>222</sup> 1 U.S.C. § 7 (1996) (codifying the Federal Defense of Marriage Act (DOMA)).

<sup>223</sup> See 28 U.S.C. 1738 (C) (1996) (“No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.”)

<sup>224</sup> See Hannah Farmer, *The Case for Gay Marriage*, HELIUM (April, 1 2010, 7:14 p.m.), [http://www.helium.com/debates/65929-should-homosexuals-receive-all-the-rights-and-benefits-of-marriage/side\\_by\\_side](http://www.helium.com/debates/65929-should-homosexuals-receive-all-the-rights-and-benefits-of-marriage/side_by_side) (stating that homosexuals “should enjoy the legal benefits that come with marriage and the ability to commit to one another in civil ceremonies [because] anything less is prejudiced and unjust”).

<sup>225</sup> See *infra* Part IV.A.2.

children fatherless and neighborhoods chaotic.”<sup>226</sup> He argues that, for the benefit of marriage and society, “America needs more marriages, not fewer, and the best way to encourage marriage is to encourage marriage, which is what society does by bringing gay couples inside the tent.”<sup>227</sup> Additionally, Andrew Sullivan points out that “the least fundamentalist and most tolerant of states, Massachusetts, has both civil marriage rights for gay couples and the lowest divorce rates in the country.”<sup>228</sup> Based on these arguments, legalizing gay marriage would help rather than harm marriage.

Second, gay marriage will help rather than harm children. “Whether or not gay marriage is allowed, children will continue to be raised by gay parents in this country, and it will happen in increasing numbers, as it has over the past several decades.”<sup>229</sup> Thus, allowing these couples to marry would allow their children to enjoy the stability and other benefits unique to marriage.<sup>230</sup> One study has even found that children raised by lesbian couples actually fare *better* than their peers.<sup>231</sup> There is, therefore, no need to restrict marriage to opposite-sex couples in order to protect children.

Finally, proponents of gay marriage argue that society as a whole would benefit from homosexual unions.<sup>232</sup> Because marriage would encourage homosexuals to give up their high-risk sexual practices (such as multiple partners),<sup>233</sup> the spread of AIDS and other sexually transmitted diseases would likely diminish and decrease the burden that those health problems place on society.<sup>234</sup>

<sup>226</sup> Jonathan Rauch, *For Better or Worse? The Case for Gay (and Straight) Marriage*, NEW REPUBLIC, May 6, 1996, at 18.

<sup>227</sup> Jonathan Rauch, *Gay Marriage Is Good for America*, WALL ST. J., June 21, 2008, at A9.

<sup>228</sup> ANDREW SULLIVAN, *THE CONSERVATIVE SOUL* 70 (2006); see also U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, tbl.119 (2007) (Marriage and Divorces - Number and Rate, by State, 1990-2004); CTR. FOR DISEASE CONTROL, BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR 2005, at 6 (2006) (volume 54, number 20, of the National Vital Statistics Reports).

<sup>229</sup> Dale Carpenter, *Symposium: Gay Marriage in the Conservative Movement: Transcript: A Traditionalist Case for Gay Marriage*, 50 S. TEX. L. REV. 93, 98 (2008).

<sup>230</sup> *Id.* at 97.

<sup>231</sup> Nanette Gartrell & Henny Bos, *US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 PEDIATRICS 1, 7 (2010), available at <http://pediatrics.aappublications.org/cgi/reprint/peds.2009-3153v1>. The data in this study is likely flawed, however, because the participants were self-selected and the data was reported by the parents rather than the children. See *id.* at 3-4.

<sup>232</sup> See, e.g., Justin T. Wilson, *Note: Preservationism, or The Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us Into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 662 (2007) (“According to the argument’s premise, same-sex couples are more prone to contracting and transmitting STIs; as such, marriage would civilize them for the betterment of all society: their relationships would stabilize, they would be less likely to engage in extra-relationship sexual activities, and they would benefit from increased commitment to one another.”).

<sup>233</sup> Messerli, *supra* note 208.

<sup>234</sup> See Scott DeNicola and Jeff Hooten, *The High Cost of Promiscuity*, FOCUS ON THE FAMILY CITIZEN 6, 6-21 (February 1998) (detailing many of the costs that result from sexual liberties).

## 2. ARGUMENTS AGAINST GAY MARRIAGE

Supporters of the traditional definition of marriage as codified in 1 U.S.C. § 7<sup>235</sup> argue that upholding the traditional definition of marriage promotes several important state interests,<sup>236</sup> particularly the conceiving and raising of children.<sup>237</sup> Furthermore, legalizing same-sex marriage would be harmful to society in at least two ways: (a) it would further erode the already-weakened institution of marriage by including a characteristically transient and promiscuous sexual class<sup>238</sup> and (b) it would allow schools and other public institutions to openly undermine the religious values that parents try to teach to their children.<sup>239</sup>

The three most important state interests in preserving traditional marriage are the repopulation of the state,<sup>240</sup> balanced and nurturing family environments,<sup>241</sup> and the overall health and well-being of the community.<sup>242</sup> First, procreation is a vital state and social interest because it serves to propagate the human race<sup>243</sup> and to bind society in a way that no other thing can.<sup>244</sup> An Arizona court, when faced with the same-sex marriage issue, noted:

“[The state] has a legitimate interest in encouraging procreation and child-rearing within the stable environment traditionally associated with marriage, and that limiting marriage to opposite-sex couples is rationally related to that interest. Essentially, the State asserts that by legally sanctioning a heterosexual relationship through marriage, thereby imposing both obligations and benefits on the couple and inserting the State in the relationship,

<sup>235</sup> See 1 U.S.C. § 7 (1996) (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”)

<sup>236</sup> See generally William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 154 (2004).

<sup>237</sup> See Helen M. Alvaré, *The Turn Toward the Self in the Law of Marriage & Family: Same-Sex Marriage & its Predecessors*, 16 STAN. L. & POL’Y REV. 135, 167-68 (2005) (discussing the importance of heterosexual marriage in child-rearing).

<sup>238</sup> See Lynn D. Wardle, *A Response to the “Conservative Case” for Same-Sex Marriage: Same-Sex Marriage and the “Tragedy of the Commons,”* 22 BYU J. PUB. L. 441, 460, 467 (2008) (arguing that marriage has been deteriorating and disintegrating as a result of cohabitation, divorce, and other destructive factors, and allowing gay marriage will only further harm the institution of marriage).

<sup>239</sup> The Church of Jesus Christ of Latter-day Saints, *The Divine Institution of Marriage* (Aug. 13, 2008), [http://newsroom.lds.org/ldsnewsroom/eng/commentary/the-divine-institution-of-marriage#\\_ednref6](http://newsroom.lds.org/ldsnewsroom/eng/commentary/the-divine-institution-of-marriage#_ednref6) [hereinafter *Divine Institution of Marriage*].

<sup>240</sup> Duncan, *supra* note 237, at 154.

<sup>241</sup> See *Divine Institution of Marriage*, *supra* note 240 (discussing the unique benefits for children of having both a mother and father at home).

<sup>242</sup> See Wardle, *supra* note 239, at 457-59 (discussing a large body of statistical data that demonstrates that the homosexual lifestyle poses a significant health risk to the community).

<sup>243</sup> Duncan, *supra* note 237, at 154-55.

<sup>244</sup> See Coolidge, *supra* note 207, at 46-47 (discussing the role of heterosexual intercourse in linking society in a communal and generational way).

the State communicates to parents and prospective parents that their long-term, committed relationships are uniquely important as a public concern."<sup>245</sup>

Even though same-sex couples are currently allowed to have children through adoption or in vitro fertilization in many places,<sup>246</sup> they are less likely to do so without the state protection and stability that marriage would offer. Same-sex couples cannot procreate in the natural sense of the word, producing a child that is fully genetically linked to both partners.<sup>247</sup> Research shows that "the presence of a non-genetic parent in a child's home is the largest single risk factor for severe child maltreatment yet discovered."<sup>248</sup> In fact, "children living with one genetic and one non-genetic parent are up to one-hundred times more likely to suffer fatal abuse than children living with two genetic parents."<sup>249</sup> Whether these statistics relate to children born out of wedlock, those living with parents from a second marriage, or those genetically linked to only one or neither partner in a homosexual relationship, children living with a non-biological parent are far more likely to be abused or neglected because they do not usually invoke the same level of care and concern that genetic connections produce.<sup>250</sup> Because abuse begets abuse,<sup>251</sup> an increase in children raised by a non-biological parent could have far-reaching and disastrous generational effects.

<sup>245</sup> Duncan, *supra* note 237, at 157 (quoting *Standhardt v. Superior Court*, 77 P.3d 451, 461 (Ariz. Ct. App. 2003)).

<sup>246</sup> For a list of gay adoption laws by state, see LAMBDA LEGAL, OVERVIEW OF STATE ADOPTION LAWS, <http://www.lambdalegal.org/our-work/issues/marriage-relationships-family/parenting/overview-of-state-adoption.html> (last visited Apr. 30, 2011).

<sup>247</sup> There are a few limited exceptions to this statement, such as where the brother of one of the women in a lesbian relationship donates sperm in order to impregnate the other partner in a lesbian relationship, or where some genetic material from each partner is taken and combined with the genetic material of a third person in order to make a complete embryo, but these exceptions are very rare, and do not provide the same genetic links created naturally by two heterosexual parents.

<sup>248</sup> Christopher Marlborough, Note, *Evolution, Child Abuse And The Constitution*, 11 J.L. & POL'Y 687 (2003).

<sup>249</sup> Molly J. Walker Wilson, *An Evolutionary Perspective on Male Domestic Violence: Practical and Policy Implications*, 32 AM. J. CRIM. L. 291, 312 (2005) (citing Wilson & Daly, *supra* note 87, at 28). (this quote is citing to an article that in itself cited Martin Daly and Margo I. Wilson, *Violence Against Step Children*, 5 Current Directions in Psychological Science n. 3 77, 78 (1996). The authors of *Violence Against Step Children* found that young children living with their stepfathers had a 100 times difference in fatal abuse than their counterparts with genetic parents.)

<sup>250</sup> See *id.* at 312-14 (explaining the natural biological tendency to prefer blood-ties over non-genetic relationships).

<sup>251</sup> See JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN & CHILDREN A DECADE AFTER DIVORCE* 117 (1989) (finding that nearly half of the children from abusive families become either abusive or victimized in early adulthood); C.J. Newton, *Child Abuse: An Overview*, MENTAL HEALTH J. (April 1, 2001) <http://www.findcounseling.com/journal/child-abuse/> (claiming that "Children who survive abuse to adulthood in turn are more likely to abuse their own children who, if they survive, grow up more likely to abuse their own children, who . . .").



Adoption is an important secondary option when a child's biological parents are unable or unwilling to raise it.<sup>252</sup> However, to place same-sex couples on the same status as heterosexual couples ignores the data, presented in the following paragraph, showing the importance of having children raised by parents of opposite genders. Furthermore, because married couples are more likely to have children than non-married couples,<sup>253</sup> legalizing same-sex marriage would likely increase the market for in vitro fertilization, which has been shown to be problematic for children who never know one of their biological parents.<sup>254</sup>

In addition to the importance of preserving the optimal form and environment for procreation, states want to make sure that children are raised in balanced, long-term, nurturing family environments, which evidence shows do not commonly exist in same-sex relationships.<sup>255</sup> The values of heterosexual marriage also include "modeling of male and female behavior for the next generation, the promotion of the natural affection and self-sacrifice elicited from parents toward their children, and the formation of virtuous, educated, and free citizens fit to continue a tradition of self-governance."<sup>256</sup> Although some same-sex marriage proponents claim that children raised by homosexual couples fare just as well as those raised by heterosexual couples,<sup>257</sup> the bulk of the evidence suggests otherwise. One prominent sociologist explained that "[t]he burden of social science evidence supports the idea that gender differentiated parenting is important for human development and that the contribution of fathers to childrearing is unique and irreplaceable."<sup>258</sup> He further explained that fathers tend to focus on their children's long-term development while mothers see to the children's more immediate needs (which also contributes to the long-term well-being of children).<sup>259</sup> "What is clear is that children

<sup>252</sup> See Alvaré, *supra* note 238, at 167-71 (arguing that the heterosexual marriage relationship is the ideal relationship in which to raise children, and that courts have allowed homosexual and single-parent adoptions only because "efforts to find heterosexual married households did not succeed").

<sup>253</sup> Laura Stafford, Susan L. Kline & Caroline T. Rankin, *Married Individuals, Cohabitors, and Cohabitors Who Marry: A Longitudinal Study of Relational and Individual Well-Being*, 21 J. OF SOCIAL & PERSONAL RELATIONSHIPS 231, 237 (2004).

<sup>254</sup> See generally ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, INSTITUTE FOR AMERICAN VALUES, MY DADDY'S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION 5 (2010).

<sup>255</sup> See Wardle, *supra* note 239, at 466-67 (2008) (discussing the characteristic transience and infidelity that commonly plagues homosexual relationships, even when the couple is married); *Divine Institution of Marriage*, *supra* note 240 (discussing the unique benefits for children of having both a mother and father at home).

<sup>256</sup> Alvaré, *supra* note 238, at 167-68 (citing John Witte, *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019 (2001)).

<sup>257</sup> See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 980 (N.D. Cal. 2010) ("Children raised by gay or lesbian parents are as likely as children raised by heterosexual parents to be healthy, successful and well-adjusted.").

<sup>258</sup> DAVID POPENOE, *LIFE WITHOUT FATHER* 146 (1996).

<sup>259</sup> *Id.* at 145.

have dual needs that must be met [by opposite gender parents]: one for independence and the other for relatedness, one for challenge and the other for support."<sup>260</sup> "In an ideal society, every child would be raised by both a father and a mother."<sup>261</sup>

Finally, states have important interests in protecting the health and overall well-being of their residents. Legalizing same-sex marriage, however, would facilitate the spread of physical and psychological ailments that accompany homosexual relations, rather than promote public health and well-being.<sup>262</sup> For example, gay sex is either directly responsible for, or a contributing factor in 70% of all reported AIDS cases in the United States from the first detected case until 2004.<sup>263</sup> Homosexual intercourse is also a major cause of a number of other serious diseases, including anal cancer, chlamydia trachomatis, cryptosporidium, ciardia lambia, herpes simplex virus, HIV, human papilloma virus, isospora belli, microsporidia, gonorrhea, viral hepatitis types B & C, and syphilis.<sup>264</sup> Higher levels of psychiatric illness, including depression, drug and alcohol abuse, and suicide attempts also plague both gay and lesbian relationships,<sup>265</sup> even in countries where homosexual marriage and sexual relations are legal and accepted by society.<sup>266</sup> Although one might assume that legalizing same-sex marriage would reduce these problems, Dutch researchers, who live in the most homosexual-friendly country in the world, have shown that gay men who have steady partners tend to engage in more risky sexual behaviors than gays without steady partners, thus increasing the risk of disease rather than reducing it.<sup>267</sup> Clearly, legalizing same-sex marriage would harm rather than help state health interests. It would also harm society in other critical ways.

<sup>260</sup> *Id.* at 145.

<sup>261</sup> *Divine Institution of Marriage*, *supra* note 240.

<sup>262</sup> See Wardle, *supra* note 239, at 457-59 (2008) (discussing a large body of statistical data that demonstrates that the homosexual lifestyle poses a significant health risk to the community).

<sup>263</sup> *Id.* at 457 (citing Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Serv., A Glance at the HIV/AIDS Epidemic 1 (2007), available at <http://www.cdc.gov/hiv/resources/factsheets/At-A-Glance.htm>).

<sup>264</sup> *Id.* at 458 (citing John R. Diggs, Jr., *The Health Risks of Gay Sex*, 2002 Corporate Resource Council at 3, available at [http://www.corporateresourcecouncil.org/white\\_papers/Health\\_Risks.pdf](http://www.corporateresourcecouncil.org/white_papers/Health_Risks.pdf)).

<sup>265</sup> *Id.* at 458 (citing John R. Diggs, Jr., *The Health Risks of Gay Sex*, 2002 Corporate Resource Council at 6-7, available at [http://www.corporateresourcecouncil.org/white\\_papers/Health\\_Risks.pdf](http://www.corporateresourcecouncil.org/white_papers/Health_Risks.pdf)).

<sup>266</sup> Theo Sandfort et al., *Same-Sex Sexual Behavior and Psychiatric Disorders*, 58 ARCHIVES OF GENERAL PSYCHIATRY 85, 89 (2001).

<sup>267</sup> *Id.* at 459 (citing Maria Xiridou et al., *The Contribution of Steady and Casual Partnerships to Incidence of HIV Infection Among Homosexual Men in Amsterdam*, 17 AIDS 1029, 1033 (2003)). Although the cited study limited its participants to men under the age of 30 who were patients of an HIV/AIDS/STD clinic, evidence that expectations among even relatively steady homosexual partnerships, including marriage, to have "open" relationships, combined with the tendency of long-term sexual partners of any sexual orientation to engage in riskier sexual behaviors (such as oral or unprotected sex) suggests that these findings would hold true for any "open" homosexual relationships.

## A. GAY MARRIAGE WOULD ERODE THE INSTITUTION OF MARRIAGE

Same-sex relationships are characteristically unstable, and are plagued by infidelity, promiscuity, and polyamory.<sup>268</sup> This holds true even in jurisdictions that have openly embraced homosexuality and legalized same-sex marriage.<sup>269</sup> Between 1995 and 2002 in Sweden, for example, the divorce rate among gay male couples during an eight year period was 50% higher than that among heterosexual couples, and 167% higher among lesbian couples than heterosexual couples.<sup>270</sup> As for statistics within the United States, “a 2005 Vermont study noted that there was a dramatic difference in the percentage of couples who had decided that extra-relationship sex was acceptable; . . . for gay men both in civil unions and not in registered unions it was from 1250% to 1400% higher than for men in conjugal marriages.”<sup>271</sup> A 1997 study of older homosexually active men in Australia also revealed that, on average, participants in the study tended to have between 101 and 500 different lifetime sexual partners, while between 10.2% and 15.7% reported that they had had over 1000 different sexual partners.<sup>272</sup> Despite the narrow participant pool in this particular study, the research bears out the overall conclusion that, even in places where gay sex and same-sex marriage are legal, homosexual men experience higher rates of promiscuity, infidelity, and non-monogamy than the general heterosexual population.<sup>273</sup> In light of these statistics, even if homosexual couples could benefit from marital status, gay marriage would more likely “set

<sup>268</sup> *Id.* at 466-67.

<sup>269</sup> *Id.* at 466 (citing studies from the Netherlands and Vermont that discuss the different expectations for monogamy and fidelity between heterosexual couples and homosexual couples).

<sup>270</sup> Maggie Gallagher & Joshua K. Baker, *Same-Sex Unions and Divorce Risk: Data from Sweden* (iMAPP Policy Brief, May 3, 2004), available at <http://www.marriedebate.com/pdf/SSdivorcerisk.pdf> (quoting Gunnar Anderson, et al., *Divorce-Risk Patterns in Same-Sex “Marriages” in Norway and Sweden* (presented at the 2004 annual meeting of the Population Association of America)).

<sup>271</sup> Wardle, *supra* note 239, at 466 (citing Sondra E. Solomon et al., *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those not in Civil Unions, and Heterosexual Married Siblings*, 52 *SEX ROLES* 561, 569 (2005)).

<sup>272</sup> Paul Van de Ven et al., *A Comparative Demographic and Sexual Profile of Older Homosexually Active Men*, 34 *JOURNAL OF SEX RESEARCH* 349, 354 (1997).

<sup>273</sup> See Richard E. Redding, *It's Really About Sex: Same-Sex Marriage, Lesbian Parenting, and the Psychology of Disgust*, 15 *Duke J. Gender L. & Pol'y* 127, 162-63 (2008) (citing Grant Colfax et al., *Longitudinal Patterns of Methamphetamine, Popper (Amyl Nitrate), and Cocaine Use and High-Risk Sexual Behavior Among a Cohort of San Francisco Men Who Have Sex with Men*, 82 *J. URBAN HEALTH* i62, i65 (2005) (reporting results of longitudinal survey of 736 gay and bisexual San Francisco men finding that 49% had more than ten male sex partners during a six-month period and 17% had between six and nine partners); Beryl A. Koblin et al., *High-Risk Behaviors Among Men Who Have Sex with Men in 6 US Cities: Baseline Data From the EXPLORE Study*, 93 *AM. J. PUB. HEALTH* 926, 929 (2003) (reporting results of survey of 4295 gay and bisexual men finding that 42% had more than ten sexual partners in the six-month period preceding the study and 18% had between six and nine partners); George F. Lemp et al., *Seroprevalence of HIV and Risk Behaviors Among Young Homosexual & Bisexual Men*, 272 *J. AM. MED. ASS'N* 449, 451 (1994) (reporting results of study of 425 young gay and bisexual men in San Francisco/Berkeley finding that 27% reported having had over fifty sexual partners in their lifetime); Van de Ven, *supra* note 273, at 354 (1997) (reporting results of survey of 2583 Australian gay men finding that 47-50% had casual sex only and 15-25% were sexually monogamous, and that the modal number of lifetime male sex partners for older men

a new and devastating minimum standard for marital relations. . .” that would dilute, distort, and eventually destroy the moral and behavioral norms of traditional marriage.<sup>274</sup>

#### B. GAY MARRIAGE WOULD ALLOW GOVERNMENT AGENCIES TO PROMOTE DEVIANT MORAL STANDARDS

As the most fundamental unit of society, the institution of marriage is essential to the growth and development of future generations.<sup>275</sup> For that reason, “in the absence of abuse or neglect, government does not have the right to intervene in the rearing and moral education of children in the home.”<sup>276</sup> Thus, the legalization of same-sex marriage poses a threat to the traditional family environment, because it would inevitably infiltrate government programs and school curricula with pro-homosexual themes, thus openly contradicting the traditional standards of morality that many parents try to teach their children.<sup>277</sup> For example, soon after Massachusetts courts legalized same-sex marriage, some Massachusetts schools began to issue “diversity” books to their students.<sup>278</sup> When one father repeatedly requested to be informed when the school discussed homosexuality, so that he could remove his son from class on those days, the school refused and eventually prohibited him from stepping foot on school property.<sup>279</sup>

This intrusion of same-sex marriage propaganda into Massachusetts schools was not an isolated event. During an interview on National Public Radio, one eighth grade teacher in Massachusetts declared that because same-sex marriage was legal in her state, she no longer worried about openly teaching her students about the methods and details of same-sex intercourse and other homosexual relations.<sup>280</sup> Other elementary school teachers read books to their students promoting gay-

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was 101-500); and Xiridou, *supra* note 268, at 1031 (reporting study results of finding that gay men with a steady partner had, on average, eight other sexual partners per year)).

<sup>274</sup> Wardle, *supra* note 239, at 465.

<sup>275</sup> See Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 225, 233 (“Marriage is key . . . to reproducing not only children, but the family system itself. When parents do not get and stay married their children are less likely to confine childbearing to marriage and to avoid divorce, creating a downward intergenerational cycle of family fragmentation.”); Coolidge, *supra* note 207, at 53 (1997) (“Society depends upon men and women who make total commitments, give fully of themselves, nourish intimacy, and gift the world with children.”).

<sup>276</sup> *Divine Institution of Marriage*, *supra* note 240.

<sup>277</sup> *Id.*

<sup>278</sup> See, e.g., Maria Cramer and Ralph Ranalli, *Arrested Father Had Point to Make: Disputed School’s Lesson on Diversity*, BOSTON GLOBE, April 29, 2005, at B1 (reporting that a school issued kindergartners books promoting diversity, including a book entitled “Who’s in a Family” about all different kinds of families, including same-sex couples raising children).

<sup>279</sup> *Id.* (stating that the father was arrested after he refused to leave a meeting until school authorities resolved the problem of reporting homosexual discussions to parents).

<sup>280</sup> *All Things Considered* (NPR Radio Broadcast Sept. 13, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=3915906>.

marriage, such as “King and King,”<sup>281</sup> and openly posted pictures of their same-sex partners in their classrooms.<sup>282</sup> Schools in Massachusetts have consistently refused to notify parents when homosexual-related subjects were being taught.<sup>283</sup> Concerned parents brought the matter before a federal court, where it was dismissed.<sup>284</sup> The federal judge reasoned that schools were not required to notify parents when teaching homosexual-related material, and even implied that schools had a duty to teach such material so as to prepare children to be open and accepting of a diverse society where same-sex marriage was a legal reality.<sup>285</sup>

Legalizing same-sex marriage widens the door for allowing homosexual television programs and advertisements on public broadcasting channels, stocking school libraries with books on gay marriage, hosting homosexual rallies, parades, and other events in public locations, including schools, inviting homosexual and trans-gender speakers to come speak to students of all ages, and a score of other government-supported and government-funded events and activities. With the decreased protection of parental rights and increased likelihood of exposure to homosexual themes in public schools, parents who want to limit their children’s exposure to what they consider to be destructive moral standards would have no choice but to educate their children at home, place their children in expensive private institutions, move out of the state, or elect enough legislators to overturn the unfavorable laws.<sup>286</sup>

#### B. BALANCING THE VIEWS TO DETERMINE THE REASONABLENESS OF A POPULAR VOTE

Thirty-one U.S. jurisdictions have weighed the above arguments in favor of according their residents the right to decide the same-sex marriage issue.<sup>287</sup> Both the federal government and the vast majority of states, including all thirty-one in which the issue was decided by popular vote, have unequivocally upheld the traditional definition

<sup>281</sup> “King and King” is a children’s book that tells the story of a prince who “falls in love” and marries another prince, and includes illustrations of the two men kissing.

<sup>282</sup> Brian Camenker, *What Same-Sex “Marriage” Has Done to Massachusetts*, MASSRESISTANCE, Oct. 20, 2008, [http://www.massresistance.org/docs/marriage/effects\\_of\\_ssm.html](http://www.massresistance.org/docs/marriage/effects_of_ssm.html).

<sup>283</sup> *Id.*

<sup>284</sup> *Parker v. Hurley*, 474 F. Supp. 2d 261, 263 (D. Mass. 2007).

<sup>285</sup> *See id.* at 271-72 (describing the need for schools to teach civic values, including same-sex marriage, to prepare students for citizenship).

<sup>286</sup> *See id.* at 264 (listing these as the options available to objecting parents).

<sup>287</sup> *See* Mainwaring, *supra* note 27 (noting that 31 out of the 50 states have decided to ban gay marriage through a popular vote).



of marriage,<sup>288</sup> while only a handful of states have legalized same-sex marriage either through legislative acts or by judicial decree.<sup>289</sup>

Judge Retchin's balancing test provides a similar opportunity to weigh the reasonableness of an injunction that would have provided time for a popular vote on the same-sex marriage issue in D.C.<sup>290</sup> Although not outcome-determinative, the result of the four-prong test for an injunction gives additional credence to the propriety or impropriety of a popular vote on the same-sex marriage issue.

As discussed previously, (1) the referendum should have succeeded on the merits,<sup>291</sup> so the next prong evaluates (2) the irreparable harm the plaintiffs will likely suffer because the referenda (and initiative) were not allowed. This prong, which only inquires into the plaintiff's harm, is easily satisfied. Because of the likely destruction and disintegration of the family unit, especially as it relates to the welfare of children, government imposition of deviant moral standards in schools and other public fora, and the spread of disease, infidelity, and other social harms, the residents of D.C. will involuntarily suffer irreparable harm now that same-sex marriage has been imposed without an opportunity to vote to preserve the traditional definition of marriage.<sup>292</sup>

Furthermore, (3) defenders of the traditional definition of marriage, and society as a whole, will suffer far more harm due to the denial of a referendum on the same-sex marriage issue, than homosexuals would have suffered if the referendum had taken place. As discussed above, the welfare of children is of preeminent importance.<sup>293</sup> No one currently knows the long-term effects of introducing more children into homosexual marriages, but the detrimental effects of raising children in broken, single-parent homes or in homes where the child is genetically related to only one parent, are well documented. Because homosexual relationships are characteristically transient, even among those who have access to marriage, and because married homosexual couples (as opposed to cohabiting couples) are more likely to either adopt children, or give birth to them using IVF technologies (both options creating an environment where the child is not genetically linked to one or both parents), there is a high risk that emotional instability, abuse, and neglect will appear in greater profusion in society now that same-sex marriage has been legalized.

<sup>288</sup> See 1 U.S.C. § 7 (limiting the definition of "marriage" for the purposes of federal laws to "a legal union between one man and one woman as husband and wife"); Godoy, *supra* note 3 (showing that 38 states currently have some version of the Defense of Marriage Act, constitutional ban, or similar measure defining marriage as between one man and one woman).

<sup>289</sup> Godoy, *supra* note 3 (listing Massachusetts, Vermont, Connecticut, Iowa, New Hampshire, and D.C. as jurisdictions where gay marriages are legally performed).

<sup>290</sup> Jackson v. D.C. Bd. of Elections and Ethics (*Jackson I*), No. 2009 CA 004350 B at 1-2, 10-11 (D.C. Super. Ct. June 30, 2009).

<sup>291</sup> See *supra* PART III.B.3.

<sup>292</sup> See *supra* PART IV.A.2.

<sup>293</sup> See *supra* PART IV.A.2.

Denial of the referendum also imposes further limitations on the freedom of parents to reduce their children's exposure to deviant moral behaviors, because those behaviors have become legal and normal in the eyes of the state. Furthermore, the likely increase in disease and other health and emotional problems so prevalent in homosexual relationships will likely place an undue financial burden on the state, and thus on taxpayers. A judge or a legislature should not have been able to unilaterally make a change that will forever alter the institution of marriage, producing far-reaching implications and effects that will likely damage the stability, health, and well-being of society.

On the other hand, the potential harm that homosexuals may have suffered as a result of the referendum would have been limited to a small minority of individuals seeking to legitimize their relationships and behaviors in the eyes of society. Although homosexual couples could stand to benefit from the stabilizing effects of marriage, the likelihood that introducing a characteristically transient and promiscuous class into the already struggling institution of marriage will likely be more harmful to marriage as an institution than it may be helpful to homosexuals as a class. Harming marriage will inevitably harm society. Furthermore, because it has the greatest potential to create an ideal environment for producing and raising future generations, the social worth of heterosexual marriage is greater than homosexual marriage. To make the two types of marriage legally equivalent places the desires of individuals over the needs and well-being of society as a whole. While banning same-sex marriage may deny same-sex couples the same rights and benefits enjoyed by heterosexual couples, those rights and benefits exist because the state has an interest in supporting and encouraging the most ideal institution for producing and raising future generations. In light of these considerations, the potential harm to society wrought by the denial of the referendum will likely be much greater than the potential harm to homosexual couples if the referendum had been allowed.

Under the final prong, (4) the public interest in D.C. would not be disserved if the Election Board or the courts allowed a referendum or an initiative on same-sex marriage. On the contrary, the public interest is only disserved by preventing a popular vote on the issue. Admittedly, homosexuals could possibly lose a privileged status that the legislature and the courts are willing to grant them if the residents of D.C. vote to ban same-sex marriage. Denial of that status could prevent homosexual couples from receiving the stabilizing benefits of marriage, and could withhold from them rights and privileges that married heterosexual couples enjoy. On the other hand, when the D.C. Council, supported by the courts, unilaterally approved same-sex marriage without allowing the voters a say in the issue, it allowed a handful of officials to

completely redefine the historic definition of marriage in our nation's capital. Denying the voters the right to preserve the traditional understanding of the fundamental unit of society will considerably weaken the family; it will allow schools to openly teach children principles that most religions and many families vehemently oppose. Same-sex couples could have acquired additional rights through the legislative process, but those who support the traditional definition of marriage will likely never be able to regain the right to uphold their fundamental family values after being denied the right to put the matter to a popular vote.

Having more than reasonably met each of these four factors, an injunction should have issued so that supporters of the traditional definition of marriage can put the same-sex marriage matter to popular vote, just as thirty-one other jurisdictions have already done.

#### Conclusion

As analysis of the D.C. referendum and initiative laws, the Human Rights Act, and judicial precedent has demonstrated, a referendum or an initiative withholding marital privileges from homosexual couples is fully within the purview of D.C. referendum and initiative laws. A coextensive referendum right was instituted precisely for moments such as these, where vital and compelling state, social, and moral interests strongly justify, even mandate, a popular vote to counter an unfavorable judicial or legislative decree. Because the traditional definition of marriage does not violate the D.C. Human Rights Act or any federal law, the voters of the District of Columbia should be able to make the final determination regarding the definition of marriage in their jurisdiction. A referendum or an initiative to that effect is therefore proper.