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## To Have and To Hold—Or Not: The Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the United States

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## I. INTRODUCTION

Countries around the world have debated the issue of marriage rights for gays and lesbians and have come up with vastly different societal and legal responses. Perhaps the differences stem from the complexity of marriage—it is not simply about wedding bands, lace dresses, or even official certificates—it is about status. In addition to

social status, marriage confers a certain legal status upon those who enter into it. Just as the status of citizenship grants specific rights and freedoms so too does marriage. In the United States alone, a study by the General Accounting Office identified 1049 federally regulated rights and responsibilities based upon marital status.<sup>1</sup>

Privileges that many married heterosexual couples take for granted are denied to gays and lesbians who are not allowed to enter into legally recognized civil marriages. Take for example the case of Bill Flanigan.<sup>2</sup> When his partner Robert Daniel became critically ill and required hospitalization, hospital personnel would not allow Bill to accompany Robert beyond the trauma waiting room even though Robert had documents indicating that Bill was his family and legal agent for health care matters.<sup>3</sup> The hospital personnel denied Robert the opportunity for Bill's comfort and presence before Robert eventually slipped into unconsciousness. The two men never had the chance to say goodbye before Robert died.<sup>4</sup>

Prohibitions on civil marriages also convey a psychological message that gay and lesbian "relationships are not as valuable or respected as straight marriages."<sup>5</sup> Of course, not all gays and lesbians support marital relationships. Some characterize marriage as a heterosexual institution that they have no desire to mimic.<sup>6</sup> That argument, however, mischaracterizes the issue. The debate about gay marriage is not whether a couple *chooses* to marry, but whether a couple *is allowed* the choice to marry. Unlike their heterosexual counterparts, same-sex couples in most countries cannot make a choice to marry a partner of the same sex because the law denies them that right. Discussions about gay marriage will only increase, as they have recently

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1. See Gen. Accounting Office (GAO) Report, OGC 97-16, Jan. 31, 1997, available at <http://www.gao.gov/archive/1997/og97016.pdf> (last visited Aug. 15, 2003); see also Partners Task Force for Gay & Lesbian Couples, *U.S. Federal Laws for the Legally Married*, at <http://www.buddybuddy.com/mar-fed.html> (last visited Aug. 15, 2003).

2. See Press Release, Lambda Legal, *University of Maryland Medical System to be Sued Wednesday by Gay Man Prevented from Visiting His Dying Partner at Shock Trauma Center in Baltimore* (Feb. 26, 2002), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1011> (last visited Oct. 31, 2004).

3. See *id.*

4. See *id.*

5. Sandra Thomas, *Love and the Law*, VANCOUVER COURIER.COM, at <http://www.vancourier.com/issues01/07101-1/news/0711nn1.html> (site last updated Aug. 5, 2004) (quoting Laurie Arron, vice-president of the Canadian organization Equality for Gays and Lesbians Everywhere (EGALE)). EGALE filed petitions against the Canadian federal government on behalf of gay couples. See *id.*

6. See Thomas, *supra* note 5. Lesbian author Jane Rule commented, "I don't understand the way some gays are thinking, why they want to step into this cage. . . ." *Id.*

over changing laws in Canada and the United States, as gays and lesbians in many countries continue to seek equal status under the law.

*A. Scope of the Discussion*

This Article examines why and how the status of marriage has been fully granted to same-sex couples in the Netherlands, granted in six provinces and one territory of Canada, and denied vigorously in the United States. While variations in media and government structure account in part for the passage or defeat of gay marriage rights, I assert that the influence of the Christian Right in the United States has made the most significant difference among the three countries.

In addition, this Article asks and answers the question: why has the current Christian Right movement in the United States been particularly successful in opposing gay marriage? As one writer noted, “[t]he Christian Right’s anti-lesbian and gay agenda has also clearly benefited from the centrality of religion, and fundamentalism more specifically, in the United States. As a result, lesbians and gay men have faced difficulties that their counterparts in other countries have been able to escape.”<sup>7</sup> I assert that a combination of social, intellectual, and historical developments in the United States have shaped a unique Christian Right that has deliberately and strategically opposed efforts to establish access to marriage for gays and lesbians.

*B. The Christian Right, Defined*

Conservative religious movements are not exclusive to the United States or to Christianity, but such movements differ among countries.<sup>8</sup> In the United States, the Christian Right has grown out of Protestant fundamentalism and evangelicalism.<sup>9</sup> Although the Christian Right shares a Protestant history with mainstream Christians, it has defining characteristics that distinguish it—primarily the fundamentalist-rooted

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7. CRAIG A. RIMMERMAN, FROM IDENTITY TO POLITICS 124-25 (2002).

8. See DOUGLAS LONG, FUNDAMENTALISTS AND EXTREMISTS 3-4 (2002).

9. Labeling a complex movement with a few words is challenging. “Christian Right” succeeds in indicating the Christian roots of the movement but fails to reflect its Jewish participants. See RALPH REED, POLITICALLY INCORRECT 20 (1994). Using the word “Christian” is problematic as well. Many people who identify as Christian feel that the actions of some organizations using that name do not truly reflect Christian behavior. See RANDALL L. FRAME & ALAN THARPE, HOW RIGHT IS THE RIGHT 23-26 (1996). Despite its imperfections, I find the label “Christian Right” more accurate than the alternatives and use it meaning no offense to other people of faith. See also DUANE MURRAY OLDFIELD, THE RIGHT AND THE RIGHTEOUS 15-20 (1996).

belief that Biblical scripture is the inerrant, literal truth of God.<sup>10</sup> The Christian Right is not a religious denomination and therefore lacks the organizational and doctrinal structure of such institutions. However, its members do share certain common goals, such as ending legal abortion, implementing a public school curriculum that reflects their own version of morality, and preventing rights based on sexual orientation.<sup>11</sup>

What truly sets the Christian Right apart from mainstream religious groups in the United States is its political activism over the last forty years.<sup>12</sup> The modern Christian Right emerged in the late 1960s as a reaction to what it perceived as moral decline in society.<sup>13</sup> As the movement grew, its focus was to implement its spiritual agenda through political activism.<sup>14</sup> In his study of American religion, Robert Wuthnow notes that “the political rebirth that religious conservatives experienced in the late 1970s was a result of a change in the issues on the political scene.”<sup>15</sup> “Questions about public morality, abortion, and the relations between church and state all began to reappear as matters of political debate.”<sup>16</sup> To address those issues, the Christian Right created a massive media network, developed access to the political establishment, and mobilized a grassroots base of voting citizens that was unmatched in other modern Christian movements.<sup>17</sup>

### C. *Connecting the Netherlands, Canada, and the United States*

This Article begins with a discussion of the Netherlands in Part II, as it was the first country in the world to grant gay marriage. European nations have been the most progressive in recognizing rights for gays and lesbians; historically, European countries have been the first to repeal sodomy laws and to offer protection from sexual orientation discrimination.<sup>18</sup>

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10. See John H. Garvey, *Introduction*, in *FUNDAMENTALISMS AND THE STATE* 15 (Martin E. Marty & R. Scott Appleby eds., 1993).

11. See RIMMERMAN, *supra* note 7, at 122.

12. See OLDFIELD, *supra* note 9, at 34.

13. See *id.* at 59-63. Of particular concern to the Christian Right were Supreme Court decisions that ordered desegregated schools, legalized abortion, and prohibitions on mandatory prayer in public schools. See *id.*

14. See ROBERT WUTHNOW, *THE RESTRUCTURING OF AMERICAN RELIGION* 199-204 (1988).

15. *Id.* at 199-200.

16. *Id.*

17. See *id.* at 194-97, 204-07; see also DAVID RAYSIDE, *ON THE FRINGE* 122 (1998) (comparing the inferior size and power of the Christian Right in Canada to its counterpart in the United States).

18. See YUVAL MERIN, *EQUALITY FOR SAME-SEX COUPLES* 328-29 (2002).

Looking next to Canada, Part III explores the likely influence of European politics, culture, and religion. Canada has already recognized gay marriage rights in three provinces and is considering federal legislation. Although Canada has experienced resistance to pro-gay legislation from a vocal Christian Right, Canada has generally shown greater acceptance of gay and lesbian rights than its southern neighbor.

Lastly, Part IV examines the United States and its heated national and state debates over access to marriage. Currently, only one of the fifty states, Massachusetts, has recognized gay marriage. The meaning of recognition, however, is far from settled. In November 2003, the Massachusetts Supreme Judicial Court gave the legislature 180 days to draft new law granting gay couples access to civil marriage.<sup>19</sup> The legislature recessed after contentious debate that included an attempt to produce a constitutional amendment banning gay marriage.<sup>20</sup> In other matters affecting gay rights, the United States also trails behind the Netherlands and Canada. For example, sodomy statutes were declared unconstitutional as recently as June 2003, which is 193 years after the Netherlands and 34 years after Canada repealed their laws.<sup>21</sup>

## II. THE NETHERLANDS

### A. *A Historical Background of Gay Rights*

The Netherlands became the first country to recognize full marriage rights for gays and lesbians when its Parliament adopted legislation in December 2000.<sup>22</sup> When the law became effective April 1, 2001, “four gay couples exchanged rings and marriage vows at Amsterdam’s City

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19. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003); CNN.com, *Massachusetts Lawmakers Recess Without Gay Marriage Ban* (Feb. 13, 2004), at <http://www.cnn.com/2004/ALLPOLITICS/02/13/mass.marriage/index.html> (last visited Oct. 31, 2004).

20. See CNN.com, *Massachusetts Lawmakers Recess Without Gay Marriage Ban* (Feb. 13, 2004), at <http://www.cnn.com/2004/ALLPOLITICS/02/13/mass.marriage/index.html> (last visited Oct. 31, 2004).

21. See *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003). The Netherlands repealed its sodomy laws in 1810, and Canada repealed its in 1969. See MERIN, *supra* note 18, at 328-29.

22. Wet van 21 december 2000 tot wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht (wet openstelling huwelijk), Stb. 2001, 9. For an English translation of the text of the law, see the summary translation by Kees Waaldijk, Text of Dutch Law on opening up of marriage for same sex partners, available at <http://www.ruljis.leidenuniv.nl/user/cwaaldijk/www/NHR/transl-marr.html> (last visited Mar. 15, 2004).

Hall, becoming the first gay people in the world to be granted full marriage rights under the law.”<sup>23</sup>

Although the Netherlands was the first nation to grant equal marriage rights, it was not alone in recognizing rights and protections for its gay and lesbian citizens. Denmark, Norway, Greenland, Sweden, and Iceland had already created registered partnerships, which offered some but not all of the benefits and protections of civil marriage.<sup>24</sup> Although not an exhaustive list, France, Germany, Hungary, South Africa, Austria, Australia, and Spain have joined in expanding legal recognition of same-sex partners.<sup>25</sup> Additionally, on June 1, 2003, Belgium joined the Netherlands in making civil marriage available to gay and lesbian couples.<sup>26</sup> European countries have been at the forefront of recognizing gay partnerships and marriage as the demand for such rights has grown worldwide.

Commentators have attributed the Netherlands’ recognition of full marriage rights for gays and lesbians largely to the absence of any significant Christian Right movement within the country.<sup>27</sup> The Netherlands has not experienced the same sort of Christian Right political influence or control that has impeded gay rights’ gains in the United States. The resulting difference, a writer for *The Advocate* observed, is “immense.”<sup>28</sup> The writer further argued that “[w]ith no Christian Coalition or Family Research Council breathing down their necks, Dutch legislators have been able to respond seriously and maturely to gay activists’ calls for reform and to pass good laws.”<sup>29</sup>

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23. The Data Lounge, *Dutch Marriage Reform*, at <http://www.datalounge.com/datalounge/issues/index.html?storyline=800> (last visited Oct. 31, 2004).

24. See Press Release, Lambda Legal, *International Recognition of Same-Sex Partnerships* (Mar. 30, 2001), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=432> (last visited Oct. 31, 2004).

25. See International Lesbian and Gay Association (ILGA), *National Legislation Recognizing Same-Sex Partnerships*, at [http://www.ilga.org/Information/legal\\_survey/National%20Legislation%20Recognising%20Same-Sex%20Partnerships.html](http://www.ilga.org/Information/legal_survey/National%20Legislation%20Recognising%20Same-Sex%20Partnerships.html) (last visited Jan. 16, 2004) (on file with author).

26. See B.A. Robinson, *Same Sex Marriage: Belgium*, at [http://www.religioustolerance.org/hom\\_mar10.htm](http://www.religioustolerance.org/hom_mar10.htm) (last visited Oct. 31, 2004).

27. See *Life in a Zealot-Free Zone*, THE ADVOCATE, Feb. 2, 1999, available at <http://www.brucebauer.com/zealot.htm> (last visited Aug. 15, 2003) [hereinafter *Life in a Zealot-Free Zone*]. See also Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT’L & COMP. L. 141, 203-05 (2001).

28. *Life in a Zealot-Free Zone*, *supra* note 27.

29. *Id.* The Christian Coalition was founded in 1989 by Pat Robertson to give Christians a voice in government. Its mission states that it is “dedicated to equipping and educating God’s people with the resources and information to battle against anti-family legislation.” Christian Coalition of America, *Our Mission*, at <http://www.cc.org/mission.cfm> (last visited Oct. 31, 2004). The Family Research Council (FRC), first led by James Dobson, originated at the 1980 White

The lawmaking process in the Netherlands has been one that reflects tolerance and places a high value on human rights.<sup>30</sup> The cultural and political climate has allowed the country to achieve equalization of rights between both gay and nongay persons through a series of incremental steps.<sup>31</sup> First, same-gender sexual conduct was decriminalized nearly 200 years ago after Napoleon declared the Netherlands a province of France, and the country was governed by the French Penal Code.<sup>32</sup> Second, the Dutch Parliament, in 1971, made the legal age of consent for sexual contact the same for homosexuals and heterosexuals.<sup>33</sup> This was followed by a 1983 amendment to the Netherlands Constitution that included a nondiscrimination clause, which has been interpreted to include a prohibition against discrimination based on sexual orientation.<sup>34</sup> Finally, in 1998, the Dutch Parliament created a system of registered partnerships for same-gender and opposite-gender couples.<sup>35</sup> These rights precipitated legislation that allowed civil marriage and adoption rights for gays and lesbians.<sup>36</sup>

The debate in the Dutch Parliament over gay marriage was strikingly different from discussions in Canada and the United States. Many members of Parliament recognized that the existing registered partnership system, while offering some legal status, did not provide full equality.<sup>37</sup> One member described the system as “margarine” rather than “real butter.”<sup>38</sup> Unlike Canada and the United States, antigay rhetoric was

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House Conference on Families and was incorporated in 1983, and its mission includes “shap[ing] public debate and formulat[ing] public policy that values human life and upholds the institutions of marriage and the family.” Family Research Council, *Home: About FRC*, at [http://www.frc.org/get.cfm?c=ABOUT\\_FRC](http://www.frc.org/get.cfm?c=ABOUT_FRC) (last visited Oct. 31, 2004).

30. See Marilyn Sanchez-Osorio, *The Road to Recognition and Application of the Fundamental Constitutional Right to Marry of Sexual Minorities in the United States, the Netherlands, and Hungary: A Comparative Legal Study*, 8 ILSA J. INT’L & COMP. L. 131, 141 (2001).

31. See Kees Waaldijk, *Standard Sequences in the Legal Recognition of Homosexuality: Europe’s Past, Present and Future*, 4 AUSTRALIAN GAY & LESBIAN L.J. 50-52 (1994).

32. Although some authorities regarded homosexuality as morally offensive, that was not found to be sufficient reason for treating it as a crime. Maarten Salden, *The Dutch Penal Law and Homosexual Conduct*, in INTERDISCIPLINARY RESEARCH ON HOMOSEXUALITY IN THE NETHERLANDS 155, 155, 161 (A.X. van Naerssen ed., 1987).

33. See *id.*

34. See *id.*

35. See *id.*

36. See Maxwell, *supra* note 27, at 202 (discussing the historical developments within the sequential steps identified by Waaldijk).

37. See MERIN, *supra* note 18, at 124.

38. MERIN, *supra* note 18, at 124.

nearly nonexistent.<sup>39</sup> In a country known for its tolerance and pragmatic solutions to social problems, gay marriage was the next logical step in the gradual implementation of laws and rights that had already begun.

Several sociopolitical factors also contributed to the passage of the legislation. For the first time in more than eighty years, the leading opponents of the legislation, the Christian Democrats, were not part of the government coalition.<sup>40</sup> In Parliament, only five percent of the seats belonged to conservative Christian parties.<sup>41</sup> Additionally, Parliament included gay and lesbian members who had already gained the respect of their colleagues and who were influential on the issue of gay marriage.<sup>42</sup>

### *B. Differences in Legislative Structure Affect the Debates*

The structure of a legislative body plays an important role in the lawmaking process. The Dutch and Canadian Parliaments are comprised of numerous parties that find it necessary to work together to garner enough votes for their legislation. When lobbyists and special interest groups are pushing a cause, they must convince more than one party to lend its support; they cannot succeed by limiting their affiliation to only one party. Such a multi-party structure in the Netherlands minimizes the opportunity for special interests to commandeer one huge political party, as the Christian Right did in 1992 in the United States, when it comprised forty-two percent of the delegates at the Republican National Convention.<sup>43</sup>

Public opinion influenced the legislative process as well. For example, most Dutch citizens believe in recognizing and protecting the rights of sexual minorities.<sup>44</sup> People in the United States, on the other hand, are divided over the issue of homosexuality and homosexual rights.<sup>45</sup> Unlike their U.S. counterparts, Dutch parliamentarians who wish to be re-elected are more able to openly support gay rights legislation with less risk of political retaliation.

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39. See Interview by Kevin Bourassa and Joe Varnell with Kees Waaldijk, Doctor of Law, Universitat Leiden, Turin, Italy, at [http://www.samesexmarriage.ca/advocacy/turin/KeesWaaldijk\\_2002.htm](http://www.samesexmarriage.ca/advocacy/turin/KeesWaaldijk_2002.htm) (last visited Aug. 15, 2003).

40. See MERIN, *supra* note 18, at 125.

41. See *id.*

42. See *id.*

43. See REED, *supra* note 9, at 110.

44. See Maxwell, *supra* note 27, at 201-02.

45. See ALAN YANG, FROM WRONGS TO RIGHTS, THE POLICY INSTITUTE OF THE NATIONAL GAY AND LESBIAN TASK FORCE, at <http://www.nglhf.org/downloads/fwtr99.pdf> (last visited Aug. 16, 2003). Yang summarizes public opinion poll data over thirty-one years. While trends emerge showing more support for some civil rights, the majority of Americans disapprove of gay and lesbian relationships. See *id.*

In summary, gay marriage in the Netherlands invites little controversy. Conversely, given the vocal opposition of Christian Right organizations, the issue of gay marriage in both Canada and the United States is experiencing greater levels of opposition.

### III. CANADA

Canada does not yet recognize gay marriage at the federal level. In the provinces, however, Canadian gays made history in the summer of 2003 as they donned gowns and tuxedos to take their nuptial vows after the Ontario and British Columbia Courts of Appeal legalized same-sex marriage.<sup>46</sup> The journey leading up to these rulings, however, was a long one, to which we now turn.

If Canada were placed on a continuum of gay marriage rights, it would lie somewhere between the Netherlands and the United States. Canadian politics, culture, and religion have been influenced both by its ties to Europe and by its southern neighbor, the United States.<sup>47</sup> Canada seems to have been influenced by relatively tolerant European attitudes toward gay rights, as exhibited by its passage of provincial and federal legislation and by constitutional rights granted in the Charter of Rights and Freedoms of 1982.<sup>48</sup> On the other hand, the influence of the United States, which to date has no pro-gay-rights legislation at the federal level, may help explain some of the opposition that gay-rights proponents have encountered in securing such rights in Canada.

Although the Christian Right participates in political action in Canada, it plays a much smaller role than the Christian Right in the United States.<sup>49</sup> Fundamentalist-based groups in Canada have not wielded the social and political influence of their American counterparts, nor have they been tolerated as widely by Canadian society.<sup>50</sup> The

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46. See *Barbeau v. British Columbia (A.G.)*, [2003] 228 D.L.R. (4th) 416; *Halpern v. Canada (A.G.)* [2003] 225 D.L.R. (4th) 529.

47. See WALTER L. WHITE ET AL., *INTRODUCTION TO CANADIAN POLITICS AND GOVERNMENT* 2 (1977). One example of European influence is that the written Canadian Constitution, entitled the British North America Act of 1867, was passed by the Parliament of Great Britain. See *id.* Similarly, Christian Right organizations are also greatly influenced by their American counterparts. See John G. Stackhouse, Jr., *More Than a Hyphen*, in *AMAZING GRACE* 375, 375-400 (George A. Rawlyk & Mark A. Noll eds., 1993).

48. See Canadian Human Rights Act, S.C., ch. 14, § 1-2 (1996); CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 15. The section 15 protections based on sexual orientation were part of the 1982 Act, but did not come into effect until 1985, in order to give the provinces time to come into compliance. See *id.*

49. See RAYSIDE, *supra* note 17, at 122.

50. See *id.* at 105-77; see also GARY KINSMAN, *THE REGULATION OF DESIRE* 200-201 (1987).

following sections trace the history of gay rights in Canada and examine the roles of the media, the government structure, the Christian Right, and the gay-rights supporters involved in the debate over equal marriage rights for gays.

A. *Historical Background of Gay Rights in Canada*

As gays and lesbians in Canada have overcome stereotypes and oppressions, they have secured various rights and become a recognized political voice. After World War II, the Cold War spawned anti-Communist and antihomosexual “witch hunts.”<sup>51</sup> As in the United States, right-wing Canadians associated homosexuals directly with communism or viewed them as easy blackmail targets and therefore a perceived risk to national security.<sup>52</sup> Until the early 1960s, hundreds of homosexuals, either actual or suspected, lost their jobs in the civil service.<sup>53</sup> From adversity, however, came organization.

As the communist/homosexual panic was dying down, gays, particularly in urban areas, were developing visible gay cultures and small political and educational organizations.<sup>54</sup> For example, in 1964 a Vancouver group identified one of its goals as raising awareness of homosexual issues and “challeng[ing] Canadians to treat homosexuals with justice and respect.”<sup>55</sup> This organizing paid off, as the latter half of the 1970s and early 1980s saw Canadian gays and their allies gaining sexual orientation protection in the human rights codes of the provinces.<sup>56</sup>

In the 1980s, a devastating new virus, Human Immunodeficiency Virus (HIV), which caused Acquired Immune Deficiency Syndrome (AIDS), was discovered. Gay men were among the first to be diagnosed with the disease, which the media used to associate gays with the sickness.<sup>57</sup> In response to what some gays felt was slow and inadequate government response, the gay community founded organizations to meet the needs of those with AIDS and to lobby for governmental services.<sup>58</sup> Over time, government leaders and the media became better educated

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51. KINSMAN, *supra* note 50, at 120-21.

52. *See id.* at 121.

53. *See id.* at 120-21.

54. *See id.* at 160.

55. *Id.* at 148 (quoting from the Association for Social Knowledge (ASK) statement of purpose).

56. *See id.* at 182.

57. *See id.* at 15.

58. *See Gay Archivist, The Record of AIDS*, No. 10 (Nov. 1992), available at <http://www.clga.ca/Material/Records/docs/reads.htm> (last visited Oct. 31, 2003).

about the reality rather than merely the stereotypes of gay Canadians.<sup>59</sup> Activists who had lobbied for AIDS issues in the 1980s helped pave the way for gay rights activists in the 1990s to gain political access to legislators, government ministers, and other officials who helped secure additional civil rights.<sup>60</sup>

*B. Early Achievements in Gay Rights: The Human Rights Act and the Charter of Rights and Freedoms*

Major legislative and constitutional changes made throughout the 1980s and 1990s secured some rights for gays and lesbians that had been enjoyed exclusively by nongays. From the 1990s until the marriage rulings in 2003, the law expanded from general nondiscrimination protections to greater recognition and equality for gay family relationships. In 1996, "sexual orientation" was added to the list of protected groups in the Canadian Human Rights Act (Act).<sup>61</sup> The addition is particularly illustrative of the interaction between the gay community, the Christian Right, and other forces involved in legislative change.

The Act, passed by Parliament in 1976, provides federal antidiscrimination protection for federal civil servants and employees of federally regulated companies.<sup>62</sup> Twenty years later Parliament amended it to include sexual orientation as grounds for prohibited discrimination.<sup>63</sup> For ten of those twenty years, justice ministers had promised to make the change.<sup>64</sup> Pressure from Christian Right opponents was certainly a factor in the delay, but their influence was minimal compared to similar forces in the United States.<sup>65</sup> Ironically, Christian Right rhetoric, which was widely reported by the media, seemed to act as an impetus for many Canadians, generally turned off by such extremism, to support the amended Act.<sup>66</sup>

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59. See RAYSIDE, *supra* note 17, at 123.

60. See *id.* at 138.

61. Canadian Human Rights Act, S.C., ch. H-6, §§ 2, 3(1) 1976-1977 S.C. 887-888 (Can.) (as amended).

62. See RAYSIDE, *supra* note 17, at 108.

63. See Canadian Human Rights Act, S.C., ch. 14, s. 1-2 (1996).

64. See David Vienneau, *Gay Rights Law to Pass Today*, TORONTO STAR, May 9, 1996, at A3.

65. See RAYSIDE, *supra* note 17, at 122. See also *id.* at 113-39 (chronicling Christian Right opposition to the Human Rights Act amendment); MARTIN DURHAM, THE CHRISTIAN RIGHT, THE FAR RIGHT AND THE BOUNDARIES OF AMERICAN CONSERVATISM 15-18 (2000) (discussing Christian Right growth and influence in U.S. politics).

66. See RAYSIDE, *supra* note 17, at 115-18, 122.

The early political promises to add sexual orientation to the Act were made in response to equality rights granted earlier in the Canadian Charter of Rights and Freedoms (Charter), a constitutional document that came into effect in 1982.<sup>67</sup> Section 15, entitled “Equality Rights,” did not come into effect, however, until 1985 to allow provincial and territorial legislation time to comply with it. Section 15(1) provides that, “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”<sup>68</sup>

#### 1. Human Rights Codes Are Amended in the Provinces

Although the Charter does not explicitly designate sexual orientation as a protected category, its broad equality language put pressure on provincial and federal governments to add protections for gays and lesbians in their statutory human rights codes.<sup>69</sup> As the provincial governments were reviewing existing statutes in order to bring them into conformity with the Charter, Ontario became the first province (post-Charter) to add sexual orientation to its human rights code.<sup>70</sup> Most of the other provinces followed within the next few years.<sup>71</sup>

The structure of the Canadian government helped facilitate changes that were made to the provincial laws.<sup>72</sup> Canada’s highly decentralized government, in which “the ten provinces have almost complete control over education, health policy, housing, and social welfare,” created opportunities for lesbian and gay influence at the local level.<sup>73</sup> Provincial decisions and legislation that adopted protections based on sexual orientation, in turn, created leverage for change at the federal level.<sup>74</sup> As the provinces amended their codes, federal members of Parliament

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67. See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

68. *Id.* § 15(1).

69. See RAYSIDE, *supra* note 17, at 106, 110.

70. See Andree Lajoie et al., *When Silence is No Longer Acquiescence: Gays and Lesbians Under Canadian Law*, 14 CAN. J.L. & SOC’Y 106 n.15 (1999). Quebec prohibited sexual orientation discrimination before the Charter existed. The Charte des droits et libertés de la personne, L.R.Q. c. C-12, was enacted in 1975 as L.Q. 1975, c. 6. In 1977, it was amended (L.Q. 1977, c.6, s. 1) “to add sexual orientation to prohibited grounds of discrimination.” *Id.* at 106 n.14.

71. See ROBERT WINTEMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS* 265-66 (1995).

72. See RAYSIDE, *supra* note 17, at 132. Supporters at the federal level noted that similar measures passed in most of the provinces and territories were not adversely affecting candidates who were running for reelection. See *id.*

73. *Id.* at 106-07.

74. See *id.* at 107.

(MPs) could see growing support for such legislation, thereby easing fears of suffering political fallout from right-wing opponents.<sup>75</sup> In addition, MPs who supported proposed antidiscrimination amendments were bolstered by court decisions, such as *Haig v. Canada*, that established protections under the Charter for gays and lesbians.<sup>76</sup>

## 2. The Role of the Liberal Party

A sympathetic government and the structure of the parliamentary system helped overcome Christian Right and other conservative opposition to the sexual orientation amendment. In the Canadian parliamentary system, government executives, especially the Prime Minister, possess a great deal of authority.<sup>77</sup> Governments at the provincial and federal levels depend on legislative majorities to support their agendas.<sup>78</sup> The Prime Minister, therefore, controls the agenda of the popularly-elected legislative body, the House of Commons.<sup>79</sup> The other body of the Parliament is the Senate, whose appointed members wield little power.<sup>80</sup> Many legislators are elected primarily on the basis of party and party leader affiliation, rather than by an independent base of support.<sup>81</sup> Under this structure, movement activists, such as those in the gay and lesbian community, can seize opportunities to enact changes when a party executive is supportive of their cause.<sup>82</sup>

A shift in Canada's parliamentary composition helped create such an opportunity. In 1993, the Liberal party won a large majority in Parliament, reducing the number of seats held by the long-reigning Conservative party to two (compared to 157 seats held in 1988).<sup>83</sup> The Liberal Party's campaign focused on a series of promises that included a commitment to amend the Act (although the government did not specifically mention sexual orientation) and to enact hate crimes legislation that included sexual orientation.<sup>84</sup> In response to a preelection questionnaire, party leader Jean Chrétien assured the lobby group

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75. See *id.* at 106.

76. See Lajoie et al., *supra* note 70, at 106-07.

77. See Patrick Weller, *The Vulnerability of Prime Ministers in Canada and Britain*, in CANADIAN POLITICS 62-63 (Ronald G. Landes ed., 1985).

78. See WHITE ET AL., INTRODUCTION TO CANADIAN POLITICS AND GOVERNMENT, *supra* note 47, at 127.

79. See *id.* at 164.

80. See *id.* at 152, 164.

81. See Gilbert R. Winham & Robert B. Cunningham, *Party Leader Images in the 1968 Federal Election*, in APEX OF POWER 130-31 (Thomas A. Hockin ed., 1977).

82. See *id.* at 108.

83. See *id.* at 111 (table 4).

84. See RAYSIDE, *supra* note 17, at 111.

Equality for Gays and Lesbians Everywhere (EGALE) that its amendments to the Act *would* include sexual orientation.<sup>85</sup>

The addition proved to be an uphill battle for gay activists. Allan Rock, appointed Justice Minister by Prime Minister Chrétien, quickly included gay and lesbian rights among the issues he was promoting.<sup>86</sup> Dissent soon surfaced, however, as a small number of Liberal Party members said they would not support a gay rights bill.<sup>87</sup> In addition, the party encountered opposition in the province of Ontario early in 1994.<sup>88</sup> The provincial government, controlled by the New Democratic Party, was pushing Bill 167, local legislation that would grant benefits and responsibilities enjoyed by heterosexual couples to same-sex couples.<sup>89</sup> The leader of the provincial Liberal caucus, Lyn McLeod, had committed herself to supporting such benefits one year earlier, even though her caucus was largely opposed.<sup>90</sup> The liberals had expected to win the provincial election held in March 1994.<sup>91</sup> Instead, McLeod and others lost after the local Conservatives painted them and the New Democrats as gay-rights supporters.<sup>92</sup>

This made life more difficult for the federal Liberals in Parliament, as some feared a political backlash like the one suffered at the provincial level.<sup>93</sup> Later that year, Justice Minister Rock and the office of the Prime Minister again conveyed written assurances to EGALE that it would act on legislation, but in 1995, the Prime Minister was publicly back-peddling regarding changes to the Act.<sup>94</sup>

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85. See Canadian Press, Canadian News Digest, *No Free Vote on Gay Rights* (Apr. 18, 1996), available at [http://www.canoe.ca/NewsArchiveApr96/Candigest\\_Apr18.htm](http://www.canoe.ca/NewsArchiveApr96/Candigest_Apr18.htm) (last visited Oct. 31, 2004) [hereinafter *No Free Vote*].

86. See David Vienneau, *Ottawa Promises Crackdown on Crime*, TORONTO STAR, Jan. 28, 1994, at A1. Rock's first post-election speech to the House of Commons identified the issues as top priorities of the newly elected government. See *id.*

87. See David Vienneau, *Same-Sex Marriage Motion Rejected after Angry Debate*, TORONTO STAR, May 16, 1994, at A12.

88. See Rosemary Speirs, *Ottawa Dragging Its Feet on Gay Rights Issue*, TORONTO STAR, May 25, 1995, at A29.

89. See RAYSIDE, *supra* note 17, at 112.

90. See Kelly Toughill, *McLeod Bows out with Good Humor but Liberal Leader Stands by Her Party's 82-Page Platform*, TORONTO STAR, Sept. 14, 1995, at A23.

91. See *id.*

92. See RAYSIDE, *supra* note 17, at 112.

93. See Speirs, *supra* note 88, at A29.

94. See RAYSIDE, *supra* note 17, at 113; Tim Harper, *Enshrining Gay Rights is "Next Step," Ottawa Told*, TORONTO STAR, June 17, 1995, at A15.

### 3. Opposition to the Amended Act: The Reform Party and the Christian Right

The most vocal political opposition to the Act came from the conservative Reform Party.<sup>95</sup> Although the young party had carefully avoided antigay rhetoric in their 1993 platform, they began to reveal such sentiments publicly during a party assembly in October 1994.<sup>96</sup> The Reform Caucus' Task Force on the Family issued a report that had the tone and rhetorical flourish of the U.S. Christian Right.<sup>97</sup> This caught the attention of the national press, which was put on notice of the extremist element in the party.<sup>98</sup> In 1996, as a vote on the Act drew near, a newspaper article quoted party whip Robert Ringma defending the right of a shop owner to fire a homosexual and to move a black employee "to the back of the shop" if their presence offended customers.<sup>99</sup> Within two days, another Reform MP, David Chatters, said in a radio interview, "[w]hen you go into the issue of homosexuals and lesbians, it's in the interest of society to . . . discriminate against that group."<sup>100</sup> Reform Party Leader Preston Manning ordered a suspension of the two MPs.<sup>101</sup> In the press, the comments were widely reported and condemned by the *Toronto Star* and other major newspapers.<sup>102</sup> David Rayside, who documented the changes made to the Act in his book *On the Fringe*, argues that the strong antigay rhetoric employed by the Reformers actually helped secure passage of gay protections in the Act because other legislators and public opinion rejected its extremism.<sup>103</sup>

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95. See Rosemary Speirs, *Reform Closes Ranks on Gay Rights Issue*, TORONTO STAR, Oct. 14, 1994, at A8.

96. See Darcy Henton, *Seeing the Light on Reform's Dark Side, Jan Brown Carries on with Her Life and Work after Enduring Expulsion from Her Party and Ostracism from Her Former Colleagues*, TORONTO STAR, July 3, 1996, at A19 (describing how, when Jan Brown was first elected, the former Reform MP "never saw beyond the party's sound fiscal platform and its focus on traditional family values" to see "that the party was a beacon for the fringe element").

97. See RAYSIDE, *supra* note 17, at 114.

98. See *id.*

99. John Fraser, *Reform MP Knows How to Whip up This Issue*, TORONTO STAR, May 5, 1996, at E1.

100. *Intolerance in Reform*, Reform Watch Analysis, at <http://www.web.net/~refwatch/policy/racism.htm> (last visited Oct. 30, 2003).

101. See Derek Ferguson, *Manning Suspends 3 MPs for "Damage" to Party*, TORONTO STAR, May 8, 1996, at A1.

102. See Dalton Camp, *Once Again Chrétien Looks Like Only Hope*, TORONTO STAR, May 5, 1996, at F3; Canadian News Digest (The Canadian Press), *Ringma Gives Liberals a Club*, (Apr. 30, 1996), available at [http://www.canoe.ca/NewsArchiveApr96/candigest\\_apr30.html](http://www.canoe.ca/NewsArchiveApr96/candigest_apr30.html) (last visited Oct. 26, 2003) [hereinafter *Ringma*] (on file with author).

103. See RAYSIDE, *supra* note 17, at 113-14, 128.

Rayside relays that Parliamentarians heard from Christian Right organizations as well, but their impact paled in comparison to those in the United States in part “because the Protestant fundamentalism that acts as its vanguard is perceived as politically extreme by Canadian standards.”<sup>104</sup> The Canadian Christian Right’s minimal opposition to the Act reflects its impact in general. As Canadian historian and author David R. Elliott points out, Canadian fundamentalists “never greatly influenced the national culture.”<sup>105</sup>

#### 4. The Role of Gays and Lesbians

In February 1996, Justice Minister Rock again publicly announced the Liberal Party’s commitment to the Act, but hinted that action might not be taken before the next election in two years.<sup>106</sup> That very same week, however, after indications of dissent from some party members, Prime Minister Chrétien told several MPs that he wanted to drop the issue.<sup>107</sup>

It was at this point, with Chrétien waffling on his promise, that all the years of gay and lesbian activism culminated in one last push to achieve legislative equality. Because public policy at the provincial level can substantially influence federal developments, earlier successes in amending provincial human rights codes (to bring them into compliance with the Charter) put pressure on legislators in Ottawa to amend the Act.<sup>108</sup> Additionally, Ottawa-based EGALÉ had strived for nearly ten years, building upon the foundation laid by gay-rights activists in the 1980s, to achieve a legitimate presence in the capital as well as visibility and connections across the country.<sup>109</sup> In contrast to gays in the United States, Canadian gays have very few lobbying resources at the federal level; however, EGALÉ’s energetic Executive Director John Fisher was savvy in using the media to keep pressure on the Chrétien government.<sup>110</sup>

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104. *Id.* at 122.

105. David R. Elliott, *Knowing No Borders*, in *AMAZING GRACE* 349, 373 (George A. Rawlyk & Mark A. Noll eds., 1993).

106. See Edison Stewart, *Minister Waffles on Outlawing Homosexual Bias*, *TORONTO STAR*, Feb. 21, 1996, at A9.

107. See RAYSIDE, *supra* note 17, at 114.

108. See *id.* at 132.

109. See *id.* at 118-19, 121.

110. See *id.* at 119.

## 5. The Role of the Media

Working with the media, Fisher capitalized on two factors: (1) the media was largely sympathetic to EGALE's position, and (2) the media framed the issue as one of integrity.<sup>111</sup> After the head of the Canadian Human Rights Commission publicly criticized the government for failing to add sexual orientation to the Act, the press focused on the government's inability to keep its promise.<sup>112</sup> Mindful of the perception that the government's integrity was under fire, Fisher reminded the Chrétien government of earlier promises that it made to EGALE to support the amendment.<sup>113</sup> In press interviews, Fisher positioned himself against a backdrop of flip-flop sandals, an image previously used in Ontario to criticize Lyn McLeod for flipping her position on same-sex benefits.<sup>114</sup> Fisher reminded the Chrétien government that a perceived lack of integrity had caused McLeod to lose reelection.<sup>115</sup> According to one activist involved in the campaign, the tactic worked:

As long as it was a gay issue, they couldn't commit and were not going to do it; once it became an integrity issue focused on the prime minister, his advisers realized that he stood to sustain more damage by not doing it than simply by getting it out of the way.<sup>116</sup>

The media was influential in the passage of the amendment in other ways as well.<sup>117</sup> News reports and editorials had already characterized the Liberal Party as lacking integrity for its failure to meet a campaign promise to eliminate a goods and services tax.<sup>118</sup> The Party's inability to deliver on the amendment further intensified public disenchantment.<sup>119</sup> Additionally, the media had become much more knowledgeable about matters of importance to the gay community over the previous two decades and responded by covering those issues.<sup>120</sup> Finally, the media exposed and widely criticized the extremist sentiments made by those in the Reform Party.<sup>121</sup>

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111. *See id.* at 123-25.

112. *See* Editorial, *Human Rights on Hold*, TORONTO STAR, Mar. 21, 1996, at A26; Edison Stewart & Tim Harper, *Team in Trouble*, TORONTO STAR, May 4, 1996, at C1.

113. *See No Free Vote*, *supra* note 85.

114. *See RAYSIDE*, *supra* note 17, at 119.

115. *See id.*

116. *Id.*

117. *See id.* at 123.

118. *See id.* at 115.

119. *See Human Rights on Hold*, *supra* note 109, at A26; Stewart & Harper, *supra* note 109, at C1.

120. *See RAYSIDE*, *supra* note 17, at 123.

121. *See Ringma*, *supra* note 102; Richard Gwyn, *At Heart of GST Affair is Issue of Trust*, TORONTO STAR, May 5, 1996, at F3.

*C. The Significance of the Amendment's Passage*

Parliament passed the amendment adding sexual orientation protection to the Act in May 1996.<sup>122</sup> Even though subsequent legislation and court decisions interpreting the constitutionally-entrenched Charter arguably have provided legal rights of greater significance, the impact of the amendment itself cannot be overstated. The Act gave rise to subsequent case law and legislation. *M. v. H.* held that sexual orientation is protected under the Charter.<sup>123</sup> The Modernization of Benefits and Obligations Act extended federal benefits and obligations to gay couples who met its requirements.<sup>124</sup> Although the recent judicial recognition of gay and lesbian marriage rights is based upon the Charter's constitutional powers, the amended Act helped create a cultural and social climate where such legal recognition could take place.

*D. 2003: Effective Immediately, Gays Obtain Full Marriage Rights in Two Provinces*

When Peter Cook and Murray Warren, partners for twenty-nine years, walked into the British Columbia Vital Statistics Agency to apply for a marriage license, the agency turned them down based on their sexual orientation.<sup>125</sup> As the two long-time activists had done before when faced with discrimination, they decided to fight. Cook and Warren went public with their story and filed suit along with two other Vancouver couples.<sup>126</sup>

On May 1, 2003, the Court of Appeal for British Columbia, the highest court in the province, held in *Barbeau v. British Columbia (A.G.)* that the common law bar against same-sex marriage violated Section 15 of the Canadian Charter of Rights and Freedoms.<sup>127</sup> The gay and lesbian petitioners could not marry yet, though, because the court suspended relief until July 2004 to allow the federal and provincial governments the time to bring legislation into accord with the decision.<sup>128</sup>

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122. See RAYSIDE, *supra* note 17, at 117.

123. See *M. v. H.*, [1999] 171 D.L.R. (4th) 577 (Can.).

124. See Modernization of Benefits and Obligations Act, c.12 (2000) (Can.), available at <http://laws.justice.gc.ca/en/-8.683436/html> (last updated Dec. 31, 2002).

125. See Paul Willcocks, *Murray Warren Doesn't Want to Wait Much Longer for a Marriage License*, VANCOUVER SUN, July 21, 2000, available at <http://www.egale.ca/index.asp?lang=E&menu=30&item188> (last visited Oct. 31, 2004).

126. See *id.*

127. See *Barbeau v. British Columbia, (A.G.)* [2003] 225 D.L.R. (4th) 472, 522, para. 158; CAN. CONST., *supra* note 43, § 15.

128. See *Barbeau*, [2003] 225 D.L.R. (4th) at 522-23.

The Ontario Court of Appeal issued a similar decision on June 10, 2003. In *Halpern v. Canada (A.G.)*, the court held that excluding gay and lesbian couples from marriage was unlawfully discriminatory and mandated relief effective immediately, thereby allowing gay couples to wed without delay.<sup>129</sup>

After *Halpern*, the British Columbia High Court issued another ruling on July 8, 2003, which reanalyzed the earlier *Barbeau* decision “for the sole purpose of requesting [the] Court to lift the suspension of remedies to give same-sex couples in British Columbia the same right to marry as their counterparts in Ontario.”<sup>130</sup> The British Columbia court followed the lead of the *Halpern* court and ordered the remedy to take effect immediately.<sup>131</sup> The court was also influenced by the federal government’s decision not to appeal the earlier decisions in *Barbeau* or *Halpern*.<sup>132</sup> Both the *Barbeau* and *Halpern* courts relied on an earlier ruling issued by the Superior Court of Quebec (an intermediate court) that had found the common law bar to same-sex marriage discriminatory under section 15 of the Charter.<sup>133</sup> However, in *Hendricks v. Quebec (A.G.)*, the court stayed its declaration for two years.<sup>134</sup> By the time the Ontario and British Columbia decisions were announced in 2003, Christian Right groups, having been granted intervenor status, had appealed *Hendricks* to the Quebec Court of Appeals.<sup>135</sup>

The primary legal issue in both *Barbeau* and *Halpern* was whether the common-law definition of marriage as only between a man and a woman was unconstitutional in light of the section 15 equality provisions of the Charter. Section 15(1) grants equal protection under the law, promotes equality, and serves to prevent discrimination based on stereotypes and prejudice.<sup>136</sup> Canada’s definition of marriage is based in common law from the 1866 case, *Hyde v. Hyde and Woodmansee*.<sup>137</sup> The court defined marriage as “the voluntary union for life of one man and

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129. *See id.* at 529, 572.

130. *Id.* at 416, 419.

131. *See id.* (noting that same-sex marriages had taken place in Ontario since *Halpern*, and that it wished to prevent the unequal application of the law between the provinces.)

132. *See id.* at 419.

133. *See Barbeau*, [2003] 225 D.L.R. (4th) 472, 477; *Halpern*, [2003] 225 D.L.R. (4th) 529, 572.

134. *See Hendricks v. Quebec (A.G.)*, [2002] J.Q. No. 3816.

135. *See Michael Hendricks, Why the Legal Battle Continues in Quebec*, available at [http://www.samesexmarriage.ca/legal/quebec\\_case/legal\\_battle\\_continues.htm](http://www.samesexmarriage.ca/legal/quebec_case/legal_battle_continues.htm) (last visited Mar. 3, 2004).

136. *See Constitution Act, supra* note 63, § 15.

137. *See Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130, 1866 WL 8213 (H.L.).

one woman, to the exclusion of all others.”<sup>138</sup> Both courts of appeal found this definition to be in conflict with the equality rights granted under section 15 of the Charter.<sup>139</sup> Furthermore, the courts found that the definition of one man and one woman did not meet the standard set forth in section 1 of the Charter, which allows reasonable limitations upon rights and freedoms only if they can be “demonstrably justified in a free and democratic society.”<sup>140</sup> As a result, the high courts adopted a revised definition of marriage set forth by Justice LaForme in *Halpern* at the lower court level.<sup>141</sup> The courts thus redefined marriage to include same-sex couples as “the voluntary union for life of two persons to the exclusion of all others.”<sup>142</sup> In 2004, three more provinces and one territory struck the opposite-sex requirements for marriage.<sup>143</sup>

Technically, the decisions have effect only in their respective provinces and territory, but the impact has spread far beyond those geographic boundaries. Prime Minister Jean Chrétien promised a proposed bill to create a federal definition of marriage that includes same-sex couples; it was sent to the Supreme Court for an advisory opinion in preparation for a House of Commons vote.<sup>144</sup> In December 2004, the Supreme Court of Canada issued its opinion, which said the federal government can change the definition of marriage, thereby giving gays and lesbians the legal right to marry.<sup>145</sup> The Liberal Party government of Chrétien’s successor, Prime Minister Paul Martin, has promised a parliamentary debate and a free vote on a new federal marriage law, which is estimated to take place in the fall of 2005.<sup>146</sup> Since the 2003 provincial court decisions, couples who do not want to

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138. *Id.* at para. 130.

139. *See* Barbeau, [2003] 225 D.L.R. (4th) at 522; Halpern, [2003] D.L.R. (4th) at 572.

140. *See id.*

141. *See* Barbeau, [2003] 225 D.L.R. (4th) at 522; Halpern, [2003] 225 D.L.R. (4th) at 573.

142. *Halpern*, [2003] 225 D.L.R. (4th) at 573.

143. *See* In the Matter of Section 53 of the Supreme Court Act, R.S.C. 1985, C. S-26; In the Matter of a Reference by the Governor in Council Concerning the Proposal for an Act Respecting Certain Aspects of Legal Capacity for Marriage for Civil Purposes, as Set out in Order in Council P.C. 2003-1055, dated July 16, 2003, at para. 66, *available at* <http://www.cbc.ca/news/background/samesexrights/2004scc079.wpd.txt> (last visited Feb. 7, 2005).

144. *See* Tonda Maccharles, *Not Stalling on Gay Unions*, TORONTO STAR, Feb. 2, 2004, at A06.

145. *See Supreme Court OK’s Same-Sex Marriage*, CBC News, Dec. 10, 2004, *available at* <http://www.cbc.ca/story/canada/national/2004/12/09/scoc-gaymarriage041209.html> (last visited Feb. 7, 2005).

146. *See* Jim Brown, *Same-Sex Marriage Referral Broadened*, CNEWS, Jan. 28, 2004, *available at* <http://www.cnews.canoe.ca/cnews/Canada/2004/01/28/327965-cp.html> (last visited Oct. 31, 2004).

wait for a federally-recognized status have flocked to Ontario, where there are no residency or citizenship requirements for marriage.<sup>147</sup>

Peter Cook and Murray Warren decided that they had waited long enough; the couple has made plans to achieve what they have wanted for so long: the dignity of a relationship that is respected by their government (at least at the provincial level). They intended to marry in 2004, on their thirty-third anniversary.<sup>148</sup>

#### IV. THE UNITED STATES

##### A. *An Overview*

The issue of gay marriage in the United States is a political minefield now more than ever, due to recent state and federal court rulings advancing gay rights and the prominence of the issue in the presidential election campaign of 2004. Just as Congress rushed to pass the Defense of Marriage Act (DOMA) while awaiting a ruling on gay marriage on remand from the Supreme Court of Hawaii, history nearly repeated itself in 2003 as members of Congress proposed a constitutional amendment that was spurred by an anticipated promarriage court decision in Massachusetts.<sup>149</sup> The Federal Marriage Amendment (FMA) proposes to amend the Constitution so that marriage between persons of the same sex would be prohibited.<sup>150</sup> The Constitutional prohibition would strike a much bigger blow to marriage equality than DOMA, which bars only federal recognition of same-sex marriages.<sup>151</sup> DOMA prohibits marriage between any couple other than a man and a woman and provides that states do not have to recognize marriage between same-sex persons if other states grant such rights.<sup>152</sup> Because DOMA attempts to prohibit the recognition of a judgment from another state, it is not clear if it could withstand a constitutional challenge under the Full Faith and Credit Clause.<sup>153</sup>

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147. See EGALE CANADA, *Same-sex Marriage in Canada Following the Ontario Court of Appeal Decision, FAQ—Frequently Asked Questions*, available at <http://www.egale.ca/extra/marriagefaq.doc> (last visited Aug. 25, 2003).

148. See ReligiousTolerance.org, *Homosexual (Same-Sex) Marriages in Canada*, at <http://www.religioustolerance.org/hommarb6.htm> (last visited Oct. 31, 2003).

149. See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (1996)); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) *clarified in response to the state's motion for reconsideration*, 852 P.2d 74 (Haw. 1993).

150. See H.R.J. Res. 56, 108th Cong. (2003).

151. See 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000).

152. See 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000).

153. See 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738C (2000).

Outside of the federal arena, state and local governments have responded in various ways to demands for gay and lesbian marriage rights. The Massachusetts Supreme Judicial Court found that the Commonwealth may not deny civil marriage to same-sex couples, but it stopped short of allowing marriage licenses to be issued to the petitioners.<sup>154</sup> Instead, the court stayed its judgment for 180 days to allow the state legislature to draft new law in accordance with the opinion.<sup>155</sup> Subsequently, the court issued an advisory opinion clarifying its November 2003 ruling and stating that civil unions or anything short of marriage would be unconstitutional.<sup>156</sup>

On May 17, 2004, at the expiration of the 180 days, jubilant gay couples rushed to churches and courthouses to join one another in the first state-recognized marriages in the country.<sup>157</sup> Unhappy Massachusetts lawmakers have taken steps toward letting voters decide the marriage issue by constitutional amendment, but a vote cannot take place until 2006.<sup>158</sup>

While some states have passed laws specifically prohibiting same-sex marriage, other states and municipalities have recognized gay and lesbian relationships with domestic partnerships or some other quasi-marriage status that allows couples to receive limited benefits.<sup>159</sup> Vermont comes closest to allowing full marriage rights for gays by recognizing civil unions.<sup>160</sup> Vermont grants most of the same state benefits that it provides to heterosexual couples, but federal benefits are denied.<sup>161</sup> Gay couples, therefore, are prevented from collecting Social

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154. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969-70 (Mass. 2003).

155. See *id.* at 970.

156. See GLAD, *Opinions of the Justices to the Senate* (Feb. 4, 2004), available at [http://www.glad.org/marriage/SJC\\_Advisory\\_Opinion\\_020404.shtml](http://www.glad.org/marriage/SJC_Advisory_Opinion_020404.shtml) (last visited Oct. 31, 2004).

157. See *Gay Couples Exchange Vows in Massachusetts*, ASSOCIATED PRESS, May 17, 2004, available at <http://www.msnbc.msn.com/id/4991967> (last visited Aug. 6, 2004).

158. See *id.*

159. See HAW. REV. STAT. § 572C (1999). Hawaii created "reciprocal beneficiaries" similar to domestic partnerships as a sort of compromise during the same-sex marriage controversy. See *id.* California and the District of Columbia recognize domestic partnerships. Partnerships fall short of full equality in marriage, but recognize the marital nature of committed relationships. In-depth resources on the subject are available from Lambda Legal, at <http://www.lambdalegal.org>. Thirty-seven states prohibit same-sex marriage and all but one (Texas) passed their ban in 1995 or later, in anticipation of a Hawaii case considering same-sex marriage. See Nat'l Gay and Lesbian Task Force, *Specific Anti-Same-Sex Marriage Laws in the U.S.*, available at <http://www.thetaskforce.org/downloads/marriagemap0903.pdf> (last visited Oct. 31, 2004).

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

161. See Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)equal*, 25 VT. L. REV. 113, 147 (2000).

Security survivor benefits, filing joint federal tax returns, and receiving numerous other protections available to heterosexual couples.<sup>162</sup>

*B. The Christian Right: From Saving Souls to Saving the Nation*

An understanding of gay marriage laws in the United States is incomplete without looking at the role of the Christian Right. The influence of religious movements on the government and culture of the United States is nothing new.<sup>163</sup> Indeed, the colonists who alighted onshore at Plymouth Rock fled England to escape religious persecution and were committed to establishing a religious society in the colonies.<sup>164</sup> What *is* new about the Christian Right is that it is now media savvy and well funded, and its members intend to conform the laws to their interpretation of the will of God.<sup>165</sup>

The roots of the Christian Right are based largely in Protestant fundamentalism. Unlike the emphasis on saving souls that was the focus of its fundamentalist forefathers in the early 1900s however, this movement is aimed at political change. It espouses the belief that “the higher law of God must be made the law of the land, and true believers must use all available political tools to reach this goal.”<sup>166</sup> As noted by former Christian Coalition Executive Director Ralph Reed, the goals of the movement sound innocuous: good schools, safe streets, nonintrusive government, communities where people care for one another, and strong families.<sup>167</sup> Those goals and the means of achieving them, however, are based upon a narrow fundamentalist interpretation of Judeo-Christian values that excludes and even vilifies segments of society.<sup>168</sup> For example, the Christian Right’s goal of achieving “strong families” has led it to oppose attempts at legal recognition of gay families and

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162. *See id.*

163. *See* George M. Marsden, *Afterword: Religion, Politics, and the Search for an American Consensus*, in RELIGION AND AMERICAN POLITICS 380, 380-89 (Mark A. Noll ed., 1990).

164. *See* WILBUR EDEL, DEFENDERS OF THE FAITH 14 (1987).

165. *See* Richard V. Pierard, *Religion and the New Right in Contemporary American Politics*, in RELIGION AND POLITICS 61-62 (James E. Wood ed., 1983).

166. EDEL, *supra* note 164, at 124.

167. *See* REED, *supra* note 9, at 10.

168. *See* CHRIS BULL & JOHN GALLAGHER, PERFECT ENEMIES 15-18 (1996). In a public advertisement, The Eagle Forum, a religious right organization, suggested that gays engaged in pedophilia. *See id.* High-profile evangelical preacher Jerry Falwell has a history of making anti-Semitic comments, including “God does not answer the prayers of an unredeemed gentile or Jew.” *Id.* at 24. Newsletters and videos from religious right groups have portrayed homosexuals as sexually promiscuous, predatory child seducers, and disease-carriers. *See* DIDI HERMAN, THE ANTIGAY AGENDA 78-80 (1997). Author Didi Herman notes the similarity to older, anti-Semitic discourse that associated Jews with disease, filth, urban degeneration, and child-stealing. *See id.*

relationships.<sup>169</sup> Because the Christian Right's version of family is defined in "strict, traditional patriarchal terms,"<sup>170</sup> it has characterized gay and lesbian relationships as a threat to the family.

Laws related to same-sex marriage have resulted in part from a long-term struggle between the Christian Right and gay and lesbian movements. Advances by one often have served as a catalyst for the other, resulting in intertwined histories of the two movements.<sup>171</sup> The marriage debates of the 1990s provided a striking example: many gay rights advocates rejoiced when the Hawaii court ruled in favor of gay couples seeking access to marriage, but the Christian Right bolted into action, spurring antigay legislation at the national and state levels.<sup>172</sup> Similarly, after Massachusetts recognized the right of gay couples to marry, opponents of same-sex marriage struck back in November 2004 with eleven state constitutional amendments banning marriage for gays.<sup>173</sup>

The following section explores the interrelationship of the gay/lesbian and Christian Right movements and the effect that the Christian Right has had on gay marriage in the United States.

### C. *The New Christian Right Begins to Stir*

The modern Christian Right movement began to mobilize in response to what it deemed an erosion of religious and moral values in the 1960s and 1970s.<sup>174</sup> A 1962 ruling by the Supreme Court that struck state-mandated prayer in public school classrooms was seen as a government-backed assault against public morality.<sup>175</sup> In the eyes of the Christian Right, the erosion was reaching landslide proportions after the Supreme Court ruled that the right to an abortion was constitutionally protected.<sup>176</sup> Many within the Christian Right felt that the proposed Equal Rights Amendment (ERA), which would have granted specific constitutional rights to women had it been ratified by the requisite

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169. BULL & GALLAGHER, *supra* note 168, at 11.

170. *Id.* at 202.

171. *See generally* BULL & GALLAGHER, *supra* note 168, at xi-xv (discussing battles between the gay movement and what the authors call the "religious right").

172. *See id.*

173. *See* CNN.com, *Same-Sex Marriage Bans Winning on State Ballots*, Nov. 3, 2004, available at <http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage/index.html> (last visited Nov. 19, 2004).

174. *See id.* at 7-13.

175. *See* *Engel v. Vitale*, 370 U.S. 421, 436 (1962); EDEL, *supra* note 164, at 124-28.

176. *See* *Roe v. Wade*, 410 U.S. 113, 166-67 (1973); DURHAM, *supra* note 65, at 10.

number of states, threatened further moral decline.<sup>177</sup> Phyllis Schlafly, an outspoken ERA opponent and president of the Eagle Forum (a small Illinois-based political group) catered to conservative homemakers.<sup>178</sup> She believed the ERA was an attack on the traditional role of women that would “abolish husbands’ responsibility to care for their wives, tear apart families, and throw women into the increasingly competitive job market.”<sup>179</sup>

In her anti-ERA attacks in the early 1970s, Schlafly demonstrated the rhetoric and scare tactics that antigay activists would use for years to come.<sup>180</sup> She proclaimed that the ERA would result in legalized gay marriages, even though its Senate sponsor, Democrat Birch Bayh, had made sure that the legislative record reflected that it would not.<sup>181</sup> In one particularly inflammatory advertisement, the Eagle Forum displayed a photo of two stereotypical-looking gay men from a gay pride parade and claimed that the ERA was about homosexual sex “or even ‘sex with children.’”<sup>182</sup> Since its earliest days, the Christian Right had employed exaggerated and inaccurate images of gays to infer pedophilia, to raise the perceived “threat” of gay marriage, and to incite its membership to respond with money and political action.<sup>183</sup>

#### D. *New Visibility for Gays*

While many within the Christian Right felt that cultural and political forces were chipping away at their traditional way of life in the 1970s, an increasing number of gays and lesbians were experiencing new-found freedoms.<sup>184</sup> Urban areas saw an influx of gays, particularly men, who were discovering a more open life and creating a sense of community.<sup>185</sup>

Before long, gays began to organize both socially and politically.<sup>186</sup> As gay urban areas became more visible and its residents organized and asserted their political clout, cities across the country began to pass

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177. See BULL & GALLAGHER, *supra* note 168, at 10. The ERA was passed by Congress in 1972, but died in 1982 after failing to gain the support of thirty-eight states required for the adoption of a constitutional amendment. See *id.*

178. See *id.*

179. *Id.* at 11.

180. See *id.* at 11-12.

181. See *id.* at 11.

182. *Id.*

183. *Id.* at 13; see also DURHAM, *supra* note 65, at 53.

184. See BULL & GALLAGHER, *supra* note 168, at 4.

185. See *id.*

186. See *id.* at 8-10.

nondiscrimination ordinances that included protections for gays and lesbians.<sup>187</sup>

Throughout this same period in the 1970s, the Christian Right had been occupied primarily with defeating communism, which it perceived as an evil force that sought to replace God with atheism.<sup>188</sup> More specifically, communism was considered by the Christian Right to be anti-American and antifamily.<sup>189</sup> Cracks, however, were beginning to appear in communist ideology. Consequently, the Christian Right started to redirect its focus to what it saw as more impending evils: homosexuality, women's rights, abortion, and the unconstitutionality of school prayer.<sup>190</sup>

For the Christian Right, the increasingly visible gay communities often served as easy targets.<sup>191</sup> On both coasts, voter initiatives attempted to overturn new nondiscrimination laws or bar anyone who was openly gay from teaching in public schools.<sup>192</sup> The most visible battle came in response to a 1977 Dade County, Florida ordinance that protected gays from discrimination.<sup>193</sup> Leading the antigay charge was singer Anita Bryant, a former Miss America and spokesperson for a popular orange juice campaign.<sup>194</sup> Dade County voters overturned the ordinance, striking a blow against the emerging political gains of local gays.<sup>195</sup>

A similar storm arose the following year in California.<sup>196</sup> State senator and gubernatorial candidate John Briggs launched a voter initiative to keep anyone who was openly gay or gay-friendly from teaching in public schools.<sup>197</sup> After bitter rhetoric and advertising campaigns directed against gays, the initiative was unexpectedly defeated by nearly a four-to-three margin.<sup>198</sup> While Dade County gay residents achieved a civil rights victory that was later taken away, California sustained the opposite result.<sup>199</sup> More importantly, the Briggs initiative was an unprovoked attack to which the gay community and supporters

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187. *See id.* at 17.

188. *See id.* at 15; Marsden, *supra* note 163, at 388.

189. *See* HERMAN, *supra* note 168, at 50.

190. *See* Marsden, *supra* note 163, at 387.

191. *See* BULL & GALLAGHER, *supra* note 168, at 15-18.

192. *See id.*

193. *See id.* at 16-17.

194. *See id.* at 16. The campaign was: "A day without orange juice is like a day without sunshine." *Id.*

195. *See id.* at 17.

196. *See id.* at 16-18.

197. *See id.* at 18.

198. *See* DURHAM, *supra* note 65, at 44.

199. *See* BULL & GALLAGHER, *supra* note 168, at 17-19.

responded with effective political organization.<sup>200</sup> Regardless of who threw the first punch, the gay community learned a key lesson: an organized response would be invaluable. So, in these communities and others around the country, gays mobilized politically as they never had before.<sup>201</sup> Anticipating a need for political activity, education, and legal advocacy on a national level, they formed new organizations to address those needs.<sup>202</sup>

*E. Shifting Right into Politics*

The Briggs initiative and Bryant's crusade represented a dramatic shift in how the Christian Right viewed the role of religion in politics. In his book, *The New Christian Right*, Robert Wuthnow states that the shift evolved around the concept that private morality should play a greater role in public institutions.<sup>203</sup> The public had seen the government's roles in Vietnam and Watergate as ugly examples of public immorality.<sup>204</sup> Then recent Supreme Court decisions also had linked government and morality.<sup>205</sup> Furthermore, evangelicals experienced a boost in public perception by the election of President Jimmy Carter, a self-proclaimed born-again Southern Baptist.<sup>206</sup> As Wuthnow explains, these factors were an impetus for political organizing; as the Christian Right experienced a wider acceptance of their belief that private morality should influence the collective good, they felt a sense of political entitlement.<sup>207</sup> Seeing themselves as the custodians of biblical values that had now become prominent in public life, they felt compelled to infuse political affairs to affect the outcome of public issues.<sup>208</sup>

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200. *See id.* at 18-19.

201. *See id.* at 19.

202. The Human Rights Campaign Fund (now Human Rights Campaign) was formed in 1980 to provide a national voice in political advocacy, lobbying, and education. *See* Human Rights Campaign, *About HRC*, at [http://www.hrc.org/content/NavigationMenu/About\\_HRC/What\\_We\\_Do\\_HRC.htm](http://www.hrc.org/content/NavigationMenu/About_HRC/What_We_Do_HRC.htm) (last visited Oct. 31, 2004). The National Gay Task Force (now National Gay and Lesbian Task Force) began in 1973 to educate and advocate for gay and lesbian civil rights. *See* National Gay and Lesbian Task Force, *About Us*, at [www.thetaskforce.org/aboutus/whatwedo.cfm](http://www.thetaskforce.org/aboutus/whatwedo.cfm) (last visited Oct. 31, 2004). Lambda Legal Defense and Education Fund (now Lambda Legal) was founded in 1973 and works to secure gay and lesbian civil rights through impact litigation. *See* Lambda Legal, *About Lambda Legal*, at <http://www.lambdalegal.org/cgi-bin/iowa/about> (Oct. 31, 2004).

203. *See* Robert Wuthnow, *The Political Rebirth of American Evangelicals*, in *THE NEW CHRISTIAN RIGHT* 167, 175-80 (Robert C. Liebman & Robert Wuthnow eds., 1983).

204. *See id.*

205. *See id.*

206. *See id.*

207. *See id.*

208. *See id.*

Televangelist and former Moral Majority leader Jerry Falwell best reflected the shift in the movement's attitude toward political involvement in two statements made sixteen years apart.<sup>209</sup> First, speaking in 1965, Falwell said, “[b]elieving the Bible as I do, I would find it impossible to stop preaching the pure saving gospel of Jesus Christ, and begin doing anything else. . . . Preachers are not called to be politicians but soul winners.”<sup>210</sup> Sixteen years later, Falwell revealed a much different mission: “The idea that religion and politics don’t mix was invented by the Devil to keep Christians from running their own country. If [there is] any place in the world we need Christianity, it’s in Washington.”<sup>211</sup>

In 1979, as a way to achieve political and social advances on a national level, the Christian Right gave birth to its three principal organizations: the Moral Majority, the Christian Voice, and the Religious Roundtable.<sup>212</sup> Leaders of the organizations quickly sought both to influence and support the Republican Party presidential candidate Ronald Reagan.<sup>213</sup> Drawing on one of the Christian Right’s tried-and-true rhetorical tactics, then-Moral Majority Leader Jerry Falwell used gays and lesbians to advance his political goals.<sup>214</sup> During the 1980 presidential campaign, Falwell claimed that he had a conversation with Reagan’s opponent, President Carter, in which Carter expressed sympathy for gays.<sup>215</sup> Despite the fact that the conversation was fictional, Falwell gave a “verbatim quotation” as proof.<sup>216</sup> He received nationwide press coverage before his fraud was discovered, and his admission of fabricating the conversation was aired by only one television network.<sup>217</sup>

With these new groups in place, the presidential election of 1980 was the first in which the Christian Right’s activity played an important part.<sup>218</sup> The movement had significant radio, television, and cable resources, such as Falwell’s *Old Time Gospel Hour* and televangelist Pat Robertson’s *700 Club*, which it used successfully to mobilize its members.<sup>219</sup> Voting pattern statistics showed that most white evangelicals

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209. *See id.*

210. Pierard, *supra* note 165, at 64 (quoting WILLIAM R. GOODMAN, JR., & JAMES J.H. PRICE, *JERRY FALWELL: AN UNAUTHORIZED PROFILE* 91 (1981)).

211. *Id.*

212. *See id.* at 63.

213. *See* EDEL, *supra* note 164, at 153.

214. *See id.* at 137.

215. *See id.*

216. *Id.*

217. *See id.* Falwell admitted that he had deliberately fabricated the quoted exchange with President Carter. *See id.*

218. *See id.* at 138; DURHAM, *supra* note 65, at 11.

219. *See* EDEL, *supra* note 164, at 138-39.

(a significant constituency of the Christian Right) had supported Carter in 1976, but in 1980, sixty percent voted for Reagan and helped usher him into office in 1980.<sup>220</sup> By 1984, exit polls showed that Reagan's support from white evangelicals had risen to eighty percent.<sup>221</sup>

Reagan's election victory and ensuing presidency were critical to the success of the Christian Right.<sup>222</sup> In his book, *The Christian Right and Congress*, Matthew C. Moen observed, "What he [Reagan] did was 'mainstream' fundamentalists into politics. . . . From his simple willingness to share a platform with them, Reagan provided the fundamentalists with some legitimacy and political credentials."<sup>223</sup> Reagan also lent rhetorical support and promoted the moral agenda of the Christian Right in major speeches.<sup>224</sup> In his 1984 State of the Union Address, Reagan's topics matched many of the agenda items of the Moral Majority as he "devoted an entire section of his speech to the theme of 'traditional values.'"<sup>225</sup>

The executive branch was not the only avenue of political influence pursued by the Christian Right; Capitol Hill also received attention. Although it did not achieve immediate success on its legislative goals in the early 1980s, the Christian Right was successful in other, possibly more important, ways.<sup>226</sup>

[D]uring the relatively short span of some four years, the Christian Right placed its issues on the congressional agenda, helped obtain substantive action on them, and in so doing reignited those that had been moribund. Those were no small accomplishments in the realm of agenda-setting and influence. They were testimony to the movement's power on the Hill during the first Reagan term.<sup>227</sup>

In gaining access to Capitol Hill, the Christian Right laid the foundation for future political advances that it hoped to achieve through the Republican Party.

The early 1980s were also pivotal for the Christian Right because several Senate liberals were defeated and five extremely conservative Republicans were elected.<sup>228</sup> The new members scheduled hearings on Christian Right agenda items and pressured leadership to consider the

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220. *See id.* at 139.

221. *See id.*

222. *See* MATTHEW C. MOEN, *THE CHRISTIAN RIGHT AND CONGRESS* 50-51 (1989).

223. *Id.* at 51.

224. *See id.* at 53-54.

225. *Id.* at 54.

226. *See id.* at 83-86.

227. *Id.* at 144.

228. *See id.* at 56.

issues.<sup>229</sup> The Christian Right lost battles over school prayer and abortion, but its accomplishments in Congress were significant because “enactment of any agenda often takes considerable time while citizens gradually are sensitized to it.”<sup>230</sup> Although the Christian Right did not know it, it was paving the way for a future victory more than a decade later—the speedy passage of DOMA.

*F. The Impact of AIDS on Politics*

While the Christian Right was becoming more visible and politically successful, gay and lesbian Americans faced previously unforeseen challenges in the early 1980s. As the AIDS epidemic spread, the Christian Right seized it as a battle cry for fundraising appeals and antigay propaganda.<sup>231</sup> For instance, in a 1987 fund-raising letter, “Falwell accused gay men of donating blood because ‘they know they are going to die—and they are going to take as many people with them as they can.’”<sup>232</sup>

Ironically, the very disease that devastated pockets of the gay community acted as a catalyst for its unification and political organization.<sup>233</sup> Gay activists took to the streets demanding government-backed research and prevention efforts.<sup>234</sup> AIDS also revealed the importance of family rights for gays and lesbians.<sup>235</sup> Many men who lost partners to the disease also lost homes and personal belongings when families of the partners surfaced shortly after death to claim possessions.<sup>236</sup> The impact that AIDS had on “coming out of the closet” and on gay family relationships was instrumental later in the struggle for marriage rights.<sup>237</sup>

*G. The Christian Right Grows at the Grass Roots*

Toward the end of this decade of huge change for both movements, the Christian Right was so committed to political involvement that one of its own ran for president.<sup>238</sup> In the primaries and caucuses for the 1988

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229. *See id.* at 57.

230. *Id.*

231. *See* BULL & GALLAGHER, *supra* note 168, at 25-28; RANDY SHILTS, *AND THE BAND PLAYED ON* 55 (1987).

232. BULL & GALLAGHER, *supra* note 168, at 26.

233. *See id.* at 28-29.

234. *See id.* at 29.

235. *See id.*

236. *See id.*

237. *See id.*

238. *See* DURHAM, *supra* note 65, at 13.

presidential election, Christian religious broadcaster, Reverend Pat Robertson, garnered two million votes and made a strong showing in a number of states before dismantling his campaign.<sup>239</sup> The organizational structure that he built was a great contribution to future political activity of the Christian Right.<sup>240</sup> As Ralph Reed observed, “Robertson became the midwife who transformed a social protest movement and direct mail-driven behemoth into a well-trained, seasoned force of savvy political operatives.”<sup>241</sup> In the process, the Robertson campaign built a precinct structure in thirty-two states and provided “new blood and organizational muscle” to the ranks of the Republican Party.<sup>242</sup>

Robertson did not simply disappear after his presidential bid. In 1989, he took his campaign mailing list and started the Christian Coalition with the purpose of harnessing the voting power of the Christian Right in order to “change politics in America.”<sup>243</sup> Robertson and other Christian broadcasters continued to use an infrastructure of television, radio, and cable to build support for their agenda.<sup>244</sup> For instance, on the day of the confirmation vote for conservative Clarence Thomas to the United States Supreme Court, Robertson urged listeners of his *700 Club* to call the United States Capitol switchboard in support of the nomination.<sup>245</sup> In five minutes, viewers responded with an estimated 45,000 calls, a record at that time.<sup>246</sup>

By the 1992 elections, the Christian Right had made huge gains in the political process.<sup>247</sup> After Robertson’s unsuccessful bid for national office, the movement recognized the need for building support at the local and state levels as well, and began doing it successfully.<sup>248</sup> “On a state-by-state basis, conservative Christians were taking over state Republican parties and transforming them into vehicles for their own concerns, especially homosexuality.”<sup>249</sup> Control of the Republican Party at the state level enabled the Christian Right to comprise forty-two percent of the delegates at the Republican National Convention and to greatly influence the national platform committee.<sup>250</sup> The result was a

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239. See REED, *supra* note 9, at 193-94.

240. See *id.*

241. *Id.* at 193.

242. *Id.* at 194.

243. *Id.* at 1.

244. See *id.* at 164-66.

245. See *id.*

246. See *id.* at 166.

247. See BULL & GALLAGHER, *supra* note 168, at 79.

248. See REED, *supra* note 9, at 190-91.

249. BULL & GALLAGHER, *supra* note 168, at 78.

250. See *id.* at 79; REED, *supra* note 9, at 110.

vehemently antigay platform that opposed any civil rights advances for gays, including nondiscrimination legislation, marriage, and adoption.<sup>251</sup>

The Christian Right framed the election as a battle between good—Republicans who stood for “traditional family values”—and evil—Democrats who were “pro-gay.”<sup>252</sup> In one of the most publicized moments of the election season, the Christian Right revealed just how determined it was to use the Republican Party as a force against gay rights.<sup>253</sup> On the first night of the Republican Convention in Houston, Texas, conservative commentator Pat Buchanan said in his prime-time speech:

My friends, this election is about much more than who gets what. . . . There is a culture war going on in our country for the soul of America. It is a cultural war, as critical to the kind of nation we will one day be as was the Cold War itself. . . . A militant leader of the homosexual rights movement [referring to an openly gay speaker at the Democratic National Convention] could rise at the convention and exult, ‘Bill Clinton and Al Gore represent the most pro-lesbian and pro-gay ticket in history.’ And so they do.<sup>254</sup>

The delegates responded with fervor, waving signs that read “Family Rights Forever, Gay Rights Never.”<sup>255</sup> The Christian Right staked an exclusive claim on morality and chose the Republicans to guard and protect it.

Their presidential candidate was defeated in November 1992 however, as the Democratic ticket of Bill Clinton (President) and Al Gore (Vice President) won the election. Despite their candidates’ loss, the Christian Right showed that it had positioned itself as an influential force in American politics.<sup>256</sup> The movement used the gay community as a target throughout that period, and many in the gay community fought back, supplying volunteers, money, and votes to the Democratic campaign.<sup>257</sup> Soon after the 1992 election, this battle and all those before it would prove to be merely a build-up to the storm that was brewing over gay and lesbian marriage.

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251. See BULL & GALLAGHER, *supra* note 168, at 79.

252. *Id.* at 85-88.

253. See *id.* at 88.

254. *Id.*

255. *Id.*

256. See DURHAM, *supra* note 65, at 15-16.

257. See BULL & GALLAGHER, *supra* note 168, at 95.

*H. Wedding Bell Blues: Hawaii Debates Gay Marriage*

Until 1993, legally recognized gay marriage had been a dream for some in the gay community, a nightmare for the Christian Right, and a likely reality for no one.<sup>258</sup> When the Hawaii Supreme Court told the state that it must demonstrate a compelling reason to deny a marriage license to two women who had applied, gay marriage became a real possibility.<sup>259</sup>

1. Background

When she applied for a marriage license at the Hawaii Department of Health, Ninia Baehr could not have imagined the force of the impact her actions would have on the mainland and on her home state. Baehr had fallen in love and started to plan her life together with another woman, Genora Dancel. In the course of so doing, they decided to change their life insurance policies to name one another as beneficiaries.<sup>260</sup> The insurance company refused because it would allow only legal spouses to be designated.<sup>261</sup> When the two women consulted a lawyer about the policy, he informed them that discrimination against same-sex couples might be vulnerable to a constitutional challenge in Hawaii and asked if they were interested in pursuing a claim.<sup>262</sup> The couple struggled with the question, knowing that they might suffer public harassment, lose their jobs, and be shunned by family members.<sup>263</sup> After careful thought, however, they told the lawyer that they would be interested in participating in a legal challenge to the state's discrimination against same-sex couples.<sup>264</sup> Dancel summed up their decision to bring suit: "When you're told you can't get married, you feel like a second-class citizen."<sup>265</sup>

On December 17, 1990, Baehr and Dancel, joined by two other same-sex couples, filed for a state-issued marriage license.<sup>266</sup> Hawaii's Director of Health John C. Lewin requested an opinion from State

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258. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE* 48-49 (1996). Since 1971, unsuccessful legal challenges had been brought by gay and lesbian couples who attempted to gain the right to marry in other states. See *id.*

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

260. See ESKRIDGE, *supra* note 258, at 3.

261. See *id.*

262. See *id.*

263. See *id.*

264. See *id.* at 3-4.

265. *Id.* at 4.

266. See *id.*

Attorney General Warren Price, III.<sup>267</sup> Ten days after the couples submitted their applications, the attorney general issued his opinion: the state had acted lawfully in denying the marriage licenses.<sup>268</sup> The right to marry is fundamental under the United States Constitution, he acknowledged, but it did not apply to same-sex couples.<sup>269</sup> He relied on a United States Supreme Court case *Zablocki v. Redhail* that limited the constitutional right to marry to decisions “to marry and raise [a] child in a traditional family setting.”<sup>270</sup> He also based his opinion on a 1973 decision from the Kentucky Supreme Court that said marriage was the union of a man and a woman.<sup>271</sup>

The Hawaii Department of Health denied Baehr and Dancel their application on the grounds that same sex applicants are not capable of forming a valid marriage contract as defined by state statute.<sup>272</sup> On May 1, 1991, the same three couples whose marriage license applications had been denied filed a lawsuit asking for the statutory exclusion of same-sex couples to be declared invalid under the Hawaii or United States Constitution.<sup>273</sup>

The trial judge upheld the statute, and the plaintiffs appealed to the Hawaii Supreme Court.<sup>274</sup> On May 5, 1993, the state supreme court ruled that the exclusion constituted sex discrimination under the Hawaii Constitution.<sup>275</sup> The court remanded the case with instructions that the exclusion of same-sex couples from marriage must be subjected to strict scrutiny under Hawaii’s Equal Rights Amendment.<sup>276</sup> Specifically, the state would either have to prove a compelling state interest for denying same-sex marriage or stop discriminating.<sup>277</sup>

## 2. The Hawaii Supreme Court Ruling Sends Shockwaves Across the Country

The Hawaii Supreme Court ruling was a nightmare for the Christian Right. Although movement leaders had long used gay marriage as a rhetorical device to raise money and motivate supporters, they had not

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267. *See id.* at 4, 219 n.1.

268. *See id.* at 4.

269. *See id.*

270. *Id.* at 4, 219 n.1.

271. *See id.* at 4, 219 n.2.

272. *See id.* at 4.

273. *See id.*

274. *See id.* at 5.

275. *See id.* at 5; Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993).

276. *See Baehr*, 852 P.2d at 68.

277. *See id.*

been faced with a legal challenge that had any real chance of winning.<sup>278</sup> Hawaii was different. Whereas other American courts had failed to recognize that same-sex marriage was unconstitutional under state and federal law, *Baehr* forced a fundamental re-thinking of the question.<sup>279</sup> The Christian Right felt a sense of urgency that Reverend Lou Sheldon, a member of the Christian Right and President of the California-based Traditional Values Coalition, expressed when he stated “[t]his is a front-burner issue, because if you destroy the heterosexual ethic, then you are destroying a major pillar of Western civilization.”<sup>280</sup>

The next trial date was set for 1996.<sup>281</sup> The Christian Right wasted no time organizing in Hawaii. The Rutherford Institute, a Christian legal group based in Virginia, “asked the state supreme court to reject the marriage suit on the grounds that it would provide ‘special status’ to violence-prone, mentally ill homosexuals.”<sup>282</sup> Even before the case was heard again, the Christian Right scored success when the state legislature passed a law expressly banning gay marriages, asserting as its compelling reason that marriage is “intended for the propagation of the human race by man-woman units.”<sup>283</sup>

Bills denying same-sex marriage raced through the U.S. mainland as well. “State legislatures, many dominated by right-wing Republicans who had ridden the 1994 GOP riptide into office, began considering proposals to supersede their constitutions’ ‘full faith and credit’ provisions, which require states to honor one another’s contracts, in regards to prospective gay marriage licenses granted in Hawaii.”<sup>284</sup> By mid-1995, three states had already proposed antimarriage legislation.<sup>285</sup> In early 1996, three states enacted laws and another thirty states had introduced bills that would deny recognition of same-gender marriages performed in other states.<sup>286</sup>

With the trial (on remand to the Hawaii Circuit Court) scheduled right in the middle of the presidential election, the Christian Right also kept the issue in front of the national candidates. It circulated a

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278. See ESKRIDGE, *supra* note 258, at 48.

279. See DAVID A.J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS* 155 (1999).

280. BULL & GALLAGHER, *supra* note 168, at 208.

281. See ESKRIDGE, *supra* note 258, at 5.

282. BULL & GALLAGHER, *supra* note 168, at 209.

283. JONATHAN GOLDBERG-HILLER, *THE LIMITS TO UNION 2-3* (2002); Lambda Legal Def. & Educ. Fund, Inc., *Marriage Project: Background*, July 1995 (on file with the author) [hereinafter *Marriage Project*].

284. BULL & GALLAGHER, *supra* note 168, at 199.

285. See Lambda Legal Defense, *supra* note 283.

286. See John D’Emilio, *Here to Stay, A Working Paper on Lesbian and Gay Family Issues* 13-14 (National Gay and Lesbian Task Force, Washington, D.C.), 1996 (on file with the author).

“Marriage Protection Resolution” during the presidential caucus season in Iowa that was signed by Republican candidates from Robert Dole to Pat Buchanan.<sup>287</sup>

It was Capitol Hill, however, that delivered the biggest victory of all to the Christian Right. Spurred on by the Hawaii court ruling and Christian Right supporters, legislators in the House of Representatives introduced DOMA in May 1996 to ensure that legal same-sex marriages in Hawaii (if they came to be) would not be upheld in other states under the United States Constitution’s Full Faith and Credit clause.<sup>288</sup> The Human Rights Campaign, a gay rights political organization, noted that the unusual federal action was an “unprecedented intrusion by the U.S. Congress into an area traditionally left to the states.”<sup>289</sup> Legal scholars doubted that such legislative measures were necessary because states would probably not have been compelled to uphold the law by such means, but “the mere threat was enough to provoke uproar in Washington and around the country.”<sup>290</sup> DOMA created, for the first time ever, a federal definition of “marriage”: a “legal union between one man and one woman as husband and wife,” and “spouse”: “a person of the opposite sex who is a husband or wife.”<sup>291</sup> The legal effect was that even if a state recognized same-sex marriage, the federal government would not.<sup>292</sup> Thus, couples would be denied all federal benefits, such as Social Security survivor benefits and veterans’ benefits.<sup>293</sup>

Many supporters of the legislation expressed a religious fervor towards DOMA. In a speech reminiscent of Pat Buchanan’s 1992 “culture war” address to the Republican National Convention, Republican Senator Jesse Helms proclaimed that homosexuals were seeking to “destroy . . . America’s moral fabric” and that “the moral and spiritual survival of this Nation” was at stake.<sup>294</sup>

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287. *Id.* at 13.

288. See Andrew Sullivan, *Can Hawaii Be Stopped*, in SAME-SEX MARRIAGE: PRO AND CON 200 (Andrew Sullivan ed., 1997); Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (1996)).

289. Human Rights Campaign, *What the Defense of Marriage Act Does*, available at <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=15330&TEMPLATE=/ContentManagement/ContentDisplay.cfm> (last visited Oct. 31, 2004) [hereinafter *What the Defense of Marriage Act Does*].

290. Sullivan, *supra* note 288, at 200; see also Larry Kramer, *How Other States Can Ignore Hawaii*, in SAME-SEX MARRIAGE: PRO AND CON 329-32 (Andrew Sullivan ed., 1997).

291. 1 U.S.C. § 7 (2000).

292. See *What the Defense of Marriage Act Does*, *supra* note 289.

293. See *id.*

294. 142 CONG. REC. S10068 (1996).

In the end, DOMA was passed by overwhelming margins in both the House and the Senate and was signed into law by President Bill Clinton in September 1996.<sup>295</sup> Ironically, DOMA became law in the same month Canada amended the Act to add sexual orientation as a protected group.<sup>296</sup> The speedy passage of DOMA (it was introduced and signed into law in just over four months) pointed out disparities in support, resources, and organization between the Christian Right and gay and lesbian civil rights supporters. For twenty years, the Christian Right had opposed gay marriage. In contrast, the gay community, now faced with a possibility of gaining marriage rights, could not form a coherent response among its national leaders. Although a 1994 survey by *The Advocate* reported that eighty-five percent of gay male respondents said they would marry a same-sex partner if allowed by law, the national gay organizations were both out of touch with their constituents and fearful that supporting gay marriage would sabotage their chances for other political gains.<sup>297</sup> With the exception of Lambda Legal Defense and Education Fund, which served as cocounsel in the Hawaii case, organized response from gay leadership floundered.<sup>298</sup>

### 3. The Hawaii Circuit Court Rules

After a flurry of antimarriage legislation in Hawaii and on the mainland, the anticipated trial date finally arrived. The state of Hawaii defended its statute by arguing that it had a compelling interest in limiting marriage to men and women in order to foster and protect children.<sup>299</sup> State officials claimed that they were protecting their moral and cultural traditions, which included the fundamental right of children to be raised by a mother and father.<sup>300</sup> The state further objected to same-sex marriage because the existing laws “contemplate that marriage is a procreative relationship.”<sup>301</sup>

On December 3, 1996, state circuit Judge Kevin S.C. Chang held that denying marriage based on sex did not satisfy the strict scrutiny standard.<sup>302</sup> The state was unsuccessful in identifying a compelling state

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295. See NANCY F. COTT, PUBLIC VOWS 220 (2000). The bill passed by a vote of 342 to 67 in the House and 85 to 14 in the Senate. See *id.*

296. See Canadian Human Rights Act, S.C., ch. 14, s. 1-2 (1996).

297. See BULL & GALLAGHER, *supra* note 168, at 212-15.

298. See *id.* at 212-16.

299. See Baehr v. Miike, 1996 WL 694235, at \*3, (Haw. Cir. Ct. Dec. 3, 1996).

300. See *id.*

301. *Hawaii Judge Rejects Same-Sex Marriage Ban*, DALLAS MORNING NEWS, Dec. 4, 1996, at 1A (on file with the author).

302. See Baehr, 1996 WL 694235, at \*21.

interest as required by the Hawaii Constitution for any law that classifies people by sex.<sup>303</sup> Judge Chang rejected the state's arguments opposing homosexuals raising children, responding that sexual orientation of parents "does not automatically disqualify them from being good, fit, loving or successful parents."<sup>304</sup>

#### 4. Hawaii Responds to the Court Ruling

The ruling caused celebration among pro-gay marriage supporters, but it was short lived. The judge issued a stay, pending final appeal to the Hawaii Supreme Court.<sup>305</sup> In response to the trial court ruling, the Hawaii legislature presented to the voters a constitutional amendment that would overturn *Baehr* and ban same-sex marriages.<sup>306</sup> In November 1998, the voters approved the amendment.<sup>307</sup> Shortly thereafter, the Hawaii Supreme Court ruled that the amendment made the plaintiffs' demands for a marriage license "moot."<sup>308</sup> It appeared the battle in Hawaii was over.

##### *I. Post-Hawaii: The Marriage Battle Continues, State-By-State*

Although losing in Hawaii was a tough defeat for the gay community, the quest to achieve marriage rights was far from over. Gay and lesbian individuals could not achieve full equality until their relationships were recognized on equal footing with those of heterosexuals. More than ten years have passed since the Hawaii Supreme Court said the state engaged in gender discrimination when it denied Ninia Baehr and Genora Dancel the right to marry. Since then, gays and lesbians have continued to pursue legal challenges in Vermont, Massachusetts, and New Jersey.<sup>309</sup>

As in the Hawaii case, all three suits argued that prohibiting marriage to same-sex couples violated state constitutional rights. Vermont fell short of granting full marriage rights, but recognized civil unions that allow same-sex couples to enjoy most of the rights and obligations of marriage offered by the state.<sup>310</sup> In the Massachusetts case

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303. *See id.*

304. *Id.* at 17.

305. *See* JONATHAN GOLDBERG-HILLER, *THE LIMITS TO UNIONS* 42 (2002).

306. *See* RICHARDS, *supra* note 279, at 54.

307. *See* GOLDBERG-HILLER, *supra* note 305, at 43.

308. *Id.*

309. *See* cases cited *infra* notes 309-311.

310. *See* VT. STAT. ANN. tit. 15, § 1204 (2002); *see also* Cox, *supra* note 161, at 113-19, for a history of the legal challenge in Vermont.

*Goodridge v. Department of Public Health*, seven plaintiff couples successfully argued that the right to marry the person of one's choice was protected under the state constitution.<sup>311</sup> Similarly, in the New Jersey case *Lewis v. Harris*, the plaintiffs argued that "New Jerseyans have the right to equal protection of the law and the right to privacy, which includes the right to marry," under their state constitution.<sup>312</sup>

The pattern of continued legal challenges and the recognition of marriage rights in Massachusetts seem to indicate that courts may provide the best avenue for seeking marriage equality. As the Canadian courts were issuing their rulings in the summer of 2003, the United States Supreme Court issued a landmark decision in *Lawrence v. Texas*, effectively overruling state sodomy statutes.<sup>313</sup> Although the political, social, and rhetorical issues involved in *Lawrence*, a matter of private behavior, differ substantially from those involved in the public institution of marriage, its language affirming the constitutional protection of human dignity and precluding government intrusion upon one's choice of an intimate partner could prove to be a significant tool for gays to secure access to marriage.

#### V. AN ANALYSIS: WHY THE CHRISTIAN RIGHT HAS SUCCEEDED IN DEFEATING GAY MARRIAGE LAWS IN THE UNITED STATES

Political pressure from the Christian Right was not the sole reason for the passage of DOMA or for state antigay marriage laws. When a bill banning gay marriage passed in Hawaii's legislature in response to the first court decision, it passed easily.<sup>314</sup> One commentator noted that "[e]ven liberals otherwise sympathetic to gay rights draw the line at same-sex unions."<sup>315</sup> Why? I submit that although the Christian Right could not take credit for garnering *all* the votes needed to pass antigay marriage legislation, the movement and its predecessor, fundamentalism, have so significantly influenced politics, public discourse, and cultural institutions in the United States that our society has failed to support marriage equality for gays and lesbians.

This Part focuses on *why* the Christian Right has been significantly more influential in the United States regarding gay marriage laws than it

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311. 798 N.E.2d 941, 949, 969 (Mass. 2003).

312. *Lewis v. Harris*, Amended Complaint for Injunctive and Declaratory Relief and in Lieu of Prerogative Writs, Docket No. L-00-4233-02, para. 53, N.J. Super. Ct. Law Div., Hudson Co., filed 2002 (on file with the author).

313. 539 U.S. 558, 578-79 (2003).

314. See BULL & GALLAGHER, *supra* note 168, at 205.

315. *Id.*

has in the Netherlands and Canada. The discussion explores general historical developments that shaped the modern Christian Right and which are necessary to understand how the movement and many of the ideas that it promotes have been accepted in American culture.

A. *The Fundamentalists*

The Christian Right is commonly described as a subculture of Protestant fundamentalism. Volumes have been written on why fundamentalism has met with such success in the United States and, although scholars do not always offer the same reasons, they do agree that its influence has been substantial and widespread.<sup>316</sup> A defining characteristic of fundamentalism is its adherence to tradition, and therefore, its rejection of modernism. What guides fundamentalists in daily living is their literal interpretation of the Bible. Modernism, in contrast, employs scientific, historical, and social methodologies to an understanding of Christianity.

The Scopes “monkey trial” of 1925 marked a pivotal moment for U.S fundamentalists in their resistance to modernity.<sup>317</sup> John Scopes, a biology teacher in Dayton, Tennessee, was on trial for teaching Darwin’s evolution theory in a state that had adopted an antievolution law. The Scopes trial was a battle over creationist versus Darwinist teaching.<sup>318</sup> The much larger social battle surrounding the trial, however, was modernism versus religious fundamentalism.<sup>319</sup> Although Scopes was found guilty of teaching evolution, fundamentalists were decimated in the press and in public opinion.<sup>320</sup> Where they had held a position of dominance in shaping education and values, fundamentalists found themselves discredited and ridiculed.<sup>321</sup>

As a consequence, the movement began to entrench against the forces of modernity by building their own infrastructure as a response to the marginalization and loss of credibility suffered after the trial.<sup>322</sup> The ramifications of the Scopes trial have relevance today in explaining how extreme fundamentalist views, while not held by most people in the United States, can grow out of and be tolerated by American society. In the years following the trial, and after unsuccessful efforts to gain control

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316. See OLDFIELD, *supra* note 9, at 13-72; GEORGE M. MARSDEN, *FUNDAMENTALISM AND AMERICAN CULTURE* 184-228 (1980); WUTHNOW, *supra* note 14.

317. See OLDFIELD, *supra* note 9, at 17.

318. See *id.*

319. See OLDFIELD, *supra* note 9, at 17, 44.

320. See MARSDEN, *supra* note 316, at 184-91.

321. See *id.* at 223; OLDFIELD, *supra* note 9, at 17.

322. See *id.* at 16-17.

in leading denominations, fundamentalists began to build a support base of local congregations, Bible schools, missions, radio shows, publications and youth movements.<sup>323</sup> This infrastructure shored up fundamentalist resistance to modern cultural influences and impacted religious organizations other than those identified as fundamentalist.

The resilience of the fundamentalists resulted in a growth of its groups and sub-groups, while membership in Protestant churches declined.<sup>324</sup> In addition to establishing their own institutions, fundamentalists had a considerable impact on existing denominations.<sup>325</sup> Groups who identified themselves with fundamentalist beliefs became part of the mainstream denominations.<sup>326</sup> Fundamentalists found homes in other churches as well, in denominations that were not in the mainstream, or by forming their own more extremist churches.<sup>327</sup> It is the widespread fundamentalist presence throughout institutions and mainstream churches that allows fundamentalist thought to become so familiar in American culture. Noted Christian scholar George Marsden states that “almost nowhere outside of America did this particular Protestant response to modernity play such a conspicuous and pervasive role in the culture.”<sup>328</sup>

### *B. Literalism and America's Intellectual History*

Literalism is the belief that the sacred text of a particular religion is the literal truth. The touchstone of Protestant fundamentalism is that the Bible is the literal truth of God.<sup>329</sup> To understand why fundamentalism has taken hold more strongly in the United States than it has in Canada, the Netherlands, and other countries where Christianity is a common religion, we must look to America's intellectual history, which helped create an environment in which fundamentalism could thrive. In turn, fundamentalism influenced what would become the Christian Right and impacted much of mainstream religion.

In short, the intellectual framework that shaped fundamentalist thought in the United States did not advance past the Enlightenment, while European attitudes progressed under the influences of

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323. See LONG, *supra* note 8, at 9.

324. See ROGER FINKE & RODNEY STARK, *THE CHURCHING OF AMERICA* 247-49 (1992); DEAN M. KELLEY, *WHY CONSERVATIVE CHURCHES ARE GROWING* 20-25 (1986).

325. See MARSDEN, *supra* note 316, at 195.

326. See *id.*

327. See *id.*

328. *Id.* at 221.

329. See JOHN H. GARVEY, *Introduction: Fundamentalism and Politics*, in *FUNDAMENTALISMS AND THE STATE* 15 (Martin E. Marty & R. Scott Appleby eds., 1993).

romanticism. American fundamentalists' resistance to modernism was based in its origins in an intellectual life that relies on fixed, divinely-inspired truths.<sup>330</sup> In contrast, since the 1780s most of Europe had been swept by romanticism's emphasis on the changing and the mysterious.<sup>331</sup> Europeans widely accepted the view that history did not provide fixed answers; rather, history was informed over time and by gradual developments.<sup>332</sup>

Scientific developments in America in the 1850s forced new views on theology, but the country was generally not prepared with an intellectual framework to incorporate them.<sup>333</sup> Rather, enlightenment-dominated thought in America demanded unchanging definitions from science in order to understand the world and man's place within it. Fundamentalists in the United States did not reject all science, but they rejected science that did not prove with certainty their literalist understanding of Christianity.<sup>334</sup> Fundamentalists had no desire to try out new ideologies or beliefs, but instead looked to the unchanging words of scripture for guidance.<sup>335</sup> This mindset helps explain how the battle developed later in the Scopes trial, pitting the modern scientific theory of evolution against the fundamentalists' literal interpretation of creation from Biblical scriptures.

The most pervasive antigay images that the Christian Right has used to explain and justify condemnation of gays are based on the literal interpretation of a small number of Old Testament passages. For example the movement has repeatedly cited the story of Sodom and Gomorrah as God's condemnation of homosexual behavior.<sup>336</sup> When the city of Sodom was visited by two angelic messengers, the resident Lot offered them food and shelter.<sup>337</sup> In an attempt at violent gang rape, the men of the city stormed Lot's house, demanding that the strangers be sent out to be sodomized.<sup>338</sup> Lot refused to turn over the male guests, although he did offer his daughters.<sup>339</sup> The following day, God destroyed Sodom and its inhabitants with fire as Lot and his daughters were allowed to escape.<sup>340</sup> Fundamentalists have viewed and propagated this story as

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330. See MARS DEN, *supra* note 316, at 226.

331. See *id.* at 226-27.

332. See *id.*

333. See *id.*

334. See GEORGE M. MARS DEN, RELIGION AND AMERICAN CULTURE 59 (1990).

335. See GARVEY, *supra* note 329, at 15.

336. See JOHN SHELBY SPONG, RESCUING THE BIBLE FROM FUNDAMENTALISM 7 (1991).

337. See *Genesis* 19:1-3.

338. See *id.* at 19:4-5.

339. See *id.* at 19:8.

340. See *id.* at 19:15-30.

God's punishment of homosexuals. Oddly, they fail to explain why it was acceptable for Lot to offer his daughters. Additionally, mainstream churches in the past have also accepted the story as a biblical account against homosexuality that justifies oppression of gay people. Deeper examination of the story, however, reveals it to be one about hospitality and the values of justice, rather than a condemnation of homosexuals.<sup>341</sup> God's displeasure was not in response to homosexual sex, but to the inhospitality and brutality exhibited by Sodom's residents toward the messengers that God had sent.<sup>342</sup>

Two other frequently-quoted passages used by literalists against gays are Leviticus 18:22, "[t]hou shalt not lie with mankind, as with womankind: it *is* abomination," and Leviticus 20:13, "[i]f a man also lie with mankind, as he also lieth with a woman, both of them have committed an abomination: they shall surely be put to death. . . ."<sup>343</sup> Literalists promote these as unquestionable proscriptions against homosexuality. These two isolated scriptures, however, cannot be accurately understood outside of their context. They are part of the Holiness Code of the book of Leviticus, a text for the Hebrew people as they were called by God to be God's chosen people in exile from the Egyptians.<sup>344</sup> The Code also called for a man or woman who was a wizard to be put to death by stoning,<sup>345</sup> for anyone who cursed his father or mother to be put to death,<sup>346</sup> and for a man and woman who had sexual relations during the woman's menstruation to be cut off from God's chosen people.<sup>347</sup>

Although these rules were written for a very specific time and place, literalists pick out Leviticus 18:22 and 20:13 to oppose homosexuality today. They apply no historical, medical, or cultural analysis that might lend insight into the text, including the fact that the passages ignore female homosexual activity entirely. Anglican Bishop John Shelby Spong notes that literalists use such passages, "to justify existing prejudice by keeping oneself secure inside a way of life that cannot be challenged by any new insight."<sup>348</sup> Christian Right literalists

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341. See SPONG, *supra* note 336, at 7.

342. See *id.*

343. *Leviticus* 18:22, 20:13 (King James).

344. See Peter Pett, *Commentary on Leviticus (4)*, available at <http://uk.geocities.com/jonpartin/leviticus4.html> (last visited Oct. 20, 2004).

345. See *Leviticus* 20:27 (King James).

346. See *id.* at 20:9 (King James).

347. See *id.* at 20:18 (King James).

348. SPONG, *supra* note 336, at 8.

ignore the code's prohibition in Leviticus 19:19 against wearing linen mixed with wool, but focus on what advances their antigay agenda.<sup>349</sup>

*C. The "Ideal" Family, According to the Christian Right: No Place for Gays*

The Christian Right has fought against gay rights in general but specifically against gay marriage because it perceives such relationships as the most threatening element to their way of life. The aptly-named "Defense of Marriage Act" reflected this perceived threat from gay relationships. Commentators have noted that America's Christian Right is particularly concerned with its construct of family, which is deeply rooted in its fundamentalist history.<sup>350</sup> One commentator stated, "[f]or American Protestant fundamentalism, the family has become a potent symbol of an idealized moral order, and the imperative to 'return' to an idealized form of the family is perhaps the highest priority of the fundamentalist social agenda."<sup>351</sup> This "ideal" family is expressed by Christian Right leaders as a man, his wife, and possibly children.<sup>352</sup> Accordingly, variations from the model that include gay and lesbian couples are seen as "morally reprehensible."<sup>353</sup>

*D. The Media Power of the Christian Right in the United States*

The final piece, for purposes of this discussion, to an understanding of the Christian Right's success in the United States is its control of substantial media resources. Through its ownership of radio and cable stations, the Christian Right can promote its views and mobilize its membership. Just one example was seen during the DOMA debates. Ralph Reed noted at the time that "[t]alk radio and cable television, dominated by conservative voices like Rush Limbaugh and Pat Robertson, now rivals or eclipses the establishment press in shaping the nation's political agenda."<sup>354</sup>

In short, the key to understanding the more recent struggles in the United States between the fundamentalist-rooted Christian Right and the gay and lesbian movement requires that we put together the two elements

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349. See Leviticus 19:19 (King James).

350. See Helen Hardacre, *The Impact of Fundamentalisms on Women, the Family, and Interpersonal Relations*, in FUNDAMENTALISMS AND SOCIETY 129, 129, 131 (Martin E. Marty & R. Scott Appleby eds., 1993).

351. *Id.* at 131.

352. *Id.* at 131-32.

353. *Id.* at 133.

354. REED, *supra* note 9, at 159.

discussed earlier, the country's Enlightenment-dominated intellectual framework and fundamentalist-based literalism, with this unprecedented media accessibility. An intellectual framework grounded historically upon unchanging rules, together with fundamentalism's emphasis on literal Biblical interpretation and the Christian Right's ability to disseminate its messages widely have combined to create the unique success of the Christian Right's role in preventing full access to gay marriage here in the United States.

*E. Summary: What the Christian Right Has Meant for Gay Marriage in the United States*

There are four elements that work together to prevent widespread acceptance of gay marriage in the United States: (1) a fundamentalist presence that is pervasive in cultural institutions and mainstream religions; (2) an Enlightenment-dominated intellectual history that is receptive to a literal fundamentalist thought process; (3) a concept of family that rejects gays and lesbians; and (4) extensive Christian Right media ownership and exposure. The power of the Christian Right is that its basic beliefs and messages permeate American society through mainstream churches, radio broadcasts, and even the way Americans process information. From Phyllis Schlafly's swipes at the gay community in her early 1970s anti-ERA appeals, to publicly-broadcast accusations by Jerry Falwell and Pat Robertson that gays and lesbians were to blame for the September 11, 2001, terrorist attacks against the United States, the Christian Right has painted gays as antifamily and therefore anti-American.<sup>355</sup>

The Christian Right further perpetuates its created cultural stereotypes by ignoring religious views from mainstream churches and from gays and lesbians themselves. A study published by the Human Rights Campaign (HRC) reports:

[P]opular impressions to the contrary. . . . The fact is, it only *appears* as if there is one religious view—a negative one—about gay and lesbian people because conservative political and religious organizations, such as the Christian Coalition, the Family Research Council and Focus on the Family, have in recent years dominated the public discourse on this issue. They have done so through a combination of factors, including: a significant commitment of resources; statements that, whether accurate or not, are

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355. See John F. Harris, *God Gave U.S. 'What We Deserve,' Falwell Says*, WASH. POST, Sept. 14, 2001, at C03.

designed to attract media attention; and a willingness to be perceived as blatantly prejudiced when it comes to lesbian and gay people.<sup>356</sup>

In perpetrating the view that Christianity has only one view of homosexuality—condemnation—the Christian Right dismisses the reality that a significant number of gays and lesbians are *members* of faith communities. Children who grew up in religious traditions before realizing they were gay or lesbian suddenly did not throw aside the religious heritage with which they were raised. The Christian Right, however, rejects the concept of gay and lesbian Christians in order to support its antigay stances.

The impact of the Christian Right's well-funded and orchestrated media campaign against gays, in general, and gay rights in particular, is also felt in the political arena. For example, the Congressional debates over DOMA revealed an intolerance among certain legislators that was fostered by years of pressure from the Christian Right.<sup>357</sup> A writer for *The Advocate* who observed the significant cultural differences between the United States and the Netherlands where he was living at the time, wrote:

[In] contrast [to the Netherlands], in the United States—the fountainhead of democracy and the birthplace of the modern gay rights movement—democratic reform has been warped by a malevolent theocratic movement that views politics as a holy war. On the day the House voted to impeach President Clinton, a Washington Post writer described the vote as the climax of “a decade of destructive partisanship, personal attack, and win-at-all-costs politics.” What he avoided saying flat out was that that kind of politics, once a rarity, is a direct consequence of the religious right's mentality. To be an American in the Netherlands is to be reminded constantly of the differences that proceed from the absence of such a mentality here. While Pat Robertson and his ilk have been nipping gay-friendly curricula in the bud, a generation of Dutch people have been educated by such curricula and have grown up never hearing gays abused in the media, from the pulpit, or at the family dinner table. Hence, homosexuality is to them a non-issue.<sup>358</sup>

## VI. CONCLUSION—WHAT THE FUTURE MAY HOLD

Regarding the issue of gay marriage, the Christian Right has proven itself to be a force to be reckoned with in many countries, although to

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356. LISA BENNETT, HUMAN RIGHTS CAMPAIGN FOUNDATION, *MIXED BLESSINGS, ORGANIZED RELIGION AND GAY AND LESBIAN AMERICANS IN 1998* 8 (1999).

357. See 142 CONG. REC. S10068 (1996).

358. *Life in a Zealot-Free Zone*, *supra* note 27.

greatly different degrees. Even in the Netherlands, where opposition to its marriage legislation was minimal when it passed, the timing of its passage was influenced by the decrease in Christian Right members within Parliament and the government.<sup>359</sup> In Canada, the Liberal government defended against accusations, reminiscent of those made before the Human Rights Act's amendment to include sexual orientation, that it was wavering on its commitment to same-sex marriage.<sup>360</sup> The Liberal Party drafted a bill to legalize same-sex marriage and was waiting until the Supreme Court ruled on whether it complied with the Charter to introduce it.<sup>361</sup> With the Supreme Court giving the go-ahead in December 2004, a vote is expected some time in 2005.<sup>362</sup>

In the United States, any federally granted gay marriage rights are years away. In contrast to Canada, gay-marriage proponents in the United States must currently spend their energy on the defensive, combating the FMA making its way around Capitol Hill and engaging in state-by-state battles.<sup>363</sup> The Christian Right and other opponents to marriage equality have responded to Massachusetts' recognition of same-sex marriage with thirteen state constitutional amendments banning gay marriage.<sup>364</sup>

Voters in Missouri and Louisiana approved constitutional bans in late summer 2004.<sup>365</sup> The other eleven states voted against gay marriage in the November 2 presidential election.<sup>366</sup> The Republican Party used the issue of gay marriage to turn out religious conservative voters in what New York Times columnist Garry Wills called "revenge for the Scopes trial of 1925."<sup>367</sup> Republican candidate President Bush, who had earlier opposed a constitutional amendment banning gay marriage, endorsed the amendment to appeal to a large Christian fundamentalist bloc of the party.<sup>368</sup>

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359. See MERIN, *supra* note 18, at 125.

360. See Maccharles, *supra* note 144.

361. See Brown, *supra* note 146.

362. See *Martin Vows to Pursue Canada Gay Marriage Law*, CNN.Com, Jan. 27, 2005, available at <http://www.cnn.com/2005/WORLD/americas/01/27/canada.marriage.reut/> (last visited Feb. 16, 2005).

363. See H.R.J. Res. 56, 108th Cong. (2003).

364. See Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, Nov. 3, 2004, available at <http://www.stateline.org/stateline.?pa-story&sa=showStoryInfo&id=353058> (last visited Nov. 19, 2004).

365. See *id.*

366. See *id.*

367. Garry Wills, *The Day the Enlightenment Went Out*, N.Y. TIMES, Nov. 4, 2004, available at <http://query.nytimes.com/search/restricted/article?res=F30613FB3C580C778CDDA80994DS404482> (last visited Nov. 19, 2004).

368. See *id.*

The Christian Right has been motivated not only by changes in Massachusetts law, but also by the Supreme Court's recent decision in *Lawrence*, which many within the Christian Right perceive as a sign of moral decline in the nation.<sup>369</sup> Even with resistance from the Christian Right, however, the type of incremental change described by Kees Waaldjik of the Netherlands has begun: laws have moved from decriminalization of homosexual conduct, to protecting against discrimination, to providing some form of partnership recognition, and, at least in one state, granting marriage rights.<sup>370</sup>

Societal attitudes seem to be shifting slowly, as well. The public was evenly split in response to a May 2003 Gallup Poll that asked whether gay couples should be able to form civil unions granting some of the legal rights of married couples.<sup>371</sup> The response was forty-nine percent opposed and forty-nine percent in favor, as compared to fifty-three percent opposed and forty-one percent in favor one year earlier.<sup>372</sup>

While recent state constitutional amendments passed easily, gay activists have seen progress in the struggle over gaining recognition for gay relationships.<sup>373</sup> Attendees at a national conference of gay rights organizers noted that the general public was virtually unaware of civil unions years ago, but now, civil unions "are considered a fallback position to gay marriage, even by some conservatives."<sup>374</sup> Regardless of what takes place at the legislative or judicial levels, a tremendous challenge and opportunity exists for individuals to take action. As Kate Kendell, executive director of the National Center for Lesbian Rights noted:

What [the November 2 election] made clear was how much work we have to do making our lives real and not an abstraction. It's not enough that they see us as part of their communities, but that they also understand that the reason we want marriage equality is the same reason everyone else does, to protect and provide security for our relationships and our children—the kind of protection that in this society only marriage provides.<sup>375</sup>

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369. See CHRISTIAN COALITION OF AMERICA, WASHINGTON WEEKLY REVIEW 6-28-2003, at <http://www.cc.org/content.cfm?id=9> (last visited Aug. 15, 2003).

370. See Waaldjik, *supra* note 31.

371. See Neil A. Lewis, *Bush Backs Bid to Block Gays from Marrying*, N.Y. TIMES, July 31, 2003, at A1.

372. See *id.*

373. See Kate Zernike, *Sobered Gay Rights Groups Vow to Change Public's Mind*, N.Y. TIMES, Nov. 14, 2004, available at <http://www.nytimes.com/2004/11/14/national/14gays.html> (last visited Nov. 15, 2004).

374. *Id.*

375. *Id.*

Legal developments involving marriage rights for gays and lesbians in the United States may ultimately be decided by the judicial branch. The recognition of marriage rights in Massachusetts could result in a constitutional challenge based on the Full Faith and Credit clause, which requires states to recognize the judgments of sister states.

For supporters of gay equality, signals from the United States Supreme Court are more hopeful than those from state and national legislatures. In *Lawrence v. Texas*, Justice Kennedy and the rest of the six-three majority drew from their more tolerant European peers, who had overturned sodomy laws in actions taken by the British Parliament and the European Court of Human Rights.<sup>376</sup> The opinion recognized the dignity of gay persons and stated that *Bowers v. Hardwick*, the case *Lawrence* overruled, “demeans the lives of homosexual persons.”<sup>377</sup> In the final paragraphs, Justice Kennedy responded to the dissent’s claim that the majority was creating rights that did not exist under the Constitution.<sup>378</sup> Referring to the drafters of the Fifth and Fourteenth Amendment, Justice Kennedy responded, “[t]hey knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”<sup>379</sup>

The gay and lesbian search for freedom includes the desire for equal marriage rights. Only time will tell how long it will take to reach that milestone, but surely the concept of American freedom is great enough to encompass such a desire.

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376. See 539 U.S. 558, 560 (2003).

377. *Id.* at 575.

378. See *id.* (Scalia, J., dissenting).

379. *Id.*