Andersen v. King County: The Battle for Same-Sex Marriage—Will Washington State Be the Next to Fall?

I. INTRODUCTION

Heather Andersen and Leslie Christian, along with seven other same-sex couples, filed a suit against the state of Washington, challenging the constitutional validity of Washington's Defense of Marriage Act (DOMA), codified in the Revised Code of Washington (RCW) 26.04.010 and RCW 26.04.020(1)(c).[1] The plaintiffs claimed that the statutes violated their rights under the privileges and immunities clause, the due process clause, and the Equal Rights Amendment (ERA) of the Washington Constitution.[2] Superior Court Judge William L. Downing ruled that DOMA violated the privileges and immunities clause of the Washington Constitution, and that the statutory denial of plaintiffs' right to marry violated the state constitutional principles of substantive due process.[3] Judge Downing refused to rule on the ERA argument due to the binding precedent of *Singer v. Hara*, a 1974 decision by the Court of Appeals of Washington.[4] The Superior Court of Washington *held* RCW 26.04.010 and RCW 26.04.020(1)(c) invalid under the Washington Constitution because their exclusion of same-sex couples from the status and privileges of civil marriage were not rationally related to any valid or compelling state interest.[5] *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *11 (Wash. Super. Ct. Aug. 4, 2004).

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1. *See* Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *2-*3, *5 (Wash. Super. Ct. Aug. 4, 2004). The Revised Code of Washington now states that "[m]arriage is a civil contract between a male and a female." R.C.W. 26.04.010(1). The Code specifically prohibits marriages "[w]hen the parties are persons other than a male and a female." *Id.* at 26.04.020(1)(c).

2. *See Andersen*, 2004 WL 1738447, at *3.

3. *See id.* at *11.

4. *See id.*; Singer v. Hara, 522 P.2d 1187, 1195-97 (Wash. App. 1974).

5. *See Andersen*, 2004 WL 1738447, at *11. The case was certified to the Washington Supreme Court for review. *See id.* at *12.

II. BACKGROUND

The United States Supreme Court in the twentieth century did much to expand the list of constitutionally protected rights by creating a substantive due process gloss in its jurisprudence.[6] In *Griswold v. Connecticut* and *Eisenstadt v. Baird*, the Court dealt with the difficult issue of contraception, ruling that the constitutional right to privacy could be extended to protect the marital as well as the nonmarital relationship.[7] In *Griswold*, the Court ruled that the First Amendment right to association created a number of protected privacy rights, including the right of a married couple to use contraceptives.[8] Marriage was described as "a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred."[9] The Court ruled that decisions of procreation were to be left to its participants, and not the government.[10] Seven years later in *Eisenstadt*, it was held that this fundamental right to privacy necessarily included the right of an individual to use contraceptives whether married or single—government intrusion was not allowed to interfere with the ultimate decision to become pregnant.[11]

This expansion of substantive due process rights continued in *Roe v. Wade*, in which the Court ruled that a woman has a fundamental right to choose to have an abortion under certain defined circumstances.[12] Though the state has an interest in protecting life, and can justifiably proscribe abortions after the point of fetal viability, it was noted that the right to privacy previously enumerated in *Griswold* and *Eisenstadt* encompassed decisions of whether or not to become pregnant—and must also include the right of the mother to terminate that pregnancy, once begun.[13]

In addition to defining the constitutional parameters surrounding privacy in the bedroom, the Supreme Court in the twentieth century adjudicated several cases on state marriage regulations, thereby defining the acceptable bounds of marriage itself.[14] In *Loving v. Virginia*, the

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6. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846-47 (1992); Roe v. Wade, 410 U.S. 113, 152-53 (1973); Eisenstadt v. Baird, 405 U.S. 438, 443 (1972); Griswold v. Connecticut, 381 U.S. 479, 481-85 (1965).

7. *See Eisenstadt*, 405 U.S. at 453-54; *Griswold*, 381 U.S. at 485-86.

8. *See Griswold*, 381 U.S. at 483-84.

9. *Id.* at 486.

10. *Id.* at 485-86.

11. *See* 405 U.S. at 453.

12. *See* 410 U.S. at 152-54.

13. *See id.* at 153.

14. *See* Turner v. Safley 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

Court reviewed the case of Mildred Jeter and Richard Loving, an interracial couple married in Washington, D.C., but arrested and convicted in their home state of Virginia for violating the antimiscegenation statutes contained within the Virginia Code.[15] The Court ruled that while the regulation of marriage is traditionally a matter of state concern, Virginia's law had to be struck down as a violation of the Equal Protection Clause of the Fourteenth Amendment.[16] Despite the statute's equal application to blacks and whites, the Court ruled that it was impermissible to deny the fundamental right to marry based solely on racial classifications.[17]

In the decades that followed *Loving*, the Supreme Court handed down two other decisions that were notable for expanding the right to marry beyond the limits imposed by state law.[18] In *Zablocki v. Redhail*, the Court dealt with the case of a Wisconsin statute aimed at fathers who had defaulted on child support.[19] The statute conditioned the right to marry upon receipt of a court order proving that any previous children were sufficiently provided for, so as not to become a burden on the state.[20] The Court found that the state's intention to encourage the maintenance of child support payments could not justify the infringement on the father's fundamental right to marry.[21] It cited earlier cases on substantive due process, saying that if a couple had the right to use contraception, and the mother had a right to abort the child, then surely there could be no reason to discriminate against the ability of the couple to marry.[22]

Later, in *Turner v. Safley*, the Supreme Court again struck down a state regulation as an impermissible burden on the right to marry.[23] Here, the issue before the Court was a regulation limiting marriage within the Missouri Division of Corrections: inmate marriage (to other inmates or ex-felons) was prohibited without approval from the superintendent, and such approval was dependent upon "compelling reasons," such as the

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15. *See* 388 U.S. at 2-3.
16. *See id.* at 7, 12.
17. *See id.* at 12; *see also* Perez v. Lippold, 198 P.2d 17, 18-19 (Cal. 1948) ("Marriage is thus something more than a civil contract subject to regulation by the state; it is a fundamental right of free men. There can be no prohibition of marriage except for an important social objective and by reasonable means.").
18. *See Turner*, 482 U.S. at 99-100; *Zablocki*, 434 U.S. at 377.
19. *See* 434 U.S. at 375.
20. *See id.*
21. *See id.* at 390-91.
22. *See id.* at 386.
23. *See* 482 U.S. at 97-99.

possible birth of an illegitimate child.[24] Extending its opinion from *Zablocki* to apply to prison inmates, the Court noted that "inmate marriages, like others, are expressions of emotional support and public commitment," and highlighted the many federal benefits that prisoners were being denied due to this infringement of their right to marry.[25]

A third topic of jurisprudence, that of gay and lesbian rights, has been dealt with largely in lower courts.[26] The Supreme Court rose to address this issue in *Bowers v. Hardwick*, a 1986 challenge to a Georgia sodomy statute, where the Court upheld the state law and declared its earlier fundamental rights cases as being inapposite to the case at bar.[27] *Bowers* involved two men who were charged with violating Georgia's prohibition on consensual sodomy, and who claimed that the law infringed upon their constitutional rights to privacy and association.[28] The Court chose to take a narrow view of the issue presented, addressing itself not with the broader forms of these rights, but rather with whether or not the Constitution protected consensual homosexual sodomy as a fundamental right.[29] Referring to the many other state statutes similar to Georgia's, it held that such behavior was not "deeply rooted in this Nation's history and tradition," and therefore did not warrant constitutional protection.[30]

Bowers' impact on gay rights cases in the late 1980s and early 1990s was palpable. As long as homosexual behavior could be criminalized by state sodomy laws, homosexuals could not be elevated to the level of a suspect or even quasi-suspect class, and cases seeking equal rights frequently failed under rational basis review.[31] Gradually, however, the Court's holding in *Bowers* was called into question as state sodomy statutes were repealed or fell into disuse and other regulations were changed to protect homosexuals from various forms of discrimination.[32] Further eroding the authority of *Bowers*, the Court in 1996 ruled in

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24. *See id.* at 82.

25. *Id.* at 95-96.

26. *See* Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996); Dean v. Dist. of Columbia, Civ. A. No. 90-13892, 1992 WL 685364 (D.C. Super. Ct. June 2, 1992); High Tech Gays v. Def. Ind. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990).

27. *See* 478 U.S. 186, 190-91 (1986).

28. *See id.* at 187-89.

29. *See id.* at 190.

30. *Id.* at 192 (quoting Moore v. E. Cleveland, 431 U.S. 494, 503 (1977) (Powell, J., plurality)).

31. *See Thomasson*, 80 F.3d at 928; *High Tech Gays*, 895 F.2d at 571, 576; *Dean*, 1992 WL 685364, at *1-*2.

32. *See* Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 791-93 (1995).

Romer v. Evans that an amendment to the Colorado Constitution seeking to repeal all antidiscrimination statutes enacted for the protection of gay and lesbian citizens violated the Equal Protection Clause.[33]

The decisive case illustrating the changing attitudes towards homosexual behavior was *Lawrence v. Texas*, decided by the Supreme Court in 2003.[34] Faced with another sodomy statute, this one applying solely to same-sex couples, the Court recognized the error of its earlier analysis, and overruled *Bowers* because "its continuance as precedent demean[ed] the lives of homosexual persons."[35] Rejecting the suggestion of ruling on equal protection grounds, the Court turned to its earlier substantive due process cases and found them supportive of a broader right to privacy in matters of personal autonomy and dignity.[36] The case stopped short of ruling on the issue of same-sex marriage—but in holding that homosexuals, like heterosexuals, are entitled to the privacy to conduct their personal lives, *Lawrence* opened up a possibility for gay marriage rights that had never before existed.[37]

The first cases challenging states for the right of same-sex couples to marry ended quickly, dismissed for failure to state a claim or for the lack of presenting a constitutional question.[38] In the state of Washington, the earliest suit involving same-sex marriage was *Singer v. Hara*, where the First Division of the Court of Appeals of Washington held that neither the state's statutory legislation nor its newly adopted Equal Rights Amendment (ERA) granted the right of marriage to same-sex couples.[39] Echoing the rationale of other early same-sex marriage cases, the court in *Singer* ruled that plaintiffs were not being denied a right on the basis of sex, but rather because the definition of marriage could not be expanded to include them.[40]

Decades later, the Hawaii Supreme Court was faced with a similar question—that is, whether or not the denial of marriage licenses to same-sex couples violated its state constitutional guarantees of privacy, equal protection, and due process of law.[41] In *Baehr v. Lewin*, the court

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33. *See* 517 U.S. 620, 624, 631-32 (1996) (holding that Colorado's Amendment 2 failed to pass even the rational basis test and finding it born of animus and without any rational purpose).

34. *See* 539 U.S. 558 (2003).

35. *Id.* at 575.

36. *See id.* at 564-67.

37. *See id.* at 578.

38. *See* Jones v. Hallahan, 501 S.W.2d 588, 589-90 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971).

39. *See* 522 P.2d 1187, 1189-91, 1194 (Wash. Ct. App. 1974).

40. *See id.* at 1192.

41. *See* Baehr v. Lewin, 852 P.2d 44, 50 (Haw. 1993).

analyzed the substantive due process and marriage cases of the Supreme Court, and found that the right to privacy did not extend a right to same-sex marriage, given that there is no logical link between same-sex couples and childbirth.[42] But the court went on to conclude that the Hawaii marriage statute denied the plaintiffs rights and benefits based on their sex, thereby implicating strict constitutional scrutiny, and would be treated upon further review with a presumption of invalidity.[43]

Six years later in *Baker v. State*, another group of same-sex couples challenged the statutes governing marriage in Vermont, alleging that they were within the statutory requirements and should have been given licenses—or alternatively, that the statutes themselves were unconstitutional due to their exclusionary nature.[44] The constitutional claim of the Vermont plaintiffs was based on the Common Benefits Clause of the Vermont Constitution, which guarantees government benefits and protections to all members of the community without exception.[45] Noting various state laws on same-sex parenting, the court found that "[i]f anything, the exclusion of same-sex couples from the legal protections incident to marriage exposes *their* children to the precise risks that the State argues the marriage laws are designed to secure against."[46] It held that the rights of marriage must be extended to same-sex couples.[47] The Vermont Legislature later responded by enacting a program of civil unions, to provide the same state-sponsored benefits and protections as marriage.[48]

After the decision in *Lawrence* had given judicial legitimacy to homosexual relationships, two more same-sex marriage cases were decided, in which the Supreme Court's opinion played a pivotal part.[49] In *Standhardt v. Superior Court*, two gay men sued, claiming that Arizona's ban of same-sex marriage violated both the fundamental right to marry, and the right to equal protection.[50] The court rejected the idea that

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42. *See id.* at 55-56.

43. *See id.* at 64, 67. The state later enacted a reciprocal beneficiary program forestalling any further discussion of same-sex marriages. *See* Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 FORDHAM L. REV. 1699, 1739-42 (1998).

44. *See* 744 A.2d 864, 868-70 (Vt. 1999).

45. *See id.* at 874.

46. *Id.* at 882.

47. *See id.* at 886.

48. *See* Mark Strasser, *Equal Protection at the Crossroads: On Baker, Common Benefits, and Facial Neutrality*, 42 ARIZ. L. REV. 935, 937 (2000).

49. *See* Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

50. *See* 77 P.3d at 454.

Lawrence had entitled plaintiffs to enter into a same-sex marriage, and looking at past Supreme Court precedent, ruled that allowing such marriages would not expand the right, but rather would redefine the meaning of the word "marriage" as it has always been known.[51] Accepting Arizona's justifications of procreation and child-rearing, the court ruled that despite the inequities created by allowing opposite-sex parents to marry while denying same-sex parents the same right, plaintiffs did not have a right to same-sex marriage.[52]

Just one month after *Standhardt*, the Massachusetts Supreme Judicial Court handed down its opinion in *Goodridge v. Department of Public Health*, ruling that the denial of same-sex plaintiffs from the institution of civil marriage violated the Massachusetts Constitution.[53] The court held that the state statutes governing the marriage relationship could not be interpreted to include same-sex couples.[54] But it then went beyond all legal precedent by declaring that the ban on same-sex marriage failed to meet the rational basis test for due process *or* equal protection.[55] Facing similar state justifications to those advanced in *Baker* and *Standhardt*, the *Goodridge* court found a lifelong exclusive commitment, not the birth of children, to be the defining characteristic of civil marriage.[56] It defined civil marriage "to mean the voluntary union of two persons as spouses, to the exclusion of all others."[57]

III. THE COURT'S DECISION

In the noted case, the Superior Court of Washington addressed the issue brought up in *Baker* and *Goodridge*, and followed the precedent of the Massachusetts court, ruling the denial of same-sex marriage licenses in Washington to be unconstitutional.[58] Unlike many of the cases from other jurisdictions, here the court held that the government's justifications for Washington's DOMA needed to be held to strict constitutional scrutiny—requiring that RCW 26.04.010 and RCW 26.04.020(1)(c) be narrowly tailored to compelling state interests in order

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51. *See id.* at 458.
52. *See id.* at 463-64.
53. *See* 798 N.E.2d at 948 ("The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.").
54. *See id.* at 953.
55. *See id.* at 961.
56. *See id.*
57. *Id.* at 969-70.
58. *See* Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *10-*11 (Wash. Super. Ct. Aug. 4, 2004).

to make the continued denial of same-sex marriage licenses lawful.[59] Echoing *Baker* and *Goodridge*, Judge Downing ruled that the marriage statutes could not survive analysis under the rational basis standard, and held them violative of the privileges and immunities and due process clauses of the Washington Constitution.[60] The court declined to address the plaintiffs' ERA argument because of the legal precedent created by the Washington Court of Appeals in its 1974 case of *Singer v. Hara*.[61]

In determining the standard of review to apply in the noted case, the court rejected the plaintiffs' argument that homosexuals could be considered a suspect class.[62] Yet, looking to past Supreme Court precedent, the court found that strict scrutiny was required because of the Washington DOMA's imposition on plaintiffs' fundamental right to marry.[63] The court reflected upon *Loving*, *Zablocki*, and *Turner*, and found that in each case, the Supreme Court had focused its inquiry on the right to marry in its broader sense.[64] Regarding *Turner* specifically, the court noted that the Supreme Court had declared a fundamental right not to procreative marriage, but to "a non-coital relationship . . . that was a supportive, committed, spiritually significant marriage with government benefits and property rights."[65] Applying the expansion of personal autonomy given in *Casey* and *Lawrence* to early judicial definitions of marriage, the court found that the plaintiffs were asserting their fundamental right to take part in "the most important relation in life."[66]

Addressing first the nonlegal justifications given by opponents to same-sex marriage, the court rejected morality and tradition as insufficient reasons to validate the statutes as refined by DOMA.[67] Judge Downing cited *Lawrence* as proof that the separation of church and state precludes courts from taking sides with any one particular religious viewpoint.[68] He further remarked that "[s]erving tradition, for the sake of tradition alone, is not a compelling state interest."[69]

The court then turned to the justifications proffered by the state for its continued denial of same-sex marriages, asking whether those

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59. *See id.* at *7.
60. *See id.* at *11.
61. *See id.*
62. *See id.* at *5.
63. *See id.* at *5-*7.
64. *See id.* at *5.
65. *Id.* at *6.
66. *Id.* at *7 (quoting Maynard v. Hill, 125 U.S. 190, 205 (1888)).
67. *See id.* at *8.
68. *See id.* (quoting Lawrence v. Texas, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring)).
69. *Id.*

interests were sufficient to withstand strict constitutional scrutiny.[70] While acknowledging the fact that heterosexual marriages serve the state purpose of encouraging procreation and healthy child-rearing, the court found that there was no logical reason why allowing homosexual marriages would damage these legitimate state goals.[71] Recalling *Baker* and *Goodridge*, Judge Downing concluded that in denying same-sex couples the right to marry, the state was actually denying legal protection to the many children of gay and lesbian couples.[72] The court also addressed the argument that children will be harmed by being raised in nontraditional family structures, but refused to accept it, as there was no valid scientific evidence introduced to support the contention.[73]

Briefly touching on the ERA claim, the court cited *Singer v. Hara* as binding precedent, preventing it from ruling on this matter.[74] Judge Downing reasoned that the issue of the ERA was not in need of further deliberation, as the state's justifications for the same-sex marriage ban had already been found wanting.[75] The court held that RCW 26.04.010 and RCW 26.04.020(1)(c) violated the plaintiffs' rights under both the privileges and immunities clause and the due process clause of the Washington Constitution.[76] The court briefly addressed possible remedies for the issue, and Judge Downing made his own recommendation of extending marriage licenses to all couples; however, immediate relief was not granted, as the matter was stayed pending review by the Washington Supreme Court.[77]

IV. ANALYSIS

The legal climate surrounding the topic of same-sex marriages has changed vastly in recent years—concepts that only twelve years ago were unthinkable have moved into the mainstream.[78] Referring to the recent domino effect of cases legalizing gay marriage or quasi-marriage rights, Judge Downing characterized the court's opinion as "favoring the equal rights of all citizens (as have courts in Vermont, Hawaii, Oregon, Massachusetts, British Columbia and elsewhere before it and in other

70. *See id.* at *9-*10.
71. *See id.*
72. *See id.* at *10.
73. *See id.*
74. *See id.* at *11.
75. *See id.*
76. *See id.*
77. *See id.* at *11-*12.
78. *See* Dean v. Dist. of Columbia, No. 90-13892, 1992 WL 685364 (D.C. Super. Ct. June 2, 1992); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

jurisdictions to come)."[79] Following the groundbreaking decisions in *Lawrence* and *Goodridge*, the topic of gay marriage today is indeed a rather ubiquitous one, inspiring journal articles, symposia, and books as well as lawsuits such as those which prompted the noted case.[80]

Just a month after Judge Downing's opinion was handed down, another Superior Court of Washington declared the denial of same-sex marriage rights to be unconstitutional.[81] In *Castle v. State*, the court reaffirmed the result of the noted case, ruling that the state's historical commitment to marriage as a heterosexual institution was not enough to justify the denial of governmental rights and protections to same-sex couples and their children.[82] The *Castle* opinion went one step further than the court had been willing to go in the noted case, holding that homosexuals *did* constitute a suspect class.[83] Given that conclusion, the court found no compelling reason to deny homosexuals the fundamental right to marry.[84]

Contrary to what their opponents have charged, the noted case and *Castle* are not simply aberrations caused by "activist" judges.[85] Though a clear break from tradition, these rulings build upon principles of fundamental rights laid down by past cases and legislation both in America and the rest of the world.[86] In recent years, greater rights have been given to gay and lesbian couples in the United States and around the globe. Denmark, Norway, Sweden, Iceland, and Finland allow "registered partnerships" as a legal matter, while prohibiting church ceremonies between same-sex couples.[87] Germany allows "life partnerships," and France also allows a limited form of legal partnership,

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79. *Andersen*, 2004 WL 1738447, at *13.

80. *See* Symposium, *Can Anyone Show Just Cause Why These Two Should Not Be Lawfully Joined Together?*, 38 NEW ENG. L. REV. 487 (2004) (providing transcriptions of speeches for and against same-sex marriage); JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2004); EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY (2004).

81. *See* Castle v. State, No. 04-2-00614-4, 2004 WL 1985215, at *13 (Wash. Super. Ct. Sept. 7, 2004).

82. *See id.* at *14-*16.

83. *See id.* at *13.

84. *See id.* at *16.

85. *See* President George W. Bush, State of the Union Address 2005 (Feb. 2, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/02/20050202-11.html.

86. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Maynard v. Hill, 125 U.S. 190 (1888); Halpern v. Canada (Attorney Gen.), [2003] 65 O.R.3d 161, 168; Nancy G. Maxwell, *Opening Civil Marriage to Same-Gender Couples: A Netherlands-United States Comparison*, 18 ARIZ. J. INT'L & COMP. L. 141, 207 n.35 (2001).

87. *See* BBC NEWS UK EDITION, *Gay Marriage Around the Globe*, Dec. 9, 2004, *available at* http://news.bbc.co.uk/1/hi/world/americas/4081999.stm [hereinafter *Gay Marriage Around the Globe*].

the "civil solidarity pact."[88] In a measure expected to come into effect sometime in 2005, Britain has passed a "civil partnership" bill giving same-sex couples many of the legal rights afforded to married couples.[89]

Going beyond mere recognition, the Netherlands in 2001 became the first country to allow true same-sex marriage.[90] Belgium added itself to the list just two years later, and Canada will be soon to follow, given the legalization of same-sex marriage in seven of its provinces in 2004.[91] Even conservative Spain, over the objection of the Roman Catholic Church, announced plans to give gays and lesbians every right to marriage and adoption.[92] When viewed in light of these statistics, the United States' position on gay marriage and gay rights seems an increasingly unpopular one. Some states are slowly edging their way towards what has been achieved in Vermont and Massachusetts, but in eleven states, constitutional amendments banning same-sex marriage were passed in 2004—and more are on the way.[93]

Despite the profound divisiveness of the matter, both within the judiciary and without, the judicial barriers to same-sex marriage in the United States are falling. Not every case touching the topic has followed the same progressive result.[94] However, those that do, on whatever level, are making a historic step forward, as in the noted case and *Castle*, ruling in favor of equality and personal liberty despite a negative precedent at the state appellate level.[95] As was remarked in *Goodridge*, "[t]he history of constitutional law 'is the story of the extension of constitutional rights

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88. *See id.* Mirroring the San Francisco marriages of 2004, a same-sex marriage performed by a French mayor was quickly invalidated by the government, proving that "le mariage homosexuel est illégal en France [homosexual marriage is illegal in France]." RTL INFO, *Les Juges Annulent le Mariage Homosexuel*, July 27, 2004, *available at* http://www.rtl.fr.rtlinfo/article.asp?dicid=201461; Rene Sanchez, *High Court in California Nullifies Gay Marriages*, WASH. POST, Aug. 13, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A61169-2004Aug12.html.

89. *See Gay Marriage Around the Globe*, *supra* note 87.

90. *See id.*

91. *See id.*; CBC NEWS, *Supreme Court OK's Same-Sex Marriage*, Dec. 10, 2004, *available at* http://www.cbc.ca/story/canada/national/2004/12/09/scoc-gaymarriage041209.html.

92. *See Gay Marriage Around the Globe*, *supra* note 87.

93. *See* CNN Inside Politics, *America Votes 2004: Same-Sex Marriage Bans Winning on State Ballots*, Nov. 3, 2004, *available at* http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage; Jeannie Shawl, *Same-Sex Marriage Bans Advance in AL, IN, VA*, JURIST (Feb. 9, 2005), *available at* http://jurist.law.pitt.edu/paperchase/2005/02/same-sex-marriage-bans-advance-in-al.php.

94. *See In re* Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004); Standhardt v. Superior Court, 77 P.3d 451 (Ariz. Ct. App. 2003); Brause v. State, 21 P.3d 357 (Alaska 2001).

95. *See* Castle v. State, No. 04-2-00614-4, 2004 WL 1985215, at *16 (Wash. Super. Ct. Sept. 7, 2004); Andersen v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447, at *11 (Wash. Super. Ct. Aug. 4, 2004).

and protections to people once ignored or excluded.'"[96] With the advent of these new cases, the fight for the extension of marriage rights to same-sex couples has now begun in earnest—and it is far from over.

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96. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 966 (Mass. 2003) (quoting United States v. Virginia, 518 U.S. 515, 557 (1996)).

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