Nos. A110449, A110450, A110451, A110463, A110651, A110652

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

In re MARRIAGE CASES	JCCP No. 4365
CITY AND COUNTY OF SAN FRANCISCO, Plaintiffs and Respondents, v. STATE OF CALIFORNIA, et al., Defendants and Appellants. A110449 (San Francisco Cty. Super. Ct. No. 429-539)	GREGORY CLINTON, et al., Plaintiffs and Respondents, v. STATE OF CALIFORNIA, et al., Defendants and Appellants. A110463 (San Francisco Cty. Super. Ct. No. 429-548)
ROBIN TYLER, et al., Plaintiffs and Respondents, v. STATE OF CALIFORNIA, et al., Defendants and Appellants. A110450 (Los Angeles Cty. Super. Ct. No. BC-088-506)	PROPOSITION 22 LEGAL DEFENSE AND EDUCATION FUND, Plaintiff and Appellant, v. CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants and Respondents. A110651 (San Francisco Cty. Super. Ct. No. 503-943)
LANCY WOO, et al., Plaintiffs and Respondents, v. STATE OF CALIFORNIA, et al., Defendants and Appellants. A110451 (San Francisco Cty. Super. Ct. No. 504-038)	CAMPAIGN FOR CALIFORNIA FAMILIES, Plaintiff and Appellant, v. GAVIN NEWSON, et al., Defendants and Respondents. A110652 (San Francisco Cty. Super. Ct. No. 428-794)

AMICI CURIAE **BRIEF OF LAW PROFESSORS, THE UNIVERSITY OF TORONTO, FACULTY OF LAW, INTERNATIONAL HUMAN RIGHTS CLINIC, AND THE WOMEN'S INSTITUTE FOR LEADERSHIP DEVELOPMENT, IN SUPPORT OF RESPONDENTS**

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limitation of California Rules of Court, Rule 14(c)(1) because it contains 12,573 words, excluding the parts of the brief exempted by California Rules of Court, Rule 14(c)(3). This brief also complies with the typeface requirements of California Rules of Court, Rule 14(b)(2)-(4) because it has been prepared in a proportionately spaced font using Microsoft Word 2000 in 13-point Times New Roman typeface.

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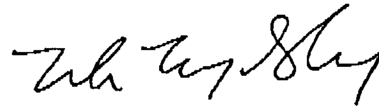

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BRIEF OF AMICI CURIAE

STATEMENT OF INTEREST OF AMICI CURIAE

This brief is submitted in the consolidated California marriage cases by ten law professors, the International Human Rights Clinic of the University of Toronto, Faculty of Law and the Women's Institute for Leadership Development. The signatories to this submission have research, writing and advocacy interests in the elimination of all forms of discrimination, including discrimination based on sex and sexual orientation. Amici are experts in the fields of comparative Constitutional law and international human rights law and are familiar with legal developments outside the United States. They respectfully submit this Brief to ensure that the Court is aware of developments in international human rights law and the laws of foreign states (hereinafter "human rights law"), with regard to the growing trend associated with civil marriages between people of the same sex, equal treatment of same-sex couples and non-discrimination principles applied to sex and sexual orientation.

SUMMARY OF ARGUMENT

This Court should consider the constitutionality of the denial of marriage to same-sex couples with the benefit of foreign and international experiences. Applying the same or similar terms to nearly identical facts, liberal democracies around the world have concluded that marriage is an essential social institution and that the continued refusal to allow same-sex couples the right to marry violates Constitutional equality principles. From Canada to Spain to South Africa, appellate courts and legislatures have determined that denying gays and lesbians the right to marry causes grave harm to their human dignity and freedom. In so doing, the record of foreign constitutional interpretations provides strong support for the Superior Court's finding that the exclusion of gay and lesbian couples from the institution of marriage violates the equal protection guarantee of the California Constitution (Cal. Const., art. I § 7, subd. (a).)

Equally important, each of these authorities has addressed and rejected arguments proffered by the Appellants in the instant cases. In the courts of appeal of British Columbia and Ontario, as well as the South African Constitutional Court and the European Court of Human Rights, appellate decisions squarely reject three arguments made in the instant cases: that marriage honors procreation, that historic definitions should guide modern views of the institution and that a separate institution called civil unions or registered domestic for same-sex couples partnerships constitutes an adequate alternative. Canadian and South African courts recently resolved that each of these claims was wholly insufficient to justify continued denial of access to civil marriage for same-sex couples. And as government spokespersons in Belgium, the Netherlands and Spain observed upon passage of same-sex marriage legislation, freedom, dignity and

equality demand nothing less. Taken together, these cases reflect a growing trend in foreign and comparative law in favor of extending the right of civil marriage to same-sex couples.

ARGUMENT

A. INTERNATIONAL LAW HAS COME TO OCCUPY A CENTRAL ROLE IN U.S. CASES WITH RESPECT TO THE INTERPRETATION OF CONSTITUTIONAL RIGHTS

Amici observe that federal and California courts frequently invoke foreign and international law. Rather than calling into question U.S. jurisprudence, amici seek to demonstrate that certain fundamental rights which are central to California have been adopted by liberal democracies the world over. California shares a common legal tradition with many foreign constitutional systems. Legal concepts like "equality," "liberty," and "discrimination" are employed globally. By construing these terms in light of foreign interpretations, this Court can use the experience of nations that share California and the United States' constitutional heritage to test workable solutions to common constitutional problems. *Cf. New State Ice Co. v. Liebmann* (1932) 285 U.S. 262, 310-11 (Brandeis, J., dissenting)(states can "serve as ... laborator[ies] for social and economic experiments.")

1. The Supreme Court has affirmed international norms with respect to human rights in defining the liberties protected by the U.S. Constitution

In *Lawrence v. Texas* (2003) 539 U.S. 558, the U.S. Supreme Court confirmed the importance of international norms for the interpretation of

constitutional liberties. *Lawrence* held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional. In so finding, the Supreme Court overruled *Bowers v. Hardwick* (1986) 478 U.S. 186, and reexamined the sweeping references to the history of Western civilization and to Judeo-Christian moral and ethical standards upon which Chief Justice Burger's 1986 decision relied. In *Lawrence*, the Court assessed the criminalization of consensual same-sex sexual intimacy against current norms of Western civilization and found that *Bowers* was out of step with those norms as evidenced by numerous comparative and international precedents:

> To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. See *P.G. & J.H. v. United Kingdom*, App. No. 00044787/98, & ¶ 56 (Eur.Ct.H. R., Sept. 25, 2001); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as Amici Curiae 11-12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.

(*Lawrence*, *supra*, 539 U.S. at 577.)

Lawrence is emblematic of a growing number of cases in which U.S. courts look to international norms to guide their analysis under the respective state or U.S. constitution. As Justice O'Connor observed in 2002, "While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have

given thought to the same difficult issues that we face here."[1] In the context of the death penalty applied to mentally disabled persons, the Supreme Court recently invoked international trends by noting that, "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved" (*Atkins v. Virginia* (2002) 536 U.S. 304, 316.) Last term, the Supreme Court relied on international law in *Roper v. Simmons* (2005) 543 U.S. 551, (2005) 125 S.Ct. 1183 which held that the execution of individuals who were under 18 years of age at the time a capital crime was committed is prohibited by the Eighth and Fourteenth Amendments.[2] Recognizing the persuasiveness of international law, Justice Kennedy observed that:

> It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a

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[1] Justice Sandra Day O'Connor, "Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law" (2002) 96 Am. Soc'y Int'l L. Proc. 348, 350 (2002); see also Chief Justice William H. Rehnquist, "Constitutional Courts—Comparative Remarks," in Germany and Its Basic Law: Past, Present, and Future—A German-American Symposium (Paul Kirchhof & Donald P. Kommers eds., 1993) 411, 412 ["...now that constitutional law is solidly grounded in so many foreign countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."]

[2] In *Kane v. Winn* (D. Mass. 2004) 319 F.Supp.2d 162, Judge Young recounted the history of international in federal court decisions and characterized the reluctance of some judges and lawmakers to apply it to domestic laws as an aberration "...given how recently the Supreme Court has reaffirmed the importance of international law in defining the liberties protected by the Bill of Rights. Needless to say, until Congress, the Supreme Court, or a new constitutional amendment commands otherwise, this court will afford international law the status it has always enjoyed in federal law." (*Kane, supra*, 319 F. Supp.2d at p. 201).

> factor in the crime. The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions ... It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

(*Id.* at 1200.)

2. The affirmation of international human rights norms is also prevalent in lower U.S. courts and in state courts

Foreign and comparative law has long been used by domestic courts in cases involving transborder issues[3] and where the reasoning of a foreign court is more persuasive than the precedent found in the United States.[4] In *People v. Tilbury*, (1991) 54 Cal. 3d 56, Justice Mosk looked to the Supreme Court of Canada opinion in *R. v. Swain*, [1991] 1 S.C.R. 933 to inform his view that an accused should be entitled to request a jury trial to prove that he was no longer insane, where the accused had previously been found not guilty by reason of insanity. *Id.* at p. 79 (Mosk, J., dissenting) (comparing California's obstacles and finding that "these restrictions are hardly less arbitrary than the scheme held unconstitutional in Canada").

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[3] In *In re Estate of O'Dea*, (1973) 29 Cal. App. 3d 759, for example, the Court interpreted Canadian constitutional law in a case involving a California court's obligation to recognize a Canadian court order nullifying an adoption.

[4] In *State ex rel. Kalal v. Circuit Court for Dane County*, (2004) 271 Wis. 2d 633, for example, the court followed the Canadian approach to statutory interpretation with respect to the statutory obligations a circuit judge must adhere prior to authorizing the issuance of a complaint in relation to a privately filed criminal complaint.

On the question of the right to marry for same-sex couples and the place of sexual orientation within the canons of antidiscrimination law, comparative jurisprudence has repeatedly been invoked by Constitutional authorities to cite the contributions of foreign courts in the interpretation of equality principles and the importance of human dignity. (See, e.g., *Halpern v. Canada (Attorney General* (2003) 65 O.R. (3d) 161 (C.A) [citing *Loving v. Virginia (Commonwealth)* (1967) 388 U.S. 1.]; *Fourie and Another v Minister of Home Affairs and Others* 2005 (3) BCLR 241 (SCA), [citing *Goodridge v. Department of Public Health*, (Mass. 2003) 798 N.E.2d 941]; *Ghaidan v. Godin-Mendoza* [2004] 3 All E.R. 411 [citing *Karner v. Austria*, no. 40016/98, [2003] Eur. Ct. H. R. 395].)[5] In *Goodridge,* the Massachusetts Supreme Court referenced and adopted the Canadian solution found in *Halpern v. Canada (Attorney General)* (2003) 65 O.R. (3d) 161 (C.A), as a way of bringing the common law definition of marriage in line with the Constitution without having to strike down marriage laws altogether:

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[5] Leading scholars of comparative and international law contend that transjudicial borrowing is inevitable. See Judges in Contemporary Democracy: An International Conversation 281 (Robert Badinter & Stephen Breyer, eds. 2004); Harold Hongju Koh, "Transnational Legal Process" (1996) 75 Neb. L. Rev. 181 (1996)[arguing that as transnational actors interact, they create patterns of behavior and generate norms of external conduct which in turn become part of domestic legal structures]; Anne-Marie Slaughter, "A Brave New Judicial World", in Michael Ignatieff, ed., American Exceptionalism and Human Rights (Princeton: Princeton University Press, 2005) 277 (arguing that American judges should draw on comparative analysis to enrich American law and to reach decisions and write opinions that will in turn be cited and grappled with by judges in other countries who have long looked to the U.S.); Melissa A. Waters, "Mediating Norms and Identity: The Role of Transjudicial Dialogue in Creating and Enforcing International Law," 93 Geo. L. J 487, 492 (2005)["...courts are engaging each other out of a developing sense that they are part of a common enterprise..."].

> We face a problem similar to one that recently confronted the Court of Appeal for Ontario, the highest court of that Canadian province, when it considered the constitutionality of the same-sex marriage ban under the *Canadian Charter of Rights and Freedoms*... In holding that the limitation of civil marriage to opposite-sex couples violated the *Charter*, the Court of Appeal refined the common-law meaning of marriage [to read the "voluntary union for life of two persons to the exclusion of all others"]. We concur with this remedy, which is entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards.

(*Goodridge*, *supra*, 798 N.E.2d at p. 969)

Accordingly, amici contend that the experience of other countries provides 1) strong evidence of a global trend of complete equality for gays and lesbians, 2) a counterweight to pervasive arguments that reserving marriage for heterosexuals is universal and natural,[6] and 3) a rebuttal to the claim that allowing same-sex marriage will compel societal recognition of polygamy, something that has not happened in a single foreign jurisdiction that has permitted same-sex couples to marry.[7]

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[6] Evan Gertsmann, 'We are the World? What United States Courts Can and Should Learn from the Law and Politics of Other Western Nations," 1 J. Int'l L. and Int'l Relations 279, 289 (2005)

[7] Michael D. Ramsey, 'International Materials and Domestic Rights: Reflections on Atkins and Lawrence,' 98 Am. J. Int'l L. 69, 75 (2004) (A comparative analysis of same-sex marriage permits "[a]bstract claims about what 'all' societies do [to] be tested against evidence of what societies actually do; whether societies we otherwise think reflect 'ordered liberty' recognize certain rights may indicated whether those rights are 'implicit' in 'ordered liberty.' Claims of inevitable consequences can be tested against what has actually happened elsewhere...")

B. THE SUPERIOR COURT'S HOLDING THAT EXCLUDING SAME-SEX COUPLES FROM THE RIGHT TO MARRY VIOLATES THE CALIFORNIA CONSTITUTION IS CONSISTENT WITH DECISIONS FROM CANADIAN AND SOUTH AFRICAN COURTS

1) THE CANADIAN EXPERIENCE

On July 20, 2005, Canada became the fourth country to extend the right to marry to same-sex couples with the passage of *The Civil Marriage Act*, S.C. 2005, c. 33. Canada was, however, the first common law jurisdiction outside the United States to adopt a definition of marriage that replaces the concept of 'one man and one woman' with 'two persons' and the first foreign authority to adjudicate the exact question before this Court – whether limiting the institution of marriage to heterosexual couples violates laws governing equality and fundamental freedoms. Prior to passage of *The Civil Marriage Act*, no fewer than nine successive provincial courts found that excluding same-sex couples from the right to marry violated the Canadian Charter of Rights and Freedoms. With the express approval of the Supreme Court of Canada, the Canadian Parliament then amended the definition of civil marriage.

a) Canadian legislatures and courts recognize that equality promotes human dignity and ends stigma

In Canada, like California, the protections provided by the Constitution are rooted in an understanding of the connection between protecting equality and preserving the dignity and self-worth of the

individual.[8] In the seminal case of *R. v. Oakes*, [1986] 1 S.C.R. 103, Chief Justice Dickson declared that:

> [t]he Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

(*Oakes*, *supra*, 1 S.C.R. 103 at para. 136.)

Human dignity emphasizes the intrinsic value of each individual. In *Law v. Canada (Minister of Employment & Immigration)*, (1999) 1 S.C.R. 497, the Supreme Court of Canada observed that:

> [h]uman dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or

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[8] The Ontario Human Rights Code, for example, explains that "it is public policy in Ontario to recognize the dignity and worth of every person and to provide for equal rights and opportunities without discrimination that is contrary to law, and having as its aim the creation of a climate and of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and the Province." (*Ontario Human Rights Code*, R.S.O. 1990, c. H.19, Preamble).

> circumstances which do not relate to individual needs, capacities, or merits.

(*Id.* at p. 530.)

In *Law*, the Court found an intimate connection between protecting equality rights and preserving the dignity and self-worth of the individual. Indeed, the Court announced that the purpose of Section 15(1), Canada's constitutional protection of equality:

> …is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

(*Id.* at p. 529).

b) The Supreme Court of Canada, recognizing the harassment, physical abuse, and stigmatization that gays and lesbians have historically suffered, has held that sexual orientation is analogous to other prohibited grounds of discrimination

The road to marriage equality in Canada, like other countries, has been marked by incremental changes, beginning with the decriminalization of sexual intimacy by two people of the same sex.[9] Following a 1967 Supreme Court of Canada decision upholding criminalization, then Justice Minister Pierre Elliott Trudeau promoted amendments to Canada's criminal

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[9] Justice Scalia's observed this pattern in *Lawrence v. Texas*, (2003) 539 U.S. at 604 (Scalia J., dissenting).

code that would decriminalize homosexuality. In 1969, consensual same-sex sexual intimacy was stricken from the *Canadian Criminal Code.*[10]

In 1982, Canada adopted the *Charter of Rights and Freedoms* which enshrined equality rights in Section 15(1) and provides that:

> Every individual is equal before the law 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.

The equality guarantee in Section 15(1) is similar to those found in provisions of the United States and California Constitutions, and, like its U.S. counterparts, does not specifically designate sexual orientation as a protected category. In *Egan v. Canada,* [1995] 2 S.C.R. 513, however, the Supreme Court of Canada unanimously held that sexual orientation was analogous to race, religion and sex under Section 15(1) of the Canadian Constitution. The Court reached this conclusion for the dual reasons that: 1) sexual orientation is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs" (*Id.* at para. 5); and 2) gays and lesbians have endured a long history of disadvantage, discrimination, stigmatization, and public harassment due to their sexual orientation. The Court recognized that:

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[10] Bill C-150, *An Act to Amend the Criminal Code*, 1st Sess., 28th Parl., 1968-69 (as passed by the House of Commons 14 May 1969). Two years earlier, in a sentiment that is virtually paraphrased by *Lawrence v. Texas*, Trudeau famously remarked to reporters that "I think the view we take here is that there's no place for the state in the bedrooms of the nation." See http://archives.cbc.ca/IDC-1-73-538-2671/politics_economy/omnibus/clip1

> The historic disadvantage suffered by homosexual persons has been widely recognized and documented. Public harassment and verbal abuse of homosexual individuals is not uncommon. Homosexual women and men have been the victims of crimes of violence directed at them specifically because of their sexual orientation ... They have been discriminated against in their employment and their access to services. They have been excluded from some aspects of public life solely because of their sexual orientation … The stigmatization of homosexual persons and the hatred which some members of the public have expressed towards them has forced many homosexuals to conceal their orientation. This imposes its own associated costs in the work place, the community and in private life ... [T]he isolation, harassment and violence imposed by the public and the rejection by their families has caused young homosexuals to have a higher rate of attempted and successful suicide than heterosexual youths.

(*Egan*, *supra*, 2 S.C.R. 513 at paras. 182-183.)

In *Vriend v. Alberta*, [1998] 1 S.C.R. 493 – a case involving a lab technician fired on account of his sexual orientation – the Supreme Court of Canada held that the exclusion of gays from Alberta's *Individual Rights Protection Act* (*IRPA*) violated the *Canadian Charter of Rights and Freedoms*. Rather than compel the provincial government to rewrite the legislation, the Court held that Section 15(1) of the *Charte*r requires that sexual orientation be "read into" the anti-discrimination law of Alberta. Justice Iacobucci wrote:

> I conclude that reading sexual orientation into the impugned provisions of the IRPA is the most appropriate way of remedying this underinclusive legislation.

(*Id.* at para. 179)

c) Same-sex couples must be entitled to the same benefits as different-sex couples in Canada

In *M. v. H.* [1999] 2 S.C.R. 3, the Supreme Court of Canada held that limiting the term "spouse" to different-sex couples for the purpose of financial support obligations after a relationship ends, violated the *Canadian Charter*. In that case, M., a lesbian who was financially dependent on her former female partner, sued after she was denied the right to seek financial support following the dissolution of a five year relationship. Concluding that it was unconstitutional to exclude same-sex partners from the definition of spouse in the Ontario *Family Law Act* (*FLA*), the Court emphasized that same-sex couples should be entitled to the same benefits and obligations as different-sex couples because the basis of the relationships cannot be distinguished. The Court found the *FLA*'s requirement that the dependency relationship be formed by a man and a woman was arbitrary:

> … same-sex couples will often form long, lasting, loving and intimate relationships. The choices they make in the context of those relationships may give rise to the financial dependence of one partner on the other.
>
> It is clear that there is differential treatment here … Members of same-sex couples are denied access to this system entirely on the basis of their sexual orientation.

(*M. v. H.*, *supra*, 2 S.C.R. 3, at paras. 57 and 62.)

Writing for the majority, Justice Cory determined that, "[t]he human dignity of individuals in same sex relationships is violated by the impugned legislation," because it denied a traditionally disadvantaged group access to a fundamental social institution. *Id.* at para. 74.

d) The Path to Dignity: Extending the Right to Marry to Same-Sex Couples

In 2000, Canada's Parliament gave legal recognition to same-sex relationships through the *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12. The Act revised 68 federal statutes to ensure that the rights and benefits enjoyed by unmarried opposite-sex couples were extended to all couples who have been living in a conjugal relationship for at least one year.[11] While the *Modernization of Benefits and Obligations Act* extended the rights and benefits of opposite sex cohabiting couples in a conjugal relationship to same-sex couples, it did not alter the common law definition of marriage in use in Canada for nearly 130 years, in force in Canada's nine common law provinces.[12] That definition derived from the old English case of *Hyde v. Hyde and Woodmansee* [1861-73] All E.R. 175, in which Lord Penzance declared:

> I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

(*Id.* at p. 177)

A federal statute applicable only to Quebec (because of its distinct civil law system governing private law) similarly provided that "5.

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[11] The Act extended "benefits and obligations to all couples who have been cohabiting in a conjugal relationship for at least one year, in order to reflect values of tolerance, respect and equality, consistent with the Canadian Charter of Rights and Freedoms." (http://www.canlii.org/ca/as/2000/c12/part3267.html (Canadian Legal Information Institute)).

[12] In Canada, s. 91(26) of the *Constitution Act 1867*, gives the federal government jurisdiction over the capacity to marry.

Marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other."[13]

A trio of landmark decisions in three different provinces heralded the end of the Canadian different-sex definition of marriage. In *Hendricks c. Québec* [2002] R.J.Q. 2506 (Que. Sup. Ct.), the Quebec Superior Court held that the prohibition against same-sex marriage in federal law contravened the equality rights of gays and lesbians entrenched in Section 15 of the *Charter*. Within months of the *Hendricks* decision, the courts of appeal in British Columbia and Ontario ruled that the common law definition of marriage violated s. 15 of the *Charter* and was therefore unconstitutional. See *EGALE Canada Inc. v. Canada (Attorney General)*, [2003], 225 D.L.R. (4th) 472 (B.C.C.A) at 501, and *Halpern v. Canada (Attorney General)*, [2003], 65 O.R. (3d) 161.

i) Marriage Is an Essential Institution

The Canadian decisions pivot on the importance of marriage as a social institution. "For centuries," the Court in *Halpern* noted, "marriage has been a basic element of social organization in societies around the world" (*Halpern*, at para. 5.) The Ontario Court of Appeal went on to say that:

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[13] *Federal Law-Civil Law Harmonization Act*, No. 1, S.C. 2001, c.4, s.5.

> [t]hrough the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.

(*Id.* at para. 5.)

Excluding same-sex couples' access to the institution of marriage deprives them of the opportunity to express their love and commitment to each other in the most public of ways. The Ontario Court of Appeal observed that under the common law rule:

> ... same-sex couples are excluded from a fundamental societal institution -- marriage. The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. Indeed, all parties are in agreement that marriage is an important and fundamental institution in Canadian society. It is for that reason that the claimants wish to have access to the institution. Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.

(*Halpern*, *supra*, 65 O.R. (3d) 161 at para. 107.)

Justice Prowse, writing for a majority of the British Columbia Court of Appeal in *EGALE*, supra, amplified the connection between the importance of marriage as an institution and the resulting impact on the individual's dignity:

> "[t]he evidence supports a conclusion that 'marriage' represents society's highest acceptance of the self-worth and the wholeness of a couple's relationship, and, thus, touches their sense of human dignity at its core."

(*EGALE*, 225 D.L.R. (4th) 472 at para. 90.)

ii) Civil unions are an inadequate alternative

Canadian courts recognized that anything less than full equality demeans the dignity of same-sex couples and the self-esteem of persons in such relationships. Specifically, civil-unions and domestic partnerships perpetuate an altogether different and inferior scheme of state recognition. As Justice Prowse reasoned:

> If the prohibition of same-sex marriage is recognized as being a contravention of the equality rights of same-sex couples...the obvious remedy is...the redefinition of marriage to include same-sex couples. In my view, this is the only road to true equality for same-sex couples. Any other form of recognition of same-sex relationships, including the parallel institution of RDP's [registered domestic partnerships], falls short of true equality. This Court should not be asked to grant a remedy which makes same-sex couples 'almost equal,' or to leave it to governments to choose amongst less-than-equal solutions.

(*EGALE*, *supra*, 225 D.L.R. (4th) 472 at para. 156.)

The Canadian Human Rights Commission (CHRC) expressed the same idea in its submission to the Parliamentary Standing Committee on Justice and Human Rights. "Under Canadian human rights law, "separate but equal" institutions like domestic partnerships are not true equality ... [T]he only answer consistent with the equality rights Parliament has already recognized is one which eliminates the distinctions between same sex and

heterosexual partners and includes the issuance of civil marriage licenses to same-sex couples."[14] The Quebec Court in *Hendricks* quoted from the Canadian Federal Court of Appeal in *Egan v. Canada*, [1993] 3 Federal Court 401, to make the point that:

> One cannot avoid the conclusion that offering benefits to gay and lesbian partners under a different scheme from heterosexual partners is a version of the separate but equal doctrine. That appalling doctrine must not be resuscitated in Canada four decades after its much heralded death in the United States.

(*Hendricks*, *supra*, R.J.Q. 2506 at para. 134.)

iii) None of the Proffered Justifications Was Constitutionally Adequate

Having found a violation of Section 15(1) equality rights, the Canadian courts examined whether any of the justifications for maintenance of the common law rule asserted by the government were constitutionally sufficient.[15] The test in Canada for determining whether a violation of the *Charter* is a justified limitation requires the government to show:

> (a) That the objective or concern is sufficiently important (pressing and substantial) to justify limiting a *Charter* right.

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[14] "Submission of the CHRC to the Standing Committee on Justice and Human Rights study on marriage and the legal recognition of same-sex unions" (May 6, 2003), available at: http://www.chrc-ccdp.cal/Legis&Poli/SameSex_MemeSexe.asp?1=e," Domestic Partnership and Other Options."

[15] In Canada, any limitation on the Charter's equality provision must be rooted in Section 1 of the Charter which states that: The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

(b) That the limitation is proportionate to the objective or concern, such that the measures chosen by the government are:

(i) rationally connected to the objective;
(ii) impair the right or freedom no more than is necessary to accomplish the objective; and
(iii) any harmful effects are proportional to the importance of the objective of the law.

(*Oakes*, *supra*, at paras. 69 and 70.)

In each of the Canadian same-sex marriage cases, the Court addressed and rejected arguments attempting to excuse the section 15 violation of the *Charter*. In *Halpern*, the Court dismissed the contention that the purpose of marriage is to unite the different sexes and encourage companionship (*Halpern*, *supra*, 65 O.R. (3d) 161 at para. 119). The Court found that favoring heterosexual relationships perpetuates the view that same-sex relationships are not equally capable of providing companionship and could not justify the infringement of equality. (*Id.* at para. 124.) The Court also acknowledged that the encouragement of child rearing is an important purpose, but emphasized that it is not the sole objective of marriage. (*Id.* at para. 94.) Likewise, the Court in *EGALE* held that because marriage is not defined by having children, the encouragement of different-sex procreation did not qualify as a pressing and substantial objective capable of excusing a *Charter* violation (*EGALE*, 225 D.L.R. (4th) 472 at paras. 120-24.) *EGALE* also recognized that same-sex couples are capable of child rearing and that excluding same-sex couples from the institution of marriage was not rationally connected to the objective. (*Id.* at paras. 126-131; see also *Halpern*, supra, 65 O.R. (3d) 161 at paras. 121-123.)

Additionally, the *Halpern* Court observed that, "this is not a case of the government balancing the interests of competing groups. Allowing same-sex couples to marry does not result in a corresponding deprivation to opposite-sex couples" (*Id.* at para. 137).

Both the *Halpern* and *EGALE* courts rejected the argument that marriage should continue to exclude same-sex couples because it is an institution that has always been understood as a union of different-sex couples. The Court in *Halpern* noted that, "stating that marriage is heterosexual because it always has been ... is merely an explanation for the opposite-sex requirement of marriage; it is not an objective that is capable of justifying the infringement of a *Charter* guarantee" (*Halpern*, *supra*, 65 O.R. (3d) 161 at para. 117.) Similarly, both courts were hostile to the argument that the restriction of marriage to opposite-sex couples is inherent in its definition noting that such an argument relies on circular reasoning and does not change the discriminatory nature of the distinction being made (*Id.* at para. 71.) In reaching this conclusion, the *EGALE* Court recognized the rapidly changing nature of laws and attitudes to marriage and the family, and the evolving character of the institution of marriage (*EGALE, supra*, 225 D.L.R. (4th) 472 at paras. 86-90.)

iv) Remedies

In both *Halpern* and *EGALE*, the courts reformulated the common law rule, substituting the words "two persons" for "one man and one woman."[16] The Ontario Court stated that:

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[16] In Canada, courts are permitted to alter legislation or the common law to bring the impugned law into conformity with the *Charter* without

> ...in our view the remedy that best corrects the inconsistency is to declare invalid the existing definition of marriage to the extent that it refers to "one man and one woman", and to reformulate the definition of marriage as "the voluntary union for life of two persons to the exclusion of all others". This remedy achieves the equality required by s. 15(1) of the *Charter* but ensures that the legal status of marriage is not left in a state of uncertainty...

(*Halpern*, *supra*, 65 O.R. (3d) 161 at para. 148.)

The *Halpern* decision caused an immediate change in Ontario law and permitted same-sex couples to obtain civil marriage licenses. By replacing “one man and one woman” with “two persons,” the Court foreclosed the possibility of polygamous marriages. Additionally, the Canadian cases have limited the extension of marriage to the civil arena. The Supreme Court of Canada found that freedom of religion under section 2(a) of the *Charter*, protects the right of religious officials to refuse to solemnize marriages between people of the same sex. (See *Same Sex Marriage Reference* (2004) 3 S.C.R. 698 at paras. 55-60; see also *Halpern, supra,* at para. 138.)

e) The Path to Dignity: Same-Sex Marriage is the law all across Canada

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invalidating the law. *Halpern* found that because “the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken.” (See *Halpern, supra,* 65 O.R. (3d) 161 at para. 146.)

Following the *Halpern*, *EGALE* and *Hendricks* decisions, the common law definition of marriage in those jurisdictions to have ruled on the subject became a voluntary union for life of two persons to the exclusion of all others. Accordingly, the right to marry was extended to same-sex couples in British Columbia, Ontario and Québec. Lower courts in the Yukon[17], Manitoba[18], Nova Scotia[19], Saskatchewan[20], Newfoundland[21] and New Brunswick[22] soon followed suit.

The Attorney General of Canada declined to appeal the British Columbia and Ontario decisions to the Supreme Court of Canada. Instead, the Parliament of Canada began the process of creating a federal statutory definition of marriage that codified the new common law rule, partly to address complaints that judges as unelected officials should not be engaged in rewriting social policy and partly to address the patchwork of entitlements in effect across the country. In 2004, the Attorney General asked the Canadian Supreme Court to consider the constitutionality of the draft legislation. In the *Same-Sex Marriage Reference*, the Supreme Court of Canada ruled that the proposed statutory definition of marriage was consistent with the *Charter* and indeed flowed from it. (*Same-Sex Marriage Reference, supra*, 3 S.C.R. 698 at paras. 42-43.)

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17 *Dunbar v. Yukon*, [2004] Y.J. No. 61 (QL)

18 *Vogel v. Canada (Attorney General)*, [2004] M.J. No. 418 (QL)

19 *Boutilier v. Nova Scotia (Attorney General)*, [2004] N.S.J. No. 357 (QL)

20 *N.W. v. Canada (Attorney General)*, [2004] S.J. No. 669 (QL)

21 See <http://www.cbc.ca/story/canada/national/2004/12/21/samesex-newfoundland041221.html>

22 *Harrison v. Canada (Attorney General)*, [2005] N.B.J. No 527 (QL)

On June 28, 2005, the Canadian House of Commons passed Bill C-38, *The Civil Marriage Act* by a vote of 158 to 133. On July 19, 2005, the Canadian Senate passed the bill on its third reading by a vote of 47-21. The Bill received Royal Assent on July 20, 2005 thus making *The Civil Marriage Act* the law across the country.

2) THE SOUTH AFRICAN EXPERIENCE

The Canadian cases reflect a growing international consensus that same-sex couples are entitled to equal treatment under the law. In December 2005, South Africa's highest court joined Canada in ruling that the exclusion of same-sex couples from the institution of civil marriage is unconstitutional. Endowed with a Bill of Rights that was formulated to amend years of subordination and oppression, South Africa's Constitution grants its judiciary the capacity to strike down unconstitutional legislation that infringes on human dignity and equality.[23]

a) The South African Constitution Enshrines the Values of Human Dignity, Equality, and Freedom

On December 1, 2005, the Constitutional Court of South Africa decided the case of *Minister of Home Affairs and Another v Fourie and Another*, (2005) Case CCT 60/04, S. Afr. Const. Ct. [hereinafter "*Fourie* (CC)"][24], aff'g 2005 (3) BCLR 241 (SCA), [hereinafter "*Fourie* (SCA)"][25] finding that both the common law[26] and statutory definitions of

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[23] S. 172 of the Constitution of the Republic of South Africa, 1996.

[24]See:http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/wdyGYOPtzV/0/57/518/0/J-CCT60-04

[25]See:http://wwwserver.law.wits.ac.za/sca/judgment.php?case_id=12942&PHPSESSID=63186a9f18d10cd12f18cde9402a4bd6

marriage[27] – each of which precluded the possibility of same-sex marriage – were unconstitutional. The Court ruled that principles of human dignity and equality demand equal access to the institution of marriage to all couples, regardless of sexual orientation.

The *Fourie* case raised the constitutional question of whether same-sex couples were "unfairly discriminated against because they are prevented from achieving the status and benefits coupled with responsibilities which heterosexual couples acquire from marriage?" (*Id.* at para. 44.) This question applied equally to the common law definition of marriage and the constitutional validity of section 30(1) of the South African Marriage Act. To answer the question, the Court addressed sections 9(1) and 9(3) of the Constitution.

South Africa's equal protection clause, Section 9(1) of the Constitution, states that "Everyone is equal before the law and has the right to equal protection and benefit of the law."

Section 9(3) of the South African Constitution provides:

> The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language and birth. [emphasis added.]

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[26] The Court defined the common law definition as: "a union of one man with one woman, to the exclusion, while it lasts, of all others."
[27] The *Marriage Act* (Act 25 of 1961) does not provide for a legal mechanism allowing same-sex couples to marry.

In *Fourie* (CC), a unanimous Court found that same-sex couples are constitutionally guaranteed the right to marry, and that a denial of the right is a direct violation of sections 9(1) and 9(3) of the Constitution.

b) Prior to *Fourie*, South African courts recognized that sexual orientation is analogous to other prohibited grounds of discrimination

Like the trend found in Canadian courts, the *Fourie* (CC) decision was preceded by a rich jurisprudence that extended the equal protection of the law to same-sex couples. In 1999, the Constitutional Court of South Africa held in *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* (2000) (1) BCLR 39 (CC),[28] that the partners of married different-sex couples cannot be given preferential immigration status over same-sex couples. The reasoning of the Constitutional Court was unequivocal – human dignity and equality demand same-sex couples' relationships be afforded the same legal status as those of opposite-sex couples. In *National Coalition*, Justice Ackerman reasoned:

> The respondents' submission that gays and lesbians are free to marry in the sense that nothing prohibits them from marrying persons of the opposite sex, is true only as a meaningless abstraction. This submission ignores the constitutional injunction that gays and lesbians cannot be discriminated against on the grounds of their own sexual orientation and the constitutional right to express that orientation in a relationship of their own choosing.

(*Id.* at para. 38.)

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[28] See:http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/pT9TOs5zg6/0/57/518/0/J-CCT10-99

With respect to the denial of equal rights to same-sex couples, Justice Ackerman stated:

> Society at large has, generally, accorded far less respect to lesbians and their intimate relationships with one another than to heterosexuals and their relationships. The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships.

(*Id.* at para. 42.)

Finally, Justice Ackerman rebutted the procreative rationale for limiting marital privileges to heterosexual couples:

> From a legal and constitutional point of view procreative potential is not a defining characteristic of conjugal relationships. Such a view would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. I would even hold it to be demeaning of a couple who voluntarily decide not to have children or sexual relations with one another; this being a decision entirely within their protected sphere of freedom and privacy.

(*Id.* at para. 51.)

The Constitutional Court applied similar reasoning in two cases that followed *National Coalition*. In *Satchwell v. President of the Republic of*

South Africa (2002) (9) BCLR 986 (CC)[29], a unanimous Court held that same-sex partners require equal access to spousal benefits. Similarly, in *Du Toit v. Minister for Welfare and Population Development* (2002) (10) BCLR 1006 (CC)[30], a unanimous Constitutional Court held that legislation permitting only different-sex couples to adopt children was unconstitutional and ordered that it be amended to allow for the adoption of children by "the two members of a permanent same-sex life partnership jointly." (*DuToit, supra*, (10) BCLR 1006 (CC) at para. 44.) The *Du Toit* decision has been described by the Supreme Court of Appeal of South Africa (SCA) as "putting on equal footing" the "protection and nurturance same-sex partners can jointly offer children in need of adoption" with heterosexual couples. (*Fourie* (SCA), *supra*, (3) BCLR 241 at para. 12.)

Other South African cases have given same-sex partners equal access to statutory health schemes, (*Langemaat v Minister of Safety and Security* (1998) (3) SA 312 (T)), the right of a same-sex partner to become the legitimate parent of a child not conceived by artificial insemination, (*J v Director General: Department of Home Affairs* (2003) (5) BCLR 463 (CC)[31]) and extended the spouse's action for loss of support to partners in

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[29] See:http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/i9Dw9gzP8W/0/57/518/0/J-CCT45-01. A minor variation of that order with no substantive change occurs in Case CCT 48/02 and can be found at http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/xs0ix2D7Wk/0/57/518/0/J-CCT48-02

[30] See:http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/J5d8HIaMYX/0/57/518/0/J-CCT40-01

[31] See:http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/hVC1vNwgyd/0/57/518/0/J-CCT46-02

same-sex life relationships, (*Du Plessis v Road Accident Fund* (2004) (1) SA 359 (SCA)).[32]

c) The Path to Dignity: Human Dignity and Equality Demand that Same-Sex Couples Be Permitted to Marry

In *Fourie (SCA)*, the South African Court of Appeal took the next logical step in recognizing the equal rights of same-sex couples. Relying on its own recent jurisprudence, that of foreign courts, and the Constitution's equality provision, the Court held that same-sex couples must be permitted to marry. Accordingly, the Court redefined the common-law definition marriage as a "union between two persons." Justice Cameron explained that:

> The vivid message of the decisions of the last ten years is that this [past] exclusion cannot accord with the meaning of the Constitution, and that it 'undermines the values which underlie an open and democratic society based on freedom and equality'

(*Fourie* (SCA), *supra*, (3) BCLR 241 at para. 16.)

The SCA then cited the Massachusetts Supreme Court's decision in *Goodridge*:

> The appellants moreover do not seek to limit procreative heterosexual marriage in any way. They wish to be admitted to its advantages, notwithstanding the same-sex nature of their relationship. Their wish is not to deprive others of any rights. It is to gain access for themselves without limiting that

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32 See:http://wwwserver.law.wits.ac.za/sca/judgment.php?case_id=12638

> enjoyed by others. Denying them this, to quote Marshall CJ in the Massachusetts Supreme Court of Judicature, 'works a deep and scarring hardship on a very real segment of the community for no rational reason.'

(*Id.* at para. 18.)

The holding of the SCA sent a clear message that the exclusion of same-sex couples from the institution of marriage constituted unfair and unjustifiable discrimination under the South African Constitution. In its reasoning, the SCA was explicit that its decision was mandated by the principles of human dignity and equality. The Court found that:

> [The] issue is access to an institution that all agree is vital to society and central to social life and human relationships. More than this, marriage and the capacity to get married remain central to our self-definition as humans.

(*Id.* at para. 14.)

The Court observed that the concept of choice is inherent to the notion of human dignity. Justice Cameron elaborated on the concept of choice first raised by Justice Madala in *Satchwell*, *supra*:

> The capacity to choose to get married enhances the liberty, the autonomy and the dignity of a couple committed for life to each other. It offers them the option of entering an honourable and profound estate that is adorned with legal and social recognition.

(*Id.* at para. 14.)

The *Fourie* Court concluded that the, "current common law definition of marriage deprives committed same-sex couples of this choice." (*Id.* at para. 15.) Justice Cameron also emphasized that offering

same-sex couples anything less than the choice to marry is akin to the widely discredited doctrine of separate but equal, because the stigma attached to the exclusion of marriage is severe.

> More deeply, the exclusionary definition of marriage injures gays and lesbians because it implies a judgment on them. It suggests not only that their relationships and commitments and loving bonds are inferior, but that they themselves can never be fully part of the community of moral equals that the Constitution promises to create for all.

(*Id.* at para. 15.)

The *Fourie* (SCA) decision concludes by stating that "legal conceptions of the family and what constitutes family life should change as social practices and traditions change." (*Id.* at para. 13(e).)

d) The Path to Dignity: Denying the Right to Marry to Same-Sex Couples Violates the South African Constitution

At the Constitutional Court, counsel for the South African Minister of Justice argued that the Constitution did not guarantee same-sex couples a right to marry, but rather guaranteed only a negative liberty to be free of interference by the state. The Minister of Justice advanced the view that although same-sex couples had suffered historical disadvantages, any disparities in treatment could be accomplished by appropriate legal remedies and did not require the inclusion of same-sex couples into the sphere of rights established by marriage. Marriage, according to the Government, had been defined by historical processes as a strictly heterosexual institution.

The Constitutional Court rejected this argument:

> A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.

(*Fourie* (CC), *supra*, Case CCT 60/04, S. Afr. Const. Ct. at para. 60.)

The Court held that any resolution short of full marriage would be a deprivation of human dignity and equality, and found that the exclusion of same-sex couples from marriage:

> represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment

> and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.

(*Id.* at para. 71.)

The Court also found that a system of laws that would give marriage to opposite-sex couples and civil unions to same-sex couples "gives to the one and not to the other." (*Id.* at para. 81.) "Small gestures in favour of equality, however meaningful," the Court found, "are not enough" (*Id.* at para. 59.) The only remedy available to the Court was to provide equal choice for same-sex couples. In conclusion, Justice Sachs returned to the theme of choice:

> ...what is in issue is not the decision to be taken, but the choice that is available. If heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples. It follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.

(*Id.* at para. 72.)

C. THE BROAD TREND IN OTHER DEMOCRATIC SOCIETIES IS TOWARD EQUAL TREATMENT OF INDIVIDUALS IN DIFFERENT AND SAME-SEX COUPLES

1) EQUALITY FOR GAYS AND LESBIANS IS INCREASINGLY RECOGNIZED UNDER INTERNATIONAL HUMAN RIGHTS LAW

The Canadian and South African experience is indicative of a larger trend in foreign and international law recognizing the equality of all citizens, regardless of sexual orientation. Around the world, states are

following the Canadian and South African trajectory from decriminalization, to equal status, to equal treatment and, ultimately, to the recognition that civil marriage should be open to all citizens. Since 2001, three civil law countries – the Netherlands[33], Belgium[34] and Spain[35] – have recognized the right of same-sex couples to access the public institution of marriage by amending their legislation and permitting same-sex couples to marry.

In Europe, the definitive affirmation of the constitutional rights of same-sex couples has occurred largely through legislatures, which are empowered to rewrite civil codes of law. As a result, it has been the legislatures of civil law countries that have led the charge to end the exclusion of same-sex couples from civil marriage. Nevertheless, several recent cases in international and European courts have recognized and affirmed the equal rights and status of same-sex couples, paving the way for marriage equality.

2) INTERNATIONAL LAW HAS CONDEMNED SEXUAL ORIENTATION AS A "SUSPECT CLASSIFICATION"

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[33] See Staatsblad van het Koninkrijk der Nederlanden 2001, nr. 9 (Official Journal of the Kingdom of the Netherlands) <http://www.eerstekamer.nl/9202266/d/w26672st.pdf>, <http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=69> (unofficial translation) [effective April 1, 2001].

[34] See <http://www.lachambre.be/kvvcr/showpage.cfm?section=flwb&language=fr&rightmenu=right&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=F&legislat=50&dossierID=2165> [effective January 30, 2003].

[35] See Boletín Oficial del Estado <http://www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=2005/11364> [effective June 30, 2005, Royal Assent on July 1, 2005].

The jurisprudence of the European Court of Human Rights (ECHR), the binding judicial body of the 46 Member States of the Council of Europe,[36] is at the center of a burgeoning awareness that historic conceptions of marriage and sexual identity are rapidly changing to meet Constitutional standards and a spirit of equality and inclusion.

The ECHR has held that the "very essence" of the European Convention on Human Rights is respect for human dignity and freedom. See *Christine Goodwin v. United Kingdom* [GC 2002], no. 28957/95, Eur. Ct. H. R. 2002-IV (11.07.2002) at para. 90; *I. v. United Kingdom* [GC], no. 25680/94, Eur. Ct. H. R. (11.07.2002) at para. 70. The Court has also found that interpreting respect for human dignity involves a contemporary understanding of present-day attitudes and obligations. The ECHR has thus held it is the responsibility of states to address outdated attitudes and misconceptions by vigorously amending discriminatory legislation and practices. *Wessels-Bergervoet vs. NL*, no. 34462/97, (Sect. 2) (Eng) – ¶ 52f, Eur. Ct. H. R. (12.11.02).

In this regard, the ECHR, like the Canadian Supreme Court in *Egan*, has read unequal treatment on the basis of sexual orientation as analogous to other forms of discrimination prohibited under international law, including those involving private life, race and religion. In *Dudgeon v. United Kingdom* (1981) 45 Eur. Ct. H. R. (Ser. A), for example, the ECHR struck down legislation from Northern Ireland that prohibited all private, consensual sexual activity between adult men. Employing a strict justification test, the ECHR held that the legislation infringed Article 8(1) of the European Convention on Human Rights ("the Convention") which

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[36] See http://www.echr.coe.int/echr

provides that: "Everyone has the right to respect for his private … life …."[37]

In *Smith & Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493 ¶ 97 (1999), which overturned the wrongful dismissals of lesbian and gay members of the armed forces, the ECHR applied the highest level of scrutiny to discrimination based on sexual orientation. As in *Dudgeon*, the Court used a strict justification test to find a violation of the "private life" provision of Article 8, stating: "[because] the sole reason for the investigations … and … discharge was their sexual orientation[,] … a most intimate aspect of an individual's private life, particularly serious reasons by way of justification were required" (*Id.* at para. 90). The Court explained that the hostility of heterosexual members of the armed forces towards gay and lesbian members was no more a sufficient justification "than similar negative attitudes towards those of a different race, origin or colour" (*Id.* at para. 97).

Like the ECHR, the United Nations Human Rights Committee (UNHRC), which interprets the International Covenant on Civil and Political Rights (ICCPR), has held that sexual orientation is a prohibited ground of discrimination under international law. In particular, the UNHRC held in *Toonen v. Australia* (Hum. Rts. Comm. 1994) *U.N. Doc. CCPR/C/50/D/488/1992*, that discrimination on the grounds of sexual

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[37] Article 8(1). Everyone has the right to respect for his private and family life [and] his home ...2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

orientation violates the core principles enshrined in the ICCPR. *Toonen* concerned the legality of a provision of the Tasmanian Criminal Code that made sexual contact between adult men a criminal offence. The complainant challenged Article 2 (the enjoyment of ICCPR rights without discrimination), Article 17 (right to privacy) and Article 26 (right to equality before, and equal protection of, the law). The UNHRC found that Article 17 had been violated, and as such, the UNHRC did not reach the alleged violations of Articles 2 or 26. The UNHRC has since held that the reference to "sex" in Article 2(1) of the ICCPR[38] must be read to include sexual orientation. See, *Edward Young v. Australia*, *infra*, (finding that "sexual orientation" is included within the meaning of Article 2 of the ICCPR).

3) REGIONAL ORGANIZATIONS AND INTERNATIONAL JUDICIAL BODIES ARE INCREASINGLY DEMANDING EQUAL TREATMENT OF SAME-SEX COUPLES

The political organs of the European Union have made the eradication of discrimination on the basis of sexual orientation an important objective for European nations. Article 13 of the Treaty on the Foundation of the European Community "European Community Treaty", as amended by the Treaty of Amsterdam,[39] empowers the Council of Ministers of the European Union to act against discrimination on the basis of sexual orientation. In 2000, the Council of Ministers issued a directive requiring all Member States of the European Union to comprehensively ban sexual-

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[38] Article 2(1) requires that all signatory states ensure "the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, ... religion, ...". International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 172.

[39] CONF/4005/97 ADD 2, http://europa.eu.int/eur-lex

orientation-based discrimination in employment and occupation.[40] To date, at least 18 states in Europe have included sexual orientation as a protected category in their anti-discrimination legislation.[41] Both the European Union and the Council of Europe now demand, as a precursor to membership, that counties remove discriminatory legislation against lesbian, gay and bisexual people.[42]

In addition to prohibiting discrimination based on sexual orientation, European nations are urging their compatriot states to recognize the rights of same-sex couples to marriage or an equivalent partnership. In 1994, for the first time, the European Parliament asked the European Commission to create a Recommendation that would end, "the barring of lesbians and homosexual couples from marriage or from an equivalent legal framework, [and guarantee instead] the full rights and benefits of marriage, allowing the registration of [same-sex] partnerships."[43]

Additionally, in 2000, the European Parliament pressed all current Member States:

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40 Directive 2000/78/EC, http://europa.eu.int/eur-lex.

41 Austria, Belgium, Czech Republic, Denmark, Finland, France, Iceland, Ireland, Lithuania, Luxemburg, Malta, Netherlands, Norway, Romania, Slovenia, Spain, Sweden and the United Kingdom.

42 See *European Parliament*: Urgency Resolution on the Rights of Lesbians and Gays in the European Union (B4-0824, 0852/98; para. J), 17.09.1998. See *Parliamentary Assembly of the Council of Europe*: Written Declaration No. 227, Febr. 1993; Halonen-Resolution (Order 488 [1993]); Opinion No. 176 (1993); http://assembly.coe.int.

43 "Resolution on equal rights for homosexuals and lesbians in the EC" (8 Feb. 1994), Official Journal [1994] C 61/40 at 42, para. 14.

> To amend their legislation recognising registered partnerships of persons of the same sex and assigning them the same rights and obligations as exist for registered partnerships between men and women [and] to amend their legislation to grant legal recognition of extramarital cohabitation, irrespective of gender.[44]

Recent developments at the ECHR indicate that European jurisprudence has come to mirror the political determination of the EU. In *Karner v. Austria* (2003 Eur. Ct. H. R.) no. 40016/98395, a seven-judge panel of the ECHR ordered the inclusion of lesbian and gay partners in the "life companion" category of Austrian tenancy law, thereby providing the equal tenancy rights to both same-sex and different-sex couples. Like *Smith & Grady*, the Court found breaches of Article 14 when combined with Article 8 of the Convention. In *Karner*, a landlord attempted to refuse the deceased's same-sex partner the right to succeed tenancy on the grounds that he did not meet the "life companion" category in Austrian law. The Court reiterated its position that discrimination based on sex or sexual orientation must meet a high threshold proportionality requirement, and that the discrimination must be "necessary" to achieve the objective of the legislation:

> [j]ust like differences [in treatment] based on sex, differences [in treatment] based on sexual orientation require particularly serious reasons by way of justification.

(*Id.* at para. 37.)

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44 "Resolution on respect for human rights in the European Union (1998-1999)" (16 March 2000), A5-0050, para. 57, http://www.europarl.eu.int/plenary/default_en.htm (texts adopted).

In *Karner*, the Government of Austria argued "that the aim of the provision in issue was the protection of the traditional family unit." (*Id.* at para. 39.) The Court required Austria to explain its tenant legislation and to show, "that it was necessary to exclude persons living in a homosexual relationship ... in order to achieve that aim." (*Id.* at para. 41.) Not surprisingly, the Court found that the Austrian government did not offer "convincing and weighty reasons justifying" the exclusion of same-sex couples from tenancy protection (*Id.* at para. 42).

The holding in *Karner* received express approval in *Ghaidan v. Mendoza*, [2004] 3 All E. R. 411 (H L), a 2004 English House of Lords judgment that allowed a same-sex partner to succeed the tenancy of his deceased partner's apartment. The House of Lords held that no sufficient justification could rationalize unequal treatment of same-sex couples. The English Court remarked that, "A homosexual couple, as much as a heterosexual couple, share each other's life and make their home together. They have an equivalent relationship." (*Id.* at para. 17.)

Like *M. v. H* in Canada, *Karner* and *Ghaidan* illustrate the global trend in human rights law requiring states to recognize and protect same-sex partners. Shortly after *Karner*, the UNHRC came to the same conclusion. In *Edward Young v. Australia*, views of the Human Rights Committee Under the Optional Protocol to The International Covenant on Civil and Political Rights, Commun. No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000; 42 I.L.M. 1244 (2003),[45] the UNHRC held that

[45] Views of the Human Rights Committee Under the Optional Protocol to The International Covenant on Civil and Political Rights, Commun. No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003) [reprinted in 42 I.L.M. 1244 (2003)], available at http://www.unhchr.ch/tbs/doc.nsf.

surviving same-sex partners are entitled to the same veterans' dependant pensions as unmarried different-sex partners. The UNHRC stated:

> 10.4 The Committee recalls its earlier jurisprudence that the prohibition against discrimination under article 26 [of the ICCPR] comprises also discrimination based on sexual orientation. [46] ... The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective ... In this context, the Committee finds that the State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation.

(*Id.* at para. 10.4)

Likewise, the Supreme Court of Israel has demanded the equal treatment of same-sex and opposite-sex couples. In *El-Al Israel Airlines, Ltd. v. Danilowitz* (1994) H.C. 721/94, 48(5) P.D. 749,[47] the Court held that Israeli legislation prohibiting discrimination on the grounds of sexual orientation prevented an airline from providing free flight benefits to the unmarried opposite-sex partners of its employees but not to their unmarried same-sex partners. Explicit in the Court's reasoning was the equal nature of same-sex and different-sex partnerships. The Court stated:

> This difference is of no relevance whatsoever ... [and] constitutes an arbitrary and unfair distinction. Is leaving a same sex domestic partner easier than leaving a spouse of the opposite sex? Are shared life [sic] of two of the same sex

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46 *Toonen v. Australia* (Hum. Rts. Comm. 1994.)

47 H.C. 721/94, El-Al Israel Airlines, Ltd. v. Danilowitz 48(5) P.D. 749 (Hebrew); http://www.tau.ac.il/law/aeyalgross/legal_materials.htm (unofficial translation).

> different from those belonging to opposite sexes, concerning the cooperative relationship and the operation of the social unit?

(*Id.* at para. 15)

To achieve equality, European courts and legislatures are increasingly determining that the institution of marriage cannot discriminate against individuals based on biological sex or sexual orientation. In Hungary, for example, the Constitutional Court ruled that the definition of "common law marriage" had to be amended to include unmarried same-sex couples.[48] Before it was struck down, the draft law in Hungary defined domestic partnership as "a woman and a man living together in a common household in an emotional and economic community outside a marriage."[49] The Hungarian Constitutional Court reasoned that:

> [a]n enduring union for life of two persons may constitute such values that it should be legally acknowledged on the basis of the equal personal dignity of the persons affected, irrespective of the sex of those living together.

(14/1995 (III.13.) AB határozat.)

In accordance with the Court's ruling, the Parliament of Hungary revised the definition of common law marriage on May 21, 1996.[50]

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[48] 14/1995 (III.13.) AB határozat. See L. Sólyom & G. Brunner, Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court at 316-21 (2000) (unofficial translation).

[49] Article 578/G, Act No. 4 of 1959 on the Civil Code, as amended in 1977 (unofficial translation).

[50] Act No. 42 of 1996 (unofficial translation). Although the Court was not prepared to strike down laws barring same-sex couples from marriage, several developments have since occurred that could ultimately spur such a

The ECHR was slower to follow suit. Until recently, the ECHR interpreted Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms to exclude same-sex couples from the institution of marriage. Article 12 states:

> Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

However, in the 2002 case of *Christine Goodwin v. United Kingdom, supra,* App. No. 28957/95, the ECHR ruled that a post-operative transsexual must be allowed to marry an individual of the same biological sex. The case involved a biologically born male who had undergone hormone and surgical treatment to become a female, but who still retained legal status as a male. Goodwin argued that by not allowing her legal gender status to change to a woman, her right to private and family life (Article 8) had been violated. Goodwin also contended that her right to marry and found a family (Article 12) had been infringed, since she was barred from marrying someone of the same legal sex.

In a unanimous 17-0 decision, the ECHR agreed that Goodwin's right to marry had been violated, rejecting arguments of biological determinism and of a marital requirement of procreation. The ECHR addressed procreation by noting that:

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change. The Court's opinion on same-sex marriage was based largely on now outdated ECHR case law regarding transsexual persons. And on September 3, 2002, the Hungarian Constitutional Court held Paragraph 199 of the Hungarian Penal Code invalid as it unjustly set an age of consent of 14 for different-sex sexual relations and 18 for same-sex sexual relations.

> The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision.

(*Id.* at para. 98.)

Like the courts in *EGALE* and *Fourie* (SCA), *Goodwin* is founded on an understanding of changing social conditions and an evolving interpretation of marriage.

> It is true that [Article 12] refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria (as held by Ormrod J. in the case of Corbett v. Corbett, paragraph 21 above). There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality.

(*Id.* at para. 100.)

Significantly, the ECHR held that Goodwin's rights had been infringed, even though she could still have married someone of her former sex:

> The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed.

(*Id.* at para. 101.)

Several European states have amended their civil marriage laws without waiting for a formal determination that Article 12 of the European Convention permits same-sex couples to marry. On April 1, 2001, for example, the Parliament of the Netherlands became the world's first legislature to recognize in law that the right to same-sex civil marriage applied equally to same-sex couples and opposite-sex couples. This recognition gained formal expression through the passage of the "Act of 21 December 2000, amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening Up of Marriage)".[52] The Civil Code was amended to read:

> Article 20 (1). A marriage can be contracted by two persons of different sex or of the same sex.

The Parliament of Belgium became the second legislature to open marriage to same-sex couples in 2003.[53] The intent of Belgium's Parliament was clear; the Belgian legislature sought a modern understanding of marriage understood as a formal relationship between two persons in order to extend the possibility of marriage to same-sex couples. The Belgian Government released the following press release in 2001, after approving an earlier draft bill on same-sex marriage:

> ...In our contemporary society, marriage is lived and felt as a (formal) relationship between two persons, having as its main object the creation of a lasting community of life. Marriage offers to the two partners the possibility of publicly affirming

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52 <http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=88> (Dutch); <http://athena.leidenuniv.nl/rechten/meijers/index.php3?m=10&c=69> (unofficial translation).

53 Law of 30 January 2003.

> their relationship and the feelings that they have for each other. Mentalities having evolved, there is no longer any reason not to open marriage to persons of the same sex. ... The bill's starting point is ... equality of treatment, in relation to marriage, of homosexual and heterosexual couples. The bill removes, consequently, a discrimination found in our legislation because of an historical context. Marriage has nevertheless a great symbolic value and a legal impact on the status of a person. If two persons want to commit themselves to such a relationship, no discrimination based on sex or sexual relationships [affinités sexuelles] can be an obstacle to their intention. This means that the rules relating to ... marriage ...should, as far as possible, be applicable to a marriage between persons of the same sex.[54]

The Belgian perspective reinforces the proposition that marriage is of such great symbolic value and importance to society, that to exclude same-sex couples from it would stigmatize the relationships of same-sex partners as being separate and unequal to those of heterosexual couples.

On June 30, 2005, Spain joined the Netherlands and Belgium and became the third European country to pass legislation permitting same-sex couples to marry.[55] The Spanish legislation fully equates, without exception, same-sex marriage to heterosexual marriage, including full adoption and inheritance rights. Spanish Prime Minister José Luis Rodríguez Zapatero addressed Parliament the day the legislation was passed and said:

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[54] Communiqué de presse, "Mariage de personnes du même sexe" ("Marriage of persons of the same sex"), June 22, 2001, http://194.7.188.126/justice/index_fr.htm (Communiqués) (unofficial translation).

[55] The legislation passed 187-147. It became official on July 3, 2005, when the law change was published in the Boletín Oficial del Estado.

> Today, Spanish society is responding to a group of people who for years have been humiliated, whose rights have been ignored, their dignity offended, their identity denied and their freedom restricted ...Today Spanish society grants them the respect they deserve, recognizes their rights, restores their dignity, affirms their identity and restores their liberty ... We are not the first [country to do this] but I am sure we will not be the last. After us will come many other countries, driven, ladies and gentlemen, by two unstoppable forces: freedom and equality.[56]

The words of Prime Minister Zapatero, uttered in an overwhelmingly Catholic country, reflect an emerging realization that marriage is not a closed institution, available only to heterosexuals, but a compact open to all couples, regardless of sexual orientation. The legislative developments in Canada, the Netherlands, Belgium and Spain reflect this view by permitting same-sex couples equal access to the globally recognized institution of marriage.[57]

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56 http://www.sgn.org/sgnnews27/page45.cfm

57 To date, the European Court of Human Rights has not addressed constitutional or other challenges to same-sex marriage legislation. The Spanish amendment to the definition of civil marriage is currently being challenged by the Partido Popular before the Tribunal Constitucional.

CONCLUSION

The foreign and comparative lessons on the question of marriage equality for same-sex couples are instructive. Common law courts that can affirm the equality principles and the human dignity of same-sex couples by striking down restrictive definitions of marriage are doing so. Indeed, international and comparative law is rapidly recognizing the equal status and dignity of same-sex couples. In addition to these court decisions, the legislatures of Canada, the Netherlands, Belgium and Spain have enacted amendments embracing marriage for all citizens. In each of these cases, changes in the definition of civil marriage have been informed by the startlingly simple proposition that same-sex couples are worthy of the same rights afforded different-sex couples.

Amici urge this Court to find that loving, committed, same-sex relationships in California warrant the same public recognition as those in Toronto, Cape Town, Amsterdam, Brussels or Madrid.

APPENDIX I

AMICI CURIAE:

INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND LAW PROFESSORS

Human Rights Organizations

The University of Toronto, Faculty of Law, International Human Rights Clinic, Toronto, Ontario, Canada

Women's Institute for Leadership Development, San Francisco, California

Law Professors

Mayo Moran
Dean, University of Toronto, Faculty of Law, Toronto, Ontario, Canada

Brenda Cossman
University of Toronto, Faculty of Law, Toronto, Ontario, Canada

Sujit Choudhry
University of Toronto, Faculty of Law, Toronto, Ontario, Canada

Robert Wintemute
School of Law, King's College, University of London, United Kingdom

Paul Schiff Berman
University of Connecticut School of Law, W. Hartford, Connecticut.

Kenji Yoshino
Yale Law School, New Haven, Connecticut.

Beth Van Schaack
Santa Clara University School of Law, Santa Clara, California

William Aceves
California Western School of Law, San Diego, California

Margaret L. Satterthwaite
New York University School of Law, New York, New York

Barbara Cox
California Western School of Law, San Diego, California