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## State Constitutional Law: The Right of Privacy and Same-Sex Marriage

Jeffrey M. Shaman\*

The right of privacy is a broad concept, used in diverse contexts to refer to a variety of claims or entitlements.<sup>1</sup> One of the more significant branches of the right of privacy concerns the right of an individual to make personal decisions about his or her life free from government control; that is, the right of individual autonomy. The right of individual autonomy or privacy potentially may encompass matters such as the right to marry, the right to have a family, the right of reproductive freedom, the right to ingest substances, the right to refuse medical treatment, the right to physician-assisted suicide, the right to cohabitation, and the right of intimate association.<sup>2</sup>

The concept of privacy or autonomy often is used interchangeably with the concept of liberty, both referring to a fundamental right of self-determination. The right of privacy is based on the principle that “a person belongs to himself and not [to] others.”<sup>3</sup> It embodies a sense of personhood—an “autonomy of self”<sup>4</sup> that should remain free from intrusion or coercion by society or the government.<sup>5</sup> It comprehends that there are certain personal decisions concerning one’s life that an

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\* Vincent de Paul Professor of Law, DePaul University College of Law. By permission of Oxford University Press, Inc., portions of this article are reprinted from: JEFFREY M. SHAMAN, *EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW* (2008).

1. The main branches of the state constitutional right of privacy are: (1) the right to be free from unreasonable government surveillance; (2) the right to prevent the collection or dissemination of personal information; and (3) the right of individual autonomy. JENNIFER FRIESEN, *1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* § 2.01 (4th ed. 2006). The focus of this Article is on the right of individual autonomy. It also should be noted that in the context of the law of torts, the right of privacy refers to: (1) intrusion into a person’s private affairs; (2) public disclosure of non-newsworthy information about an individual; (3) publicity that places an individual in a false light; and (4) appropriation of an individual’s name or likeness. *See generally* RESTATEMENT (SECOND) OF TORTS §§ 652A–652E (1977).

2. *See* 16B AM. JUR. 2d *Constitutional Law* § 652 (2009).

3. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring) (quoting Charles Fried, *Correspondence*, 6 PHIL. & PUB. AFFAIRS 288, 288–89 (1977)), *overruled by* *Planned Parenthood v. Casey*, 505 U.S. 833, 883 (1992).

4. The phrase “autonomy of self” is from *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

5. *See, e.g., id.* at 578–79.

individual should be able to make for oneself free from interference by the state.<sup>6</sup> Flowing from respect for personal dignity, the right of privacy allows an individual to define his or her own life.

The right of privacy has developed primarily through decisions of the United States Supreme Court interpreting the Federal Constitution.<sup>7</sup> Over the years the Supreme Court has used the Fourteenth Amendment of the Constitution to formulate an evolving right of privacy that encompasses certain family rights, reproductive rights, and, most recently, a right of intimate association.<sup>8</sup> Yet the Court has placed definitive limits on family and reproductive rights and also has refused to extend the right of privacy to other areas.<sup>9</sup> There is scant agreement among the justices of the Supreme Court concerning the right of privacy and at times the high Court's commitment to privacy has wavered considerably.<sup>10</sup> As a result of the Court's continuing equivocation in this area, the scope of the right of privacy under the Federal Constitution is considerably uncertain.

Given this uncertainty, it was hardly surprising when a number of states stepped into the breach to revitalize the right of privacy. State constitutions, after all, are an important source of protection for individual rights and liberties, including the right of privacy. Indeed, state constitutions contain various provisions that can be used to protect the right of privacy. Many state constitutions contain due process or law-of-the-land clauses safeguarding liberty that have been interpreted to ensure the right of privacy.<sup>11</sup> Similarly, state constitutional provisions that deny the existence of arbitrary power over individual liberty have

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6. See, e.g., *id.*

7. See John M. Devlin, *State Constitutional Autonomy Rights in an Age of Federal Retrenchment: Some Thoughts on the Interpretation of State Rights Derived from Federal Sources*, 3 EMERGING ISSUES IN ST. CONST. L. 195, 201–05 (1990).

Though the concept of privacy in general has deep roots in state law, the right of "constitutional" privacy in the *Griswold* sense was originally developed by federal courts construing the federal Constitution and only thereafter adopted by state constitutional amenders and state courts as a matter of state constitutional law. In no state did there exist any independent pre-*Griswold* tradition of constitutional protection for interests of this type. Thus all states which currently protect such rights do so through some process of adoption, explicit or implicit, from federal sources.

*Id.* at 197 (footnote omitted).

8. See JEFFREY M. SHAMAN, *EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW* 125–36 (2008).

9. See *id.*

10. See *id.* at 135–36.

11. See, e.g., *Commonwealth v. Wasson*, 842 S.W.2d 487, 501–02 (Ky. 1992).

been construed to protect the right of privacy.<sup>12</sup> State constitutional provisions guaranteeing equality also are used as a means of protection for the right of privacy.<sup>13</sup> In some states, a right of privacy has been found implicit in constitutional provisions declaring that “[a]ll persons are by nature free and independent, and have certain natural and unalienable rights”<sup>14</sup> or stating that “[t]he enumeration of rights in this constitution shall not be construed to deny and impair others retained by, and inherent in, the people.”<sup>15</sup> In modern times, five states—Alaska, California, Florida, Hawaii, and Montana—have amended their constitutions to expressly protect the right of privacy.<sup>16</sup> These express provisions provide fertile ground for the recognition of expansive privacy rights, but even where only a more general constitutional provision—such as a due process clause—is available as a source of protection for privacy, some states have been willing to countenance expansive privacy rights.<sup>17</sup>

In recent years, as claims have been made to expand the right of autonomy to new dimensions, the states have differed in their willingness to do so. Some state courts have moved forward to expand the right of a woman to choose to have an abortion,<sup>18</sup> while others have declined to take that course.<sup>19</sup> A number of state courts have recognized the right of intimate association and struck down sodomy laws well before the Supreme Court was willing to do so,<sup>20</sup> while other state courts chose to stand fast with the then prevailing federal approach rebuffing the right of intimate association.<sup>21</sup> A number of state courts have faced the issue of same-sex marriage or civil union and have reached various conclusions concerning it.<sup>22</sup> The Supreme Court of Massachusetts became a pioneer by being the first judicial body in the nation to rule that the right of privacy secured by the state constitution encompassed a right to same-

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12. See, e.g., *In re Guardianship of Browning*, 568 So. 2d 4, 10 (Fla. 1990).

13. See, e.g., *Doe v. Maher*, 515 A.2d 134, 148 (Conn. Super. Ct. 1986).

14. N.J. CONST. art. I, ¶ 1.

15. MISS. CONST. art. III, § 32.

16. See RANDY J. HOLLAND, STEPHEN R. MCALLISTER, JEFFREY M. SHAMAN, & JEFFREY S. SUTTON, *STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE* 256 (2010).

17. See SHAMAN, *supra* note 8, at 158–62.

18. See, e.g., *In re T.W.*, 551 So.2d 1186, 1194–96 (Fla. 1989); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 25 (Tenn. 2000).

19. See, e.g., *Reprod. Health Serv. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 691–92 (Mo. 2006).

20. See *Commonwealth v. Wasson*, 842 S.W.2d 487, 501–02 (Ky. 1992).

21. See, e.g., *State v. Walsh*, 713 S.W.2d 508, 511 (Mo. 1986).

22. See HOLLAND, MCALLISTER, SHAMAN, & SUTTON, *supra* note 16, at 331–32.

sex marriage.<sup>23</sup> Some twenty-eight years before that, the Supreme Court of Alaska pioneered a different sort of privacy by ruling that the state constitutional guarantee of privacy afforded a right to possess marijuana for personal use in the privacy of one's home.<sup>24</sup> The states have long recognized—first under the common law and later as an aspect of the constitutional right of privacy—a right of bodily integrity which comprehends the right of an individual to refuse medical treatment even if doing so will hasten death.<sup>25</sup> The states have drawn the line, however, at physician-assisted suicide, which has never been considered a common law right or a constitutional one, although Oregon and Washington have enacted statutes legalizing physician-assisted suicide.<sup>26</sup> Thus, considerable variation, not to mention controversy, exists concerning the parameters of the right of privacy in state constitutional law.

State constitutional conceptions of privacy independent of the federal model began to emerge at a relatively early date. In 1909, the Court of Appeals of Kentucky decided *Commonwealth v. Campbell*, which conceived a theory of individual autonomy remarkably advanced for its time.<sup>27</sup> In *Campbell*, the court ruled that an ordinance that criminalized possession of intoxicating liquor—even for private use—violated the Kentucky Bill of Rights.<sup>28</sup> The court's opinion in *Campbell* adopted the principle that the legislature has no authority to restrict the liberty of an individual except where his or her conduct will cause some injury to the public.<sup>29</sup> This precept, the court suggested, flows from the state Bill of Rights, which declares that seeking safety and happiness is an inalienable right and that the state cannot possess arbitrary power over the lives, liberty, or property of its citizens.<sup>30</sup> Quoting liberally from the works of John Stuart Mill, the court incorporated that philosopher's principle that in a just society the only purpose for which power may rightfully be exercised over an individual against his or her will is to prevent harm to others.<sup>31</sup> Therefore, the state has no right to compel an individual to do

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

24. *Ravin v. State*, 537 P.2d 494, 511–12 (Alaska 1975).

25. See SHAMAN, *supra* note 8, at 229–31.

26. See *id.* at 231–35; see also Oregon Death with Dignity Act, OR. REV. STAT. ANN. §§ 127.800–127.995 (West 2003 & West Supp. 2010); Washington Death with Dignity Act, WASH. REV. CODE ANN. § 70.245 (West Supp. 2011).

27. 117 S.W. 383 (Ky. 1909).

28. *Id.* at 387.

29. *Id.* at 386.

30. *Id.* at 385.

31. *Id.* at 386.

or forbear from doing something merely because others believe it is for the individual's own good. As the court put it, "what a man shall eat and wear, or drink or think" is beyond the authority of the state to regulate.<sup>32</sup>

The ruling in *Campbell* was an exceptional occurrence, departing from the generally accepted view in other states. Although courts during that period frequently extolled the virtues of individual liberty, the predominant rule was that individual liberty could be regulated in any way necessary to promote the general welfare, and this was so even though the conduct subject to regulation did not directly harm other persons.<sup>33</sup> Even in Kentucky, the ruling in *Campbell* would be forgotten for decades before being revived in 1992 to have a stunning impact in the case of *Commonwealth v. Wasson*, in which the Kentucky Supreme Court struck down a criminal sodomy statute on the ground that it violated the right of privacy.<sup>34</sup> When *Wasson* was decided, the prevailing precedent in the federal realm was *Bowers v. Hardwick*, a 1986 Supreme Court decision upholding the constitutionality of a Georgia criminal law prohibiting sodomy and ruling that the right of privacy does not encompass the right of a consenting adult to engage in homosexual conduct, even in the privacy of his or her home.<sup>35</sup> Eventually the high Court would end up apologizing for its decision in *Bowers* and would unceremoniously overrule it in *Lawrence v. Texas*.<sup>36</sup> But it would take seventeen years for the Court to do so, and in the meantime, a number of state courts would step into the breach by turning to their state constitutions to protect the right of intimate association and to strike down laws making sodomy a crime.<sup>37</sup> In fact, those state decisions would play a role in convincing the Supreme Court that its decision in *Bowers* had been in error and should be overruled.<sup>38</sup>

In *Wasson*, the Supreme Court of Kentucky ruled that a statute making it a crime to engage in sexual activity with a person of the same sex violated the right of individual liberty guaranteed by the Kentucky Constitution and the right of equal treatment also guaranteed by the

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32. *Id.* at 387.

33. *See, e.g.*, *Eidge v. City of Bessemer*, 51 So. 246, 252 (Ala. 1909); *State v. Williams*, 61 S.E. 61, 64 (N.C. 1908); *Ex Parte Brown*, 42 S.W. 554, 555 (Tex. Crim. App. 1897); *State v. Gilman*, 10 S.E. 283, 284 (W.V. 1889).

34. 842 S.W.2d 487, 491 (Ky. 1992).

35. 478 U.S. 186, 196 (1986).

36. 539 U.S. 558, 560 (2003).

37. *See SHAMAN*, *supra* note 8, at 216–21.

38. *Lawrence*, 539 U.S. at 572 (noting the decrease in state laws prohibiting sodomy since *Bowers*).

Kentucky Constitution.<sup>39</sup> The court proclaimed in *Wasson* that the right of privacy had deep historical roots dating back to the 1891 Kentucky Constitution.<sup>40</sup> Similarly, in striking down sodomy statutes, courts in other states found a strong historic commitment to the right of privacy in their state constitutions.<sup>41</sup>

The decision in *Wasson* certainly was groundbreaking, as was the 1999 decision of the Supreme Court of Vermont in *Baker v. State*.<sup>42</sup> In *Baker*, the Supreme Court of Vermont ruled that by excluding same-sex couples from the benefits and protections of marriage, the state marriage law violated the Common Benefits Clause of the Vermont Constitution, which prohibits special emoluments or advantages that are not shared in common by the entire community.<sup>43</sup> While ruling that same-sex couples were entitled to the same benefits and protections afforded to opposite-sex couples, the court decided to leave it to the legislature to resolve exactly how those benefits and protections should be extended to same-sex couples.<sup>44</sup> This gave the Vermont legislature a number of options, one of which was to enact a domestic partnership statute to establish an alternative legal status to marriage for same-sex couples.<sup>45</sup> In response to the decision in *Baker*, the legislature in Vermont initially enacted a statute authorizing civil unions for persons of the same sex.<sup>46</sup> Nine years later, the Vermont legislature passed a bill allowing same-sex marriage.<sup>47</sup> When the bill was vetoed by the governor, the legislature overrode the veto and the law went into effect.<sup>48</sup> So, Vermont became the first state to recognize same-sex civil unions<sup>49</sup> and also the first state to approve

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39. *Wasson*, 842 S.W.2d at 491–92.

40. *Id.* at 491–97.

41. See, e.g., *Jegley v. Picado*, 80 S.W.3d 332, 346–50 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18, 21–22 (Ga. 1998); *Campbell v. Sundquist*, 926 S.W.2d 250, 260–61 (Tenn. Ct. App. 1966), *abrogated by Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 853 (Tenn. 2008).

42. 744 A.2d 864 (Vt. 1999).

43. *Id.* at 867.

44. *Id.*

45. *Id.*

46. See VT. STAT. ANN. tit. 15, §§ 1201–1207 (West 2007 & West Supp. 2010).

47. *With Veto Overrides, Vermont Legalizes Same-Sex Marriage*, CNN.COM (Apr. 7, 2009), [http://articles.cnn.com/2009-04-07/politics/same.sex.marriage\\_1\\_same-sex-civil-union-law-gay-couples?\\_s=PM:POLITICS](http://articles.cnn.com/2009-04-07/politics/same.sex.marriage_1_same-sex-civil-union-law-gay-couples?_s=PM:POLITICS).

48. *Id.*

49. See Courtney Megan Cahill, (*Still*) *Not Fit to Be Named: Moving Beyond Race to Explain Why 'Separate' Nomenclature for Gay and Straight Relationships Will Never Be 'Equal'*, 97 GEO. L.J. 1155, 1163 n.36 (2009).

same-sex marriage through legislative enactment rather than a court order.<sup>50</sup>

The decision of the Vermont Supreme Court in *Baker* extended the legal benefits of marriage, but not the right to marry itself, to same-sex couples. In other words, the decision mandated the extension of something short of marriage—civil union or domestic partnership—to gay or lesbian couples. In *Goodridge v. Department of Public Health*, however, the Supreme Court of Massachusetts went a decisive step further, ruling that under the Massachusetts Constitution, the Commonwealth could not deny the right to marry to persons of the same sex.<sup>51</sup> Marriage, the court observed, is extremely important to individuals; in fact, it is one of the most important intimate or personal aspects of an individual's life.<sup>52</sup> As the court explained:

Marriage also bestows enormous private and social advantages on those who choose to marry. . . . “It is an association that promotes a way of life” . . . . Because it fulfills yearnings for security, safe haven, and connection that express our common humanity . . . the decision whether and whom to marry is among life's momentous acts of self-definition.<sup>53</sup>

The court noted that tangible as well as intangible benefits flow from marriage. The legal status of marriage brings with it valuable property rights and other benefits, a number of which the court enumerated in its opinion.<sup>54</sup> As the court described, “[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death.”<sup>55</sup> Given the many concrete benefits of marriage as well as its “intimately personal significance,”<sup>56</sup> the United States Supreme Court and several state supreme courts have recognized that it is a basic civil right “fundamental to our very existence and survival.”<sup>57</sup> Without the right to choose to marry, a person “is excluded from the full range of human experience and denied full protection of the laws.”<sup>58</sup> Because

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50. David D. Meyer, *Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships*, 58 AM. J. COMP. L. 115, 125 (2010).

51. 798 N.E.2d 941, 969 (Mass. 2003).

52. *Id.* at 957.

53. *Id.* at 954–55 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

54. *Id.* at 955–56.

55. *Id.* at 955.

56. *Id.* at 957.

57. *Id.* (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

58. *Id.*



civil marriage is integral to the lives of individuals as well as to the welfare of the community, the law assiduously safeguards the right of an individual to marry against undue government incursion.

The court also pointed out that for centuries in the United States, white and black Americans were prohibited by law from marrying, but that long history did not avail when the Supreme Court of California struck down a prohibition of interracial marriage in 1948 in *Perez v. Sharp* or when the United States Supreme Court struck down an anti-miscegenation law in 1967 in *Loving v. Virginia*.<sup>59</sup> Comparing the Massachusetts law barring same-sex marriage to the anti-miscegenation laws struck down in *Perez* and *Loving*, the court stated:

In this case, as in *Perez* and *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. As it did in *Perez* and *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination.<sup>60</sup>

Given the importance to individuals and the personal nature of the right to marry, the Commonwealth was unable to convince the court that there was any justification for prohibiting same-sex marriage. The Commonwealth argued that the prohibition of same-sex marriage was justified in order to encourage procreation and child-rearing within the institution of marriage.<sup>61</sup> In rejecting that argument, the court noted that the Massachusetts laws of marriage “do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family.”<sup>62</sup> There was no requirement that applicants for a marriage license attest to their ability or intention to conceive children through intercourse.<sup>63</sup> Fertility was not a condition of marriage, nor lack of it a ground for divorce.<sup>64</sup> People who never consummate their marriage and never plan to are nonetheless still married.<sup>65</sup> While many married couples have children together, “it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua

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59. *Id.* at 958 (citing *Loving*, 388 U.S. 1; *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948)).

60. *Id.* (footnote omitted).

61. *Id.* at 961.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

non of civil marriage.”<sup>66</sup> Furthermore, the court noted that “the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual.”<sup>67</sup> Thus, the attempt to isolate procreation as the source of a fundamental right to marry overlooks the complex nature of marriage and its relationship to autonomy, family, and child rearing:

The “marriage is procreation” argument singles out the one unbridgeable difference between same-sex and opposite-sex couples, and transforms that difference into the essence of legal marriage. . . . In so doing, the [Commonwealth’s] action confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relations and are not worthy of respect.<sup>68</sup>

The Commonwealth further asserted that the prohibition of same-sex marriage served the purpose of ensuring that children are raised in an optimal setting, which the Commonwealth defined as “a two-parent family with one parent of each sex.”<sup>69</sup> In response, the court readily admitted that protecting the welfare of children was a paramount state policy, but nonetheless concluded that restricting marriage to opposite-sex couples “cannot plausibly further” the policy of protecting children.<sup>70</sup> The composition of families varies greatly from household to household, and Massachusetts “has moved vigorously to strengthen the modern family in its many variations.”<sup>71</sup> There was no evidence that forbidding same-sex marriage increases the number of couples who enter into opposite-sex marriages to have children.<sup>72</sup> Thus, there was no “rational relationship” between the marriage statute and the purported rationale of protecting the “optimal” child-rearing unit.<sup>73</sup> The Commonwealth conceded: “Same-sex couples may be ‘excellent’ parents. [Same-sex] couples . . . have children for the same reasons others do—to love them,

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66. *Id.*

67. *Id.* at 962.

68. *Id.*

69. *Id.* at 961.

70. *Id.* at 962.

71. *Id.* at 963.

72. *Id.*

73. *Id.*

to care for them, to nurture them.”<sup>74</sup> However, child rearing by same-sex couples was made infinitely more difficult by “their status as outliers to the marriage laws.”<sup>75</sup> Children of same-sex couples were deprived of significant marital benefits that bring financial security to all members of a family.<sup>76</sup> So the marriage laws actually worked at cross-purposes to the state’s goal of enhancing the welfare of children; the exclusion of same-sex couples from marriage did nothing to benefit the children of opposite-sex marriages, while denying children of same-sex couples immeasurable benefits that ensue from a stable family structure.<sup>77</sup> As the court concluded, “[i]t cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.”<sup>78</sup>

The Commonwealth also argued that the expansion of marriage to include same-sex couples would lead to interstate conflict.<sup>79</sup> In response, the court stated:

[C]onsiderations of comity [should not] prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution. The genius of our Federal system is that each State’s Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.<sup>80</sup>

Finally, the court pointed out that many of the justifications that the Commonwealth had advanced in support of the marriage law were “starkly at odds with the comprehensive network of vigorous, gender-neutral laws promoting stable families and the best interests of children.”<sup>81</sup> Moreover, “the marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason.”<sup>82</sup> Given “the absence of any reasonable relationship” between the marriage ban and any legitimate state interest, the court could only conclude that the marriage ban was “rooted in persistent prejudices

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 964.

78. *Id.*

79. *Id.* at 967.

80. *Id.*

81. *Id.* at 968.

82. *Id.*

against . . . homosexual[s].”<sup>83</sup> Therefore, the court ruled that the Massachusetts law prohibiting same-sex marriage was a violation of “the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.”<sup>84</sup>

Sometime after the decision in *Goodridge*, the Massachusetts legislature requested an advisory opinion from the Massachusetts Supreme Court concerning a bill pending before the legislature that would allow civil unions for same-sex couples but prohibit same-sex marriage.<sup>85</sup> In response, the court issued an opinion declaring that civil union was not an adequate substitute for civil marriage and that to continue to disallow same-sex marriage would be a violation of the state constitution.<sup>86</sup> In other words, nothing short of marriage itself for same-sex couples would suffice to comply with the court’s ruling in *Goodridge*. In the court’s eyes, there was a wide gulf between civil union and civil marriage, a “dissimilitude” that was far from innocuous and that had the effect of assigning same-sex couples to “second-class status.”<sup>87</sup> The bill in question purported to make civil union parallel to, yet separate from, civil marriage, leading the court to observe that “separate is seldom, if ever, equal.”<sup>88</sup> By excluding same-sex couples from civil marriage, the bill would have the effect of maintaining and fostering “a stigma of exclusion that the Constitution prohibits.”<sup>89</sup>

Immediately after the decision in *Goodridge*, there were calls to amend the Massachusetts Constitution to counteract the court’s ruling, and at first it appeared that the Massachusetts legislature was determined to do exactly that.<sup>90</sup> Initially the legislature voted to amend the state constitution to ban same-sex marriage but allow civil unions.<sup>91</sup> However, to amend the Massachusetts Constitution, the legislature must re-approve a measure a second time and then submit it to a statewide vote before it may go into effect.<sup>92</sup> After the initial vote approving the amendment, the Commonwealth’s legislature had a change of heart,

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83. *Id.*

84. *Id.*

85. See *In re* Opinion of the Justices to the Senate, 802 N.E.2d 565, 566 (Mass. 2004).

86. *Id.* at 572.

87. *Id.* at 570.

88. *Id.* at 569.

89. *Id.* at 570.

90. See Roderick L. Ireland, *In Goodridge’s Wake: Reflections on the Political, Public, and Personal Repercussions of the Massachusetts Same-Sex Marriage Cases*, 85 N.Y.U. L. REV. 1417, 1423 (2010).

91. See *id.*

92. MASS. CONST. art. XLVIII.

rejecting efforts to amend the constitution to prohibit same-sex marriage.<sup>93</sup> In 2007, the legislature voted 151 to 45 against the proposed constitutional amendment, which needed 50 favorable votes to be presented to the voters in a referendum.<sup>94</sup> So same-sex marriage remained valid in Massachusetts and continues to be performed there. In fact, since May 2004, when same-sex couples began to marry in Massachusetts, thousands of same-sex marriages have been performed in the Commonwealth every year.<sup>95</sup>

Since the decision in *Goodridge*, a number of other state supreme courts have addressed the issue of same-sex marriage, with varying results. Some state high courts, in disagreement with *Goodridge*, have found nothing unconstitutional about laws limiting marriage to opposite-sex couples. In New York, the state's highest court ruled that the state domestic relations laws disallowing same-sex marriage violated neither the due process nor equal protection clause of the New York Constitution.<sup>96</sup> Applying rational basis review to the domestic relation law, the court found that the prohibition of same-sex marriage was a permissible means of promoting stable family relationships.<sup>97</sup> The court also stated: "The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father."<sup>98</sup> Several other state courts, similarly applying rational basis review, have upheld laws disallowing same-sex marriage.<sup>99</sup>

In other states, however, courts, in agreement with *Goodridge*, have struck down laws precluding same-sex marriage. In *Kerrigan v. Commissioner of Public Health*, the Supreme Court of Connecticut ruled that the state statutory prohibition of same-sex marriage violated the principle of equal protection of law guaranteed by the state constitution.<sup>100</sup> In recognizing a right to same-sex marriage, the court declared:

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93. Pam Belluck, *Massachusetts Gay Marriage Referendum Is Rejected*, N.Y. TIMES, June 15, 2007, at A6.

94. *Id.*

95. See Abby Goodnough & John Schwartz, *Judge Topples U.S. Rejection of Gay Unions*, N.Y. TIMES, July 9, 2010, at A1 (counting over 15,000 same-sex marriages since 2004).

96. *Hernandez v. Robles*, 855 N.E.2d 1, 10, 12 (N.Y. 2006).

97. *Id.* at 6–7.

98. *Id.* at 7.

99. *Morrison v. Sadler*, 821 N.E.2d 15, 27–29 (Ind. Ct. App. 2005); *Conaway v. Deane*, 932 A.2d 571, 635 (Md. 2007); *Andersen v. King County*, 138 P.3d 963, 990 (Wash. 2006).

100. 957 A.2d 407, 481 (Conn. 2008).

Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice. To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others. The guarantee of equal protection under the law, and our obligation to uphold that command, forbids us from doing so. In accordance with these state constitutional requirements, same sex couples cannot be denied the freedom to marry.<sup>101</sup>

In California, the state supreme court ruled that state laws precluding same-sex marriage violated the equal protection clause of the California Constitution,<sup>102</sup> but that decision was nullified by a constitutional amendment, Proposition 8, adopted by the electorate stating that “[o]nly marriage between a man and a woman is valid or recognized in California.”<sup>103</sup> However, Proposition 8 was subsequently found to violate the Fourteenth Amendment of the Federal Constitution by a federal district court in California.<sup>104</sup> That decision is now on appeal to the Ninth Circuit Court of Appeals,<sup>105</sup> and is expected eventually to wind up being decided by the nation’s highest court.<sup>106</sup> More recently in Iowa, after the state supreme court unanimously recognized a right to same-sex marriage,<sup>107</sup> three justices of the court who faced the electorate in a retention election were voted off the bench.<sup>108</sup> This unprecedented vote was the result of a well-financed campaign directed by out-of-state organizations opposed to gay marriage<sup>109</sup>—a campaign that some observers view as a serious threat to judicial independence and the willingness of judges to protect minority rights.<sup>110</sup>

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101. *Id.* at 482 (footnotes omitted).

102. *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008), *superseded by constitutional amendment as stated in* *Strauss v. Horton*, 207 P.3d 48, 61–62 (Cal. 2009).

103. CAL. CONST. art. I, § 7.5.

104. *See Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010).

105. The question has been certified to the California Supreme Court. *Perry v. Schwarzenegger*, No. 10-16696, 2011 WL 9633, at \*1 (9th Cir. Jan. 4, 2011).

106. *See* Jesse McKinley, *Both Sides in California’s Gay Marriage Fight See a Long Court Battle Ahead*, N.Y. TIMES, June 27, 2010, at A12.

107. *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009).

108. A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 4, 2010, at A1.

109. *Id.*

110. Erwin Chemerinsky, an esteemed constitutional scholar and dean of the University of California, Irvine, School of Law stated: “What is so disturbing about this is that it really might cause judges in the future to be less willing to protect minorities out of fear that they might be voted out of office.” *Id.*

It is important to note that the legalization of same-sex marriage, whether through court ruling or legislative action, pertains only to civil marriage, which is a secular institution governed, as it always has been, by civil law.<sup>111</sup> While civil marriage is governed by state law, religions remain free to choose what marriages they will or will not sanctify and may continue to define marriage as a union between a man and a woman.<sup>112</sup> It should be mentioned that not all religions reject same-sex marriage; Quakers, Unitarians, Buddhists, as well as Reform and Reconstructionist Jews recognize same-sex unions.<sup>113</sup> But however a particular religion may define marriage for its own purposes, the fact remains that civil marriage is a secular institution governed exclusively by secular law.

At the present time, same-sex marriage is permitted in five states as well as the District of Columbia,<sup>114</sup> while nine additional states allow same-sex civil unions or domestic partnerships.<sup>115</sup> On the other hand, thirty-six states have enacted statutes prohibiting same-sex marriage and thirty of those states have adopted constitutional amendments barring same-sex marriage.<sup>116</sup> Thus, in the realm of state constitutionalism, the right of privacy continues its evolutionary course.<sup>117</sup>

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111. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

112. See *Varnum*, 763 N.W.2d at 906.

113. Ben Schuman, *God & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO. L.J. 2103, 2108 (2008). Moreover, within religions that reject same-sex marriage, there are adherents and clergy who support such unions. For example, "[i]n 2004, almost 500 clergy from eighteen faith traditions signed a 'Religious Declaration for the Freedom of Same Sex Couples to Marry,' stating that they 'oppose appeals to sacred texts and religious traditions for the purpose of denying legal equality to same-gender couples.'" *Id.* at 2109.

114. In addition to the District of Columbia, Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont permit same-sex marriage. See Monica Davey, *In Illinois, Lawmakers Approve Legislation Allowing Civil Unions*, N.Y. TIMES, Dec. 2, 2010, at A19.

115. The nine states are: California, Hawaii, Illinois, Maine, Nevada, New Jersey, Oregon, Washington, and Wisconsin. *Id.*

116. See Christine Vestal, *Gay Marriage Legal in Six States*, STATELINE.ORG (June 4, 2009, 4:40 PM), <http://www.stateline.org/live/details/story?contentId=347390>.

117. In the public arena, although same-sex marriage is steadily gaining acceptance among the populace, public opinion regarding same-sex marriage remains divided. A recent poll shows public opinion regarding gay marriage to be almost evenly split, with forty-seven percent of the populace supporting gay marriage and fifty percent opposing it. Jennifer Agiesta, *Post-ABC Poll: Views on Gay Marriage Steady, More Back Civil Unions*, WASH. POST BEHIND THE NUMBERS BLOG (Feb. 12, 2010, 6:00 AM), [http://voices.washingtonpost.com/behind-the-numbers/2010/02/post-abc\\_poll\\_views\\_on\\_gay\\_mar.html](http://voices.washingtonpost.com/behind-the-numbers/2010/02/post-abc_poll_views_on_gay_mar.html). Civil union for same-sex couples enjoys broader support among the populace, with two-thirds of the public endorsing civil union that provides the same legal rights for same-sex couples as those enjoyed by married opposite-sex couples. *Id.*