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Enactment of Historic Civil Union Act Is the Right Step for Illinois**

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The Times They Are a Changin’: Enactment of Historic Civil Union Act Is the Right Step for Illinois

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I. INTRODUCTION

Imagine this scenario: Sam and Jane were married, in a private ceremony, nearly twenty years ago. Over the years, Sam and Jane lived a stable and happy life. They had joint checking and savings accounts, purchased a home together, and had lines of credit in both of their names. In a tragic turn of events, Sam died unexpectedly and did not have a will. When Jane filed a petition for her surviving spouse share of Sam’s estate, pursuant to section 2-1 of the Probate Act of 1975,¹ she was informed that she had no

1. 755 ILL. COMP. STAT. 5/213.1 (2008).

rights to the estate, even though she had spent the last twenty years contributing to the estate. Our shared ethos of justice and decency tells us this is unfair. So you might ask—how could this be?

Sam and Jane symbolize a couple² from the reported 22,887 same-sex partners, who are in committed relationships, living in Illinois.³ Until the recent passage of Senate Bill 1716—civil union legislation entitled the Illinois Religious Freedom Protection and Civil Union Act⁴—Illinois did not legally recognize same-sex unions,⁵ expressly prohibited same-sex marriage,⁶ and did not recognize persons of the same-sex who had validly entered into a same-sex union from other states;⁷ thereby, excluding same-sex couples from hundreds of Illinois laws in which marriage was the only means to access certain benefits and responsibilities.⁸

This Comment will begin by discussing the background of legal recognition for same-sex unions. This history is notable in order to understand that the debate that surrounds same-sex unions today is implicitly tied to our notions of how “marriage” is and should be defined, as opposed to the equal protection of the law for all citizens, as our nation and state promises.⁹ This Comment will then explore how other states have handled this hotly debated subject and address Illinois legislation on the subject.

2. See *In re Estate of Hall*, 707 N.E.2d 201 (Ill. 1998) (showing abovementioned scenario is more than a hypothetical, it is based on the real facts of this case).

3. U.S. Census Bureau 2000, <http://www.census.gov/prod/2003pubs/censr-5.pdf> (last visited Oct. 2, 2009). Some studies have suggested that the figures from the 2000 Census undercounted gay and lesbian people, in committed relationships, by sixty-two percent. See, e.g., David M. Smith & Gary J. Gates, *Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households*, in A HUMAN RIGHTS CAMPAIGN REPORT 1, 2 (2001).

4. S.B. 1716, 96th Gen. Assemb., Reg. Sess. (Ill. 2010); Ray Long & Monique Garcia, *Illinois Senate Approves Civil Union, Measure Heads to Quinn*, CLOUT ST. (Dec. 1, 2010, 3:32 PM), http://newsblogs.chicagotribune.com/clout_st/2010/12/illinois-senate-debates-civil-union-measure.html.

5. See *State Policies on Same-Sex Marriage*, HUMAN RIGHTS CAMPAIGN, http://archive.stateline.org/flash-data/2007_May_31-CivilUnions/Social_Policy.pdf (last visited Oct. 2, 2009).

6. 750 ILL. COMP. STAT. 5/212(a)(5) (2004); 750 ILL. COMP. STAT. 5/213.1 (2004) (“A marriage between 2 individuals of the same sex is contrary to the public policy of this State.”).

7. 750 ILL. COMP. STAT. 5/216 (2004) (stating marriages that are obtained by Illinois residents in another jurisdiction are void in Illinois if prohibited under Illinois law); Recognition of Vt. Same-Sex Civil Unions by Ill., Op. Att’y Gen. No. 00-017 (Ill. 2000) (holding Illinois does not have to recognize civil unions entered into validly in another jurisdiction after the Vermont decision to enact civil unions).

8. Geoffrey R. Stone, *Civil-Union Bill an Apt Compromise*, CHI. TRIB., Mar. 26, 2007, at 17; ACLU, Support Civil Unions in Illinois – House Bill 1826, <http://www.aclu-il.org/legislative/alerts/marriagefairness.pdf> (last visited Nov. 15, 2009).

9. See Ben Schuman, *God & Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 GEO. L.J. 2103, 2105 (2008).

Next, this Comment will discuss the challenges that same-sex partners and their children were confronted with due to the lack of legal recognition of their relationships and then delve into counter-arguments to such recognition. It will be argued that the enactment of the Illinois Religious Freedom Protection and Civil Union Act¹⁰ was the proper measure to extend the equality to “all persons,” as the Illinois constitution promises, while preserving the traditional definition of “marriage” and allowing religious organizations to maintain their autonomy.¹¹

II. BACKGROUND

A. THE EVOLUTION OF LEGAL RECOGNITION FOR SAME-SEX UNIONS

While lesbian and gay advocates have been fighting for equal rights for over half a century,¹² the recognition of same-sex relationships is relatively new.¹³ In the United States, the legal recognition of same-sex relationships first came in the form of localities, such as Berkeley, West Hollywood, Santa Cruz, and Los Angeles, extending health benefits to the same-sex partners of its civic employees in the 1980s.¹⁴ In the 1990s, there began to be a slow and limited legal recognition of same-sex relationships by a few states, namely Massachusetts and Delaware, which determined that the same-sex partners of some of their employees could be covered in benefit plans, which was accomplished by an administrative order.¹⁵

Further, in the 1990s, private and public employers began to increasingly provide inclusive benefits to same-sex partners of their employees, and by the end of the decade, nearly half of the fifty major corporations had broadened their benefit plans to include their employees’ same-sex partners.¹⁶ Additionally, the vast majority of top universities and colleges throughout the nation had shifted toward providing benefits to their employees’ same-sex partners.¹⁷

10. S.B. 1716, 96th Gen. Assemb., Reg. Sess. (Ill. 2010).

11. See Long & Garcia, *supra* note 4.

12. ERIC MARCUS, MAKING GAY HISTORY 21 (2002) (discussing the struggle for equal rights for the gay community since the creation of the first gay and lesbian advocacy groups: Mattachine Society, the Daughters of Bilitis, and ONE, Inc. in 1950); Steven Epstein, *Gay and Lesbian Movements in the United States*, in THE GLOBAL EMERGENCE OF GAY AND LESBIAN POLITICS 30 (1999).

13. See DAVID RAYSIDE, QUEER INCLUSIONS, CONTINENTAL DIVISIONS 126 (2008).

14. *Id.* at 129-30.

15. *Id.* at 130.

16. *Id.* at 132-33.

17. *Id.* at 139.

Nonetheless, these gains were not without their setbacks.¹⁸ With the national debate over recognition of same-sex unions heating up, those in opposition to such recognition began passionately and bitterly fighting, with some success, to repeal gay rights ordinances and laws at the local, city, and state level.¹⁹ Also, some large corporations within the United States began to rollback their inclusive benefits plans.²⁰

Ultimately, it was the unlikely State of Hawaii that would forever change the atmosphere of recognition for same-sex unions in the United States.²¹ In 1993, the Supreme Court of Hawaii in *Baehr v. Lewin*²² became the first court in the history of the United States to imply that marriage could include a relationship of same-sex partners.²³

In *Baehr*, three same-sex couples, who met all of the eligibility requirements other than they were not of the opposite sex, were denied the right to obtain a marriage license in the State of Hawaii.²⁴ These couples brought suit against the Director of the Department of Health, alleging that their denial to marriage licenses violated their right to privacy, equal protection, and due process of law which was afforded to them via the Hawaiian constitution.²⁵ The trial court granted the Director's motion for summary judgment and dismissed the same-sex couples' complaint.²⁶ On appeal, the Hawaii Supreme Court declared that the statutory requirement of being of the opposite sex to access a marriage license "denies same-sex couples access to the marital status and its concomitant rights and benefits."²⁷

18. See Epstein, *supra* note 12, at 67-73.

19. *Id.* at 68-69 (noting referendums in Oregon that repealed gay rights ordinances and a constitutional amendment in Colorado, which made it nearly impossible for gay rights to be recognized in the future at any level of government). In *Romer v. Evans*, 517 U.S. 622 (1996), the Supreme Court found the Colorado amendment to be unconstitutional. *Id.*

20. See RAYSIDE, *supra* note 13, at 140. The book discusses several examples of companies retracting their inclusive benefits plans, including Exxon Mobile's decision in 1999 to change the "family benefits program" to only apply to *married* families. *Id.* The previous benefit plan, under Mobil Corporation, did cover the partners and families of its same-sex employees. *Id.* The decision led to a firestorm of advocacy by a number of gay and lesbian, human rights, and union organizations, but Exxon Mobile refused to budge and the new benefits program remained. *Id.*

21. See *id.* at 133.

22. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), *superseded by constitutional amendment*, HAW. CONST. art. I, § 23, *as recognized in Baehr v. Milke*, No. 20371, 1999 Haw. LEXIS 391, at *1 (Haw. Dec. 9, 1999).

23. *Baehr*, 852 P.2d at 60; see also WILLIAM ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE 219 n.4 (1996).

24. *Baehr*, 852 P.2d at 49-50.

25. *Id.* at 50.

26. *Id.* at 52.

27. *Id.* at 60.

Interestingly, the court did not decide to strike down the law nor find that same-sex couples had a fundamental right to marry.²⁸ Instead, the Hawaii Supreme Court remanded the case to the trial court level stating the Director would have the burden of surmounting the presumption that the statute was unconstitutional by showing it “is justified by compelling state interests and . . . is narrowly drawn to avoid unnecessary abridgments of the applicant couples’ constitutional rights.”²⁹ Three years later, the trial court entered judgment in favor of the same-sex couples and held that the state had failed to present satisfactory justification for limiting marriage to persons of opposite sex.³⁰

This decision placed the debate over same-sex marriage on the center stage at both the national and state level; and “an issue that had been a curiosity became an apocalyptic sensation.”³¹ Groups who opposed same-sex marriage used the *Baehr* decision to mobilize support for legislation, at all levels of government, which would legally define “marriage” as between one woman and one man.³² Many conservative groups and religious organizations argued, among other things, that recognizing same-sex marriage would lead to the destruction of the institution of marriage, would harm procreation and the raising of children, and that homosexuality was an immoral practice.³³

One of the greatest fears for groups who opposed same-sex marriage was that the Full Faith and Credit Clause of the United States Constitution³⁴ would require states that did not allow same-sex marriage to recognize marriages that took place validly in Hawaii.³⁵ By and large, states follow what is called “the celebration rule,” which means that states honor out-of-state marriages, as long as it was valid within the state it was celebrated.³⁶ Thus, the state in which the couple chooses to live after being wed would enforce the responsibilities and benefits that accompany the marriage, as if it had been performed within the home state.³⁷ Same-sex marriage opponents and proponents felt the Full Faith and Credit Clause may be an effective vehicle

28. *Id.* at 67.

29. *Baehr*, 852 P.2d at 67.

30. *Id.*; see also *Baehr v. Miike*, No. 20371, 1999 Haw. LEXIS 391 (reversing the trial court’s decision that the Hawaiian law violated the constitution because the marriage amendment made the same-sex couples’ complaint moot); RAYSIDE, *supra* note 13, at 134.

31. WILLIAM N. ESKRIDGE, EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 26 (2002).

32. See Epstein, *supra* note 12, at 70.

33. See ESKRIDGE, *supra* note 31, at 34-40.

34. U.S. CONST. art. IV, § 1 (asserting states must follow “public acts, [r]ecords, and judicial [p]roceedings” of other states).

35. See, e.g., ESKRIDGE, *supra* note 31, at 26-32.

36. *Id.* at 26-27.

37. *Id.*

in which same-sex marriage, like heterosexual marriage, might receive full recognition throughout the country.³⁸

However, opinion polls steadily showed that the majority of Americans were not in favor of state recognition of same-sex marriage,³⁹ even when they did disapprove of discrimination against gays and lesbians in the workplace.⁴⁰ Thus, with the majority of Americans objecting to same-sex marriage and with the fear that same-sex marriage “might spread to other jurisdictions,” opponents to same-sex marriage sought and won a national solution.⁴¹ In 1996, Congress passed the Defense of Marriage Act (DOMA), which stated in the first section that for purposes of federal law, “marriage” was defined as “a legal union between one man and one woman;” and in the second section, it declared that the states had the power to refuse to recognize valid same-sex marriages that were entered into in other states.⁴² As a consequence of the passage of DOMA, the issue of recognition of same-sex unions became squarely within the purview of the states.

B. STATE LEGISLATION: WHAT OTHERS HAVE DONE

After the *Baehr* decision, nearly every state legislature introduced legislation against same-sex marriage.⁴³ Just months after *Baehr*, Utah became the first state to preemptively pass legislation to assure that there would be no recognition of same-sex marriages within its jurisdiction.⁴⁴ Shortly thereafter, in 1994, Hawaii became the second state to do so.⁴⁵ After the federal government’s passage of DOMA, states quickly fell in line and passed “junior DOMAs,” specifically defining marriage to be between one woman and one man.⁴⁶ Further, states began rapidly passing or updating nonrecognition statutes, which varied by state, but generally declared a same-sex marriage void even if they were entered into validly within the state cele-

38. See ESKRIDGE, *supra* note 31, at 26-27; RAYSIDE, *supra* note 13, at 134-35; see also Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1062-73 (1995) (discussing issues pertaining to same-sex marriage and states’ choices of law, such as a courts freedom of choice to invalidate a marriage based on the public policy of the state).

39. See ESKRIDGE, *supra* note 31, at 26.

40. See Epstein, *supra* note 12, at 71.

41. ESKRIDGE, *supra* note 31, at 32.

42. 1 U.S.C. § 7 (1996); 28 U.S.C. § 7 (1997); see also MICHAEL MELLO, LEGALIZING GAY MARRIAGE 14 (2004) (discussing the passage of DOMA and the impact on portability of civil unions) (quoting Defense of Marriage Act of 1996, 28 U.S.C. § 1738 (2000)).

43. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); ESKRIDGE, *supra* note 31, at 27.

44. Marriage Recognition Policy, UTAH CODE ANN. § 30-1-4.1 (West 2009) (stating same-sex marriages are “prohibited and declared void”); ESKRIDGE, *supra* note 31, at 27.

45. HAW. CONST. art. I § 23; RAYSIDE, *supra* note 13, at 135.

46. See, e.g., ESKRIDGE, *supra* note 31, at 39.

brated.⁴⁷ As of October 1, 2009, forty states have laws restricting marriage to one man and one woman⁴⁸ and twenty-nine states have a constitutional amendment also restricting marriage to one man and one woman.⁴⁹

Notwithstanding these same-sex marriage setbacks, legal recognition for gay and lesbian relationships has grown over the last decade.⁵⁰ In April of 2000, Vermont became the first state in the nation to create civil union laws for same-sex couples.⁵¹ The path to the concept of a civil union started in December of 1999, when the Vermont Supreme Court in *Baker v. State* held that same-sex couples were entitled to the same legal protections and benefits as heterosexual married couples, per the Vermont Constitution.⁵² The court then deferred to the legislature to decide how to go about affording those rights.⁵³ A very heated debate ensued in which “[l]egislators had been ‘deluged with tens of thousands of letters, phone calls, and e-mails’ . . . [and] the pressure on legislators (from both sides) was remarkable.”⁵⁴ At that time, instead of choosing to allow same-sex marriage, Vermont chose to enact the civil union legislation that did grant same-sex partners the same legal protections, benefits, and responsibilities as heterosexual married couples.⁵⁵ In addition, the legislation listed in great detail what these protections, benefits, and responsibilities were.⁵⁶ Nine years later, effective September 1, 2009, the State of Vermont took the next groundbreaking step and

47. See *id.* at 27-39.

48. See *infra* note 49. In addition to those states, Delaware, Illinois, Indiana, Maryland, Minnesota, North Carolina, Pennsylvania, Washington, West Virginia, and Wyoming have laws that limit marriage to one woman and one man. *Statewide Marriage Prohibitions*, HM. RTS. CAMPAIGN, http://www.hrc.org/documents/marriage_prohibitions_2009.pdf (last visited Oct. 11, 2009).

49. The states that have a constitutional amendment limiting marriage to one woman and one man are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Kansas, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin. *Id.*

50. See RAYSIDE, *supra* note 13, at 154-58.

51. VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002); see also MELLO, *supra* note 42, at 12.

52. VT. CONST. ch. 1, art. VII; *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

53. See MELLO, *supra* note 42, at 12.

54. *Id.* at 81 (quoting Adam Lisberg, *Senators Rule Out Gay Right to Marry*, BURLINGTON FREE PRESS, March 18, 2000; Nancy Remsen and Adam Lisberg, “Civil Union” Debate Hits Apex, BURLINGTON FREE PRESS, March 15, 2000).

55. VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002); see also MELLO, *supra* note 42, at 11-12.

56. VT. STAT. ANN. tit. 15, § 1204 (2002); John R. Schleppebach, *Strange Bedfellows: Why Older Straight Couples Should Advocate for the Passage of the Illinois Civil Union Act*, 17 ELDER L.J. 31, 43 (2009).

began allowing same-sex marriage, not by a judicial mandate, but through legislation.⁵⁷

In July of 2004, Maine enacted legislation to allow recognition of same-sex unions termed domestic partnerships.⁵⁸ However, Maine's legislation was not as inclusive as Vermont's and did not accord domestic partners with all the same rights as heterosexual married couples.⁵⁹ In 2009, Maine followed in the footsteps of Vermont and passed legislation allowing same-sex marriage, which was set to become effective on September 11, 2009.⁶⁰ However, due to a clause in the Maine Constitution⁶¹ that allows citizens to veto legislation, the statute was placed on the November 4, 2009 ballot for a popular vote.⁶² By a small margin (fifty-three percent opposing the law versus forty-seven percent supporting it) the law was repealed, making Maine the thirty-first state to oppose same-sex marriage in a popular vote.⁶³ Interestingly, although the citizens of Maine voted to repeal same-sex marriage, they have never chosen to repeal the domestic partnership laws, reflecting the trend in polls that the majority of Americans support civil unions but do not support same-sex marriage.⁶⁴

Also in 2004, New Jersey passed civil union legislation.⁶⁵ The law initially was limited in scope and imposed strict eligibility requirements; however, when updated in 2007, the statute declared "civil union couples have all of the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative, or court rule, public policy, common law, or any other source of civil law, as are granted to spouses in a marriage."⁶⁶ In addition, New Jersey chose to honor same-sex unions

57. VT. STAT. ANN. tit. 18, § 5131 (2009); Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, N.Y. TIMES, Apr. 8, 2009, at A1.

58. ME. REV. STAT. ANN. tit. 22, § 2710 (2009).

59. *Id.*; Schleppenbach, *supra* note 56, at 44-45.

60. Jenna Russell, *Gay Marriage Law Signed in Maine*, *Advances in N.H.*, B. GLOBE, May 6, 2009, available at http://www.boston.com/news/local/breaking_news/2009/05/gay_marriage_la.html.

61. M.E. CONST. art. IV, § 17.

62. Karl Vick, *Maine Set to Vote on Gay Marriage*, WASH. POST, Nov. 2, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/02/AR2009110201107.html>.

63. Abby Goodnough, *A Setback in Maine for Gay Marriage but Medical Marijuana Law Expands*, N.Y. TIMES, Nov. 4, 2009, available at <http://www.nytimes.com/2009/11/05/us/politics/05maine.html>.

64. Pew Forum on Religion & Public Life, *Most Still Oppose Same Sex Marriage: Majority Continues to Support Civil Unions*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (Oct. 9, 2009), available at <http://pewforum.org/newassets/images/reports/samesexmarriage09/samesexmarriage09.pdf> (indicating fifty-seven percent of Americans support civil unions whereas 53% of Americans oppose same-sex marriage) [hereinafter PEW RESEARCH CTR.].

65. N.J. STAT. ANN. § 26:8A-1 (West 2007).

66. *Id.*; Schleppenbach, *supra* note 56, at 46.

that are validly entered into outside of its jurisdiction.⁶⁷ Lastly, in May of 2004, the State of Massachusetts began allowing same-sex marriage after the Supreme Court of Massachusetts in *Goodridge v. Department of Public Health* held that the state's rationale for statutorily prohibiting same-sex marriage was not rationally related to a permissible state interest.⁶⁸ Further, in what came as a shock to many, the state legislature voted against a measure to place a constitutional amendment on the ballot to ban same-sex marriage.⁶⁹

In 2005, Connecticut and California joined the states legally recognizing same-sex unions.⁷⁰ The statutes passed by both states were similar to those previously enacted, providing same-sex couples that enter into a domestic partnership (California) or a civil union (Connecticut) the same rights, benefits, and protections of marriage; however, neither statute included a catalogue of benefits as the Vermont and New Jersey statutes had.⁷¹ California's law also recognized same-sex unions that were validly entered into outside of its jurisdiction.⁷²

Interestingly, both states would have their legislation challenged and overturned by each state's supreme court with ultimately very different outcomes. In May of 2008, the California Supreme Court, in *In re Marriage Cases*, held that the state statutory prohibition against same-sex marriage was unconstitutional because it drew a clear distinction between same-sex couples and opposite-sex couples, which excluded the former from the fundamental right to marry without a valid, compelling state interest.⁷³ However, in November of 2008, Proposition 8 was passed by popular vote, which amended the California state constitution to limit marriages to those between one man and one woman, effectively overturning the state supreme court's decision.⁷⁴ In spite of this, and for the first time ever, a federal court—the United States District Court for the Northern District of California—using a strict scrutiny test,⁷⁵ ruled that the constitutional amendment was

67. N.J. STAT. ANN. §26-A-6(c), 37-1-13.1 to 13.2 (West 2007); Schleppenbach, *supra* note 56, at 46.

68. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

69. Stephen Smith, *Same-Sex Marriage Win in Boston: Massachusetts State Lawmakers Reject Constitutional Amendment*, CBSNEWS.COM, Sept. 14, 2005, available at <http://www.cbsnews.com/stories/2005/09/14/national/main846230.shtml>.

70. CONN. GEN. STAT § 46B-38NN (2008); CAL. FAM. CODE § 297.5 (West 2009).

71. CONN. GEN. STAT § 46B-38NN (2008); CAL. FAM. CODE § 297.5 (West 2009); Schleppenbach, *supra* note 56, at 46.

72. CAL. FAM. CODE § 299.2 (2009).

73. *In re Marriage Cases*, 183 P.3d 384, 451-52 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5.

74. CAL CONST. art. I, § 7.5.

75. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 995-97 (N.D. Cal. 2010) (noting that the standard of review used is strict scrutiny, but that Proposition 8 would not have

not narrowly tailored to meet a compelling state interest, and as a result, violated the Due Process Clause of the Fourteenth Amendment.⁷⁶ On August 16, 2010, the United States Court of Appeals for the Ninth Circuit placed a stay on same-sex marriages in California until it has decided the appeal, which was set to be heard in December of 2010.⁷⁷

Additionally in 2008, the Connecticut Supreme Court, in *Kerrigan v. Commissioner of Public Health*, similarly held that the state statutory prohibition against same-sex marriage violated the equal protection of same-sex couples, even though the couples were provided with analogous rights under the civil union provision.⁷⁸ The court declared, “Although marriage and civil unions do embody the same legal rights under our law, they are by no means ‘equal.’”⁷⁹ Contrary to the reaction in California over its high court’s decision to mandate the recognition of same-sex marriage, the lawmakers in the State of Connecticut agreed to repeal the previous marriage laws and replaced the laws with gender-neutral language, which the Governor then signed into law.⁸⁰

New Hampshire and Oregon extended recognition of same-sex unions in 2007 with the passage of civil union bills that were similar to those previously enacted in the abovementioned states.⁸¹ Along with other New England states, New Hampshire passed legislation that grants same-sex marriage, which became effective on January 1, 2010.⁸² Colorado and Hawaii also offer very limited rights for same-sex couples, such as certain property rights and hospital visitation.⁸³

Most recently, the Midwest has begun to see a shift in dogma when it comes to the rights of same-sex couples. In April of 2009, the Iowa Supreme Court in *Varnum v. Brien*, using a strict scrutiny analysis,⁸⁴ held that

withstood rational basis review either because there is no reasonable reason for excluding same-sex couples from marriage).

76. *Id.* at 994-95.

77. Jesse McKinley, *Court Extends Stay on Allowing Gay Marriage*, N.Y. TIMES, Aug. 16, 2010, at A12.

78. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 479-82 (Conn. 2008).

79. *Id.* at 418.

80. See Susan Haigh, *Decade-Long Battle to Allow Gay Marriage in Conn. will End with Governor’s Expected Signature*, ASSOCIATED PRESS, S.F. EXAM’R, June 20, 2009, available at <http://www.sfexaminer.com/nation/ap/48687447.html>.

81. N.H. REV. STAT. ANN. §§ 457-A:1 to A:8 (2007); OR. REV. STAT. §§ 106.010-999 (2007).

82. N.H. REV. STAT. ANN. § 457:45 (2010); see also Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES, June 3, 2009 (noting the passage of same-sex marriage).

83. COLO. REV. STAT. § 10-16-105 (2010); HAW. REV. STAT. § 323-2 (West 2010); see also Schlessenbach, *supra* note 56, at 47.

84. *Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009) (“[C]ourts apply a heightened level of scrutiny under equal protection analysis when reasons exist to suspect ‘preju-

the statutory prohibition on same-sex marriage violated same-sex couples right to equal protection under the Iowa Constitution because the state's rationale for denying marriage was not substantially related to an important state interest.⁸⁵ After this decision, conservatives and other groups that oppose same-sex marriage have vowed to take the same approach as California and petition to amend the Iowa Constitution in order to strictly define marriage in the traditional sense.⁸⁶

In addition, in May of 2009, Wisconsin became the first Midwestern state to pass legislation to establish domestic partnerships, even though the state has a constitutional amendment banning same-sex marriage.⁸⁷ While the domestic partnership does not provide all the rights and benefits provided with marriage (only forty-three protections out of more than two hundred afforded to marriage),⁸⁸ proponents of equal rights for same-sex couples see this as "a major milestone in the quest for fairness."⁸⁹

Also in 2009, a same-sex marriage bill was approved both in Washington D.C.⁹⁰ and the State of Washington on the same day citizens of Maine voted to repeal same-sex marriage laws — the electorate voted to extend all the rights and responsibilities of marriage to same-sex unions in the form of domestic partnerships.⁹¹

C. LEGISLATION IN ILLINOIS

As was previously mentioned, Illinois does not legally recognize same-sex marriage.⁹² Further, before the recent enactment of the Civil Union Act, Illinois did not recognize same-sex marriages entered into by citi-

dice against discrete and insular minorities' . . . rights are evaluated according to a standard known as 'strict scrutiny.' Classifications subject to strict scrutiny are presumptively invalid and must be narrowly tailored to serve a compelling governmental interest.").

85. *Id.* at 898-904.

86. Jeff Eckoff & Grant Schulte, *Unanimous Ruling: Iowa Marriage No Longer Limited to One Man, One Woman*, DES MOINES REGISTER, Apr. 3, 2009, <http://www.desmoinesregister.com/article/20090403/NEWS/90403010>.

87. WIS. STAT. §770.001 (2009) (domestic partnership); WIS. CONST. art. XIII § 13 ("Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state.").

88. Christine Callsen, *Domestic Partnerships Reference Guide*, FAIR WISCONSIN (July 9, 2009, 11:43 AM), <http://fairwisconsin.blogspot.com/2009/07/domestic-partnerships-reference-guide.html>.

89. *Id.*

90. Robert McCartney, *Same-Sex Marriage Bill Approved in D.C.*, WASH. POST, Dec. 16, 2009, <http://www.washingtonpost.com/wp-dyn/content/discussion/2009/12/15/DI2009121504161.html>.

91. Steve Chapman, *Lost, But It's Not Losing*, CHI. TRIB., Nov. 15, 2009.

92. 750 ILL. COMP. STAT. 5/212(a)(5) (2004). The law states: "The following marriages are prohibited: . . . a marriage between 2 individuals of the same sex." *Id.*

zens of states where the unions are valid,⁹³ and did not have its own civil union legislation. However, the path for recognition of civil unions in Illinois began on February 23, 2007, when Representative Greg Harris introduced in the Illinois House, as House Bill 1826, civil union legislation entitled the Illinois Religious Freedom Protection and Civil Union Act.⁹⁴ The bill garnered strong support from a number of Illinois agencies, such as the ACLU and the Illinois State Bar Association.⁹⁵ Further, a number of Illinois newspapers gave endorsements to the bill, such as the Chicago Tribune stating it was an “apt compromise” between supporters of a traditional view of marriage and gay rights advocates.⁹⁶ Although the bill did pass the Human Services Committee of the Illinois House in March of 2007, House Bill 1826 was re-referred to the Rules Committee on May 31, 2008, and there it remained when the session adjourned on January 13, 2009.⁹⁷

Nevertheless, this was not the end for civil union legislation in Illinois. On February 18, 2009, Representative Greg Harris reintroduced the Illinois Religious Freedom Protection and Civil Union Act as House Bill 2234 (Civil Union Act).⁹⁸ This time the bill featured fewer comparisons to marriage, which had previously made some legislators leery to support it.⁹⁹

93. 750 ILL. COMP. STAT. 5/216 (2004); *State Has No Duty to Accept Civil Unions as Legal*, Ryan Finds, CHI. DAILY L. BULL., Jan. 26, 2001, at 5.

94. H.B. 1826, 95th Gen. Assemb., Reg. Sess. (Ill. 2007), available at <http://www.ilga.gov/legislation/95/HB/PDF/09500HB1826lv.pdf>.

95. *Support Civil Unions in Illinois – House Bill 1826*, ACLU, *supra* note 8; Stephanie Potter, *State Bar Backs Proposed Legislation Creating Civil Unions*, CHI. DAILY L. BULL., June 25, 2007, at 1.

96. Stone, *supra* note 8, at 17; see also *It’s Time to Authorize Civil Unions in Illinois*, CHI. SUN TIMES, Mar. 27, 2007, at 29 (“Couples should be allowed to care for each other no matter what their sexual orientation – not in opposition to the law, but with its full support.”); Schleppenbach, *supra* note 56, at 49.

97. Monique Garcia, *Committee Narrowly Approves Civil Union Bill*, CHI. TRIB., Mar. 22, 2007, at 9; *Bill Status of H.B. 1826*, ILL. GEN. ASSEMB., <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1826&GAID=9&DocTypeID=HB&LegId=30661&SessionID=51&GA=95> (last visited Nov. 15, 2009). Two other bills were also introduced into the Illinois General Assembly, one intended to amend the Illinois Constitution to limit marriage to opposite-sex couples S.J.R.C.A. 0008, 95th Gen. Assemb., Reg. Sess. (Ill. 2007), and the other aimed to permit same-sex marriages, H.B. 1615, 95th Gen. Assemb., Reg. Sess. (Ill. 2007). Neither bill progressed beyond the committee stage. See Illinois General Assembly, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1615&GAID=9&DocTypeID=HB&LegId=30427&SessionID=51&GA=95> (last visited Nov. 15, 2009).

98. H.B. 2234, 96th Gen. Assemb., Reg. Sess. (Ill. 2009), available at <http://www.ilga.gov/legislation/96/HB/PDF/09600HB2234.pdf>.

99. Erik Potter, *“Marriage” Gets Harder to Find in Civil Union Bill*, ST. LOUIS POST-DISPATCH (May 22, 2007, 7:00 AM), <http://www.illinoisfamily.org/news/contentview.asp?c=33322> See also Garcia, *supra* note 97, at 9 (“[S]ome lawmakers opposed the civil-union legislation . . . saying it draws little distinction from traditional marriage. ‘There is a fine line, and I think Rep. Harris crossed it.’”)

Again this bill passed the Human Services Committee of the Illinois House but was re-referred to the Rules Committee on May 31, 2009, seemingly to suffer the same fate as its predecessor. However, on November 30, 2010, the Civil Union Act was stunningly resuscitated when the Illinois House of Representatives voted to approve a mirror act pending in the senate, S.B. 1716.¹⁰⁰ On December 1, 2010, the Illinois Senate followed suit and voted to enact the Illinois Religious Freedom Protection and Civil Union Act.¹⁰¹ Governor Pat Quinn signed the Act into law on January 31, 2011.¹⁰² The Act will go into effect on June 1, 2011.¹⁰³

In general, the bill is comparable to the civil union laws that were in place in New Hampshire and Connecticut, before those laws were changed to grant marriage for same-sex couples.¹⁰⁴ For example, similar to those bills, the Civil Union Act outlines in broad terms the rights provided to parties in a civil union, stating that “[a] party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law.”¹⁰⁵

Next, the bill lays out prohibitions to obtaining a civil union, such as being under the age of eighteen, being related to one another, or currently being married or in a legally analogous relationship.¹⁰⁶ The bill also outlines how the civil union would be applied for, licensed and certified, and states that the Illinois Marriage and Dissolution of Marriage Act¹⁰⁷ would govern the dissolution and/or invalidation of a civil union.¹⁰⁸ In addition,

said Rep. Mary Flowers (D-Chicago), who opposed the bill in committee. ‘I think what he did is make this, indirectly, same-sex marriage but called it something else. Marriage is between a man and a woman’”). The original draft of H.B. 1826 used the word “marriage” forty-nine times. Schleppebach, *supra* note 56, at 59 n.116.

100. See Long, *supra* note 4.

101. *Id.*

102. Monique Garcia, *Quinn Signs Historic Civil Union Bill into Law; Same-Sex Couples Will Get Many of the Rights as Married Counterparts*, CHI. TRIB., Feb 1, 2011, at C6.

103. See Long & Garcia, *supra* note 4.

104. See Schleppebach, *supra* note 56, at 49.

105. S.B. 1716 §20, 96th Gen. Assemb., Reg. Sess. (Ill. 2009), available at <http://www.ilga.gov/legislation/96/SB/PDF/09600SB1716lv.pdf>.

106. *Id.* at § 25.

107. 750 ILL. COMP. STAT. 5/101-714 (2008).

108. S.B. 1716 § 30-45, 96th Gen. Assemb., Reg. Sess. (Ill. 2009), available at <http://www.ilga.gov/legislation/96/SB/PDF/09600SB1716lv.pdf>; 750 ILL. COMP. STAT. 5/301-06, 401-13 (2004).

the bill includes language to honor same-sex unions that are validly entered into outside of Illinois jurisdiction.¹⁰⁹

With that said, the Civil Union Act, like the other civil union laws in our nation, would not be able to bestow federal rights upon individuals in the civil union.¹¹⁰ Due to the definitions of “marriage”—“between one man and one woman” and spouse — “only to a person of the opposite sex who is husband or wife” under the federal DOMA legislation,¹¹¹ many federal benefits, such as those in connection with Medicare, Social Security, federal housing and food stamps, veteran benefits, federal taxes, and federal employment programs, are not accessible through a civil union.¹¹²

The Civil Union Act does have two attributes that sets it apart from many other civil union laws. First, the Act does not preclude opposite sex couples from entering into a civil union, but instead states that it is “a legal relationship between 2 persons, of either the same or opposite sex.”¹¹³ Second, the Civil Union Act explicitly states it will not “interfere with or regulate the religious practice of any religious body,” and allows religious organizations to decide whether it will officiate or solemnize a civil union.¹¹⁴ Both of these attributes are important to consider when analyzing criticism from either side of the debate.

First, by allowing same and opposite sex couples to enter into the union, the impact of causing a disparate class is lessened. One group of opposite-sex couples who would certainly benefit from the passage of the Civil Union Act is older partners, who face many federal legal impediments in remarrying, such as loss of a pension, loss of Medicare or Social Security benefits, and issues concerning succession of testate or intestate.¹¹⁵ Since being in a civil union does not impact federal benefits, these couples could profit from significant state rights without losing the federal benefits they

109. S.B. 1716 § 60, 96th Gen. Assemb., Reg. Sess. (Ill. 2009), available at <http://www.ilga.gov/legislation/96/SB/PDF/09600SB1716lv.pdf>.

110. See *In re Marriage Cases*, 183 P.3d 384, 417 (Cal. 2008), superseded on different grounds by constitutional amendment, CAL. CONST. art. 1, § 7.5 (holding California’s domestic partnership laws do not grant same-sex couples many federal benefits, neither would allowing same-sex couples to marry due to DOMA’s definition of marriage being between one man and one woman).

111. 1 U.S.C. § 7 (1996); 28 U.S.C. § 7 (1997).

112. See U.S. GEN. ACCOUNTABILITY OFFICE, GAO/OGC-97-16, DEFENSE OF MARRIAGE ACT, (1997) (identifying 1049 federal laws where marriage is a factor); see also *People v. Greenleaf*, 780 N.Y.S. 2d 899, 903 (N.Y. 2004) (“There can be no constitutional rationale for denying same-sex couples the right to receive the benefits that are so lavishly bestowed on mixed-sex couples.”); Andrew Koppelman, *Dumb and Doma: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 3-4 (1997).

113. S.B. 1716 § 10, 96th Gen. Assemb., Reg. Sess. (Ill. 2009), available at <http://www.ilga.gov/legislation/96/SB/PDF/09600SB1716lv.pdf>.

114. *Id.* at § 15.

115. See Schleppenbach, *supra* note 56, at 32.

so urgently need.¹¹⁶ Second, by allowing religious organizations to decide whether it will officiate or solemnize a civil union, the Civil Union Act will preserve the traditional definition of “marriage” and allow religious organizations to maintain their independence.¹¹⁷

III. ARGUMENT

Regardless of one’s opinion on same-sex “marriage,” the lack of legal recognition for same-sex couples in Illinois, before the enactment of the Civil Union Act, created substantial legal inequalities between committed couples who were opposite-sex and same-sex. Although Illinois had extended some limited benefits to partners of same-sex couples, there are still many more rights and obligations that are only available through marriage.¹¹⁸ Thus, the prohibition against recognizing same-sex unions was in stark contrast to the equal protection promised in the Illinois constitution.¹¹⁹ The New York high court’s declaration in *People v. Greenleaf*, that “[t]here can be no constitutional rationale for denying same-sex couples the right to receive the benefits that are so lavishly bestowed on mixed-sex couples,”¹²⁰ also rings true in Illinois. The correct solution for Illinois was to enact the Illinois Civil Union Act, which has now extended to same-sex couples the “same legal obligations, responsibilities, protections, and benefits” that are given to married couples while preserving the traditional definition of “marriage” and allowing religious organizations to maintain their autonomy.¹²¹

A. CHALLENGES THAT SAME-SEX COUPLES CURRENTLY FACE IN ILLINOIS

1) *Health*

There are many overall health and mental health benefits associated with a recognized union between partners.¹²² In fact, studies have shown that the right to marry is closely related to a person’s health and living a

116. *Id.*

117. *See, e.g.,* Stone, *supra* note 8, at 17.

118. *Id.*

119. *See* Laura Johnson, *Same-Sex Marriage in Illinois: A Public Policy Analysis*, CHL. SCH. PROF. PSYCHOL., May 24, 2009, at 6, *available at* http://www.allacademic.com/meta/p204689_index.html (arguing current ban on same-sex marriage is in violation of the Illinois Bill of Rights and Illinois Constitution).

120. *People v. Greenleaf*, 780 N.Y.S. 2d 899, 903 (N.Y. 2004).

121. *See* H.B. 2234 § 60, 96th Gen. Assemb., Reg. Sess. (Ill. 2009), *available at* <http://www.ilga.gov/legislation/96/HB/PDF/09600HB2234.pdf>; Stone, *supra* note 8, at 17.

122. *See* Johnson, *supra* note 119, at 5.

long life.¹²³ Unmarried women's mortality rates are 50% higher than that for married women, and the mortality rates for unmarried men are 250% higher than those for married men.¹²⁴ Additionally, married partners have higher levels of well-being, both psychologically and physically, and report being happier.¹²⁵ While these studies were performed on opposite-sex couples, the American Psychological Association found that it is safe to assume those benefits would generalize to same-sex couples.¹²⁶ Psychological research has found that in general, gay and lesbian couples fit the same archetypes of couplehood as heterosexual couples and develop commitments and meaningful, loving emotional attachments just as opposite-sex couples do.¹²⁷

Further, it should be noted that the research was performed on married couples, not on those in civil unions or domestic partnerships, as the research predated such unions.¹²⁸ Interestingly, these studies found that those health benefits were not found when people simply live together.¹²⁹ Researchers believe the reason for the limited benefits to cohabitators is that one of the main reasons persons chose to cohabitate instead of get married is a desire to retain one's own life apart from their companion.¹³⁰ In addition, persons who choose cohabitation tend to value time for one's individual free time, apart from their companion, more than persons who choose to marry.¹³¹ Since, prior to the enactment of the Civil Union Act, same-sex couples in Illinois only had the option of cohabitating, the reasons listed for why a person chooses to cohabitate would likely not apply to most commit-

123. See Proof Brief of the Am. Psychol. Ass'n as Amici Curiae Supporting Plaintiff-Appellees, at 12, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (No. 07-1499) at 10, available at www.apa.org/about/offices/ogc/amicus/varnum.pdf; EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 19, 20 (2004).

124. LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 47-48 (2000).

125. See Proof Brief of the Am. Psychol. Ass'n as Amici Curiae Supporting Plaintiff-Appellees, *supra* note 123, at 11.

126. See *id.* at 7 (“[E]mpirical research demonstrates that the psychological and social aspects of these committed relationships between same-sex partners closely resemble those of heterosexual partnerships.”); Johnson, *supra* note 120, at 4; see also *Greenleaf*, 780 N.Y.S.2d at 903 (“[S]ame-sex relationships are based on the same thing as heterosexual unions: intimacy, companionship, love and family.”).

127. See Proof Brief of the Am. Psychol. Ass'n as Amici Curiae Supporting Plaintiff-Appellees, *supra* note 123; Johnson, *supra* note 119, at 4.

128. See WAITE & GALLAGHER, *supra* note 124, at 73. Waite & Gallagher's book was published in 2000, the year Vermont became the first state to have civil unions. Further, much of the research they rely on was published in a 1990 literature review in the *Journal of Marriage and the Family*. *Id.* at 47.

129. *Id.*

130. *Id.*

131. *Id.*

ted same-sex couples.¹³² Thus, arguably the option to create a formal civil union—with all of the benefits and obligations of marriage — will be an act that transforms a relationship from being just a cohabitating relationship between two people to a relationship acknowledging their relationship to the world, family and friends, and possibly their religious community; thereby, allowing same-sex couples to partake in the increased health benefits that go along with marriage.

One important benefit that may lead to the increased health longevity is access to insurance coverage through one's spouse, which is currently not offered to the majority of same-sex couples in Illinois.¹³³ Another is support from one's significant other while in the hospital.¹³⁴ Researchers have found that the denial of access to a partner causes stress that leads to slower healing and that survival rates are better for patients who have had surgery, cancer, or cardiac issues when they are married.¹³⁵ Further, much stress and mental anguish is endured by the partners who are denied access to their sick or injured loved ones, at times even when the partner is dying.¹³⁶ Further still, same-sex couples are often denied the right to make critical deci-

132. Since many same-sex couples have been fighting, both through attempts to pass legislation and through lawsuits, to be able to marry their partners, it is reasonable to assume that those who would like to be married do not chose to cohabit instead in order to maintain their own autonomy or leisure time. In fact, when same-sex couples are given the right to obtain marriage licenses, scores of couples take advantage of the opportunity. When the state of California began issuing marriage licenses to same-sex couples, 250 licenses were issued that day and the city clerk's office was performing 500 wedding ceremonies a day. Spencer Michaels, *Same-Sex Couples Begin Marrying in California*, PBS, available at http://www.pbs.org/newshour/bb/law/jan-june08/justmarried_06-17.html.

133. See Johnson, *supra* note 119, at 5; see also Julia E. Heck et al., *Health Care Access Among Individuals Involved in Same-Sex Relationships*, 96 AM. J. PUB. HEALTH 1111, 1111-18 (2006) (discussing their research, which found that women in same-sex relationships have less access to health care, visit a doctor less, and report having "unmet medical needs as a result of cost issues").

134. See Johnson, *supra* note 119, at 5.

135. *Id.*; see also Proof Brief of the Am. Psychol. Ass'n, as Amici Curiae Supporting Plaintiff-Appellees, *supra* note 123, at 12 (arguing the legal benefits of access to loved ones in the time of need can lessen the stress of the incident).

136. See *Help Us Build An Illinois We Can Be Proud Of*, ACLU, <http://www.aclu-il.org/lgbt/index.shtml> (last visited Nov. 11, 2009) (describing the story of Randy W. of Springfield, IL who very nearly missed spending the last few minutes of his partner's life with him because he was prohibited from spending the night in his partner's room, which is generally permitted for spouses and the hospital did not notify him when his partner's condition became worse); see also Proof Brief of the Am. Psychol. Ass'n as Amici Curiae Supporting Plaintiff-Appellees, *supra* note 123, at 12 ("[T]he unmarried partner of a decedent may not be legally recognized as having any relation to her or his partner and thus can experience 'disenfranchised grief.' i.e., 'the grief that persons experience when they incur a loss that is not or cannot be openly acknowledged, publicly mourned, or socially supported.'").

sions for their unconscious partners.¹³⁷ These denials have taken place even when the couples have prepared for a medical emergency by creating advanced directives, power of attorney documents, and living wills.¹³⁸

2) *Economic*

Beyond mental and health benefits, there are also many economic benefits that same-sex couples are currently excluded from.¹³⁹ Some of these benefits include access to spousal benefits sponsored by the state, such as workers' compensation benefits¹⁴⁰ and pension coverage.¹⁴¹ Another is the lack of protection from creditors if a purchase was jointly made and one partner was to die.¹⁴²

While steps can be taken in estate planning to avert some of these grave outcomes, the reality is that not all citizens plan for such events as timely and cautiously as is prudent; however, the legal system for married

137. See Long & Garcia, *supra* note 4, at 1; see also *Support Civil Unions in Illinois – House Bill 2234*, *supra* note 8. This site tells the story of Rep. McKeon of Chicago who was denied the right to make a decision regarding the care of his unconscious life partner because the hospital could not find the power of attorney documents. *Id.* Rep. McKeon was forced to leave his partner to locate the documentation and in the meantime his partner died. No such paperwork is required for spouses to make such decisions. *Id.*

138. Tara Parker-Pope, *Kept From a Dying Partner's Bedside*, N.Y. TIMES, May 19, 2009, at D5. This article details two lesbian couples who were denied access to their partners as they lay dying, which have led to lawsuits. *Id.* One couple, Janice Langbehn and Lisa Pond, had been a committed couple for eighteen years and had adopted three children together. *Id.* Lisa collapsed from a burst aneurysm and died while Janice argued in vain with the hospital personal to let her and their children visit. *Id.* The other couple, Sharon Reed and Jo Ann Ritchie, had been in a committed relationship for seventeen years when Ms. Ritchie's liver failure took her life. *Id.* Sharon was told by a nurse she had to leave Jo Ann's room even after Jo Ann had pleaded "I'm afraid of dying. Don't leave me alone." *Id.* Thus, Sharon's anguish has been multiplied by the fact "she felt as if her partner was thinking she had betrayed her trust." *Id.* In both cases the couples had prepared advanced directives, power of attorney and living will documents. *Id.*

139. See *Support Civil Unions in Illinois – House Bill 2234*, *supra* note 8; see also Stone, *supra* note 8, at 17 (listing a number of the economic benefits the bill would allow same-sex couples to participate in).

140. 820 ILL. COMP. STAT. 305/1.7 (2007) (stating compensation will be paid to a widow or widower).

141. 40 ILL. COMP. STAT. 5/7-118 (2000) (asserting a surviving spouse will receive the employee's pension even when no designation has been completed naming the spouse as the beneficiary, however, if the employee would like a partner to receive her pension she must have elected to do so before death).

142. 720 ILL. COMP. STAT. 65/15 (2004) (prohibiting creditors from collecting the deceased spouse's debt from the surviving spouse, unless the purchase was a family expense).

couples anticipates this fact and strives to nonetheless take care of a dependent of the deceased—this is not so for same-sex couples.¹⁴³

3) *Domestic*

Other protections that same-sex couples were excluded from were laws and procedures pertaining to domestic relations.¹⁴⁴ Such laws include mutual support between partners, dissolution of the relationship, disposition of property, and parental rights.¹⁴⁵ For a married couple, the disposition of their property upon the termination of the relationship is spelled out in the appropriate state dissolution laws; however, for same-sex couples, this was not the case.¹⁴⁶ Consequently, the end of a same-sex relationship, absent an explicit written contract, can present numerous issues.¹⁴⁷

Courts throughout the United States are split on how to handle dividing property for cohabitators; some courts have allowed for recovery under a constructive-trust theory,¹⁴⁸ some under an implied contract theory,¹⁴⁹ some under an unjust enrichment theory,¹⁵⁰ while some courts have not allowed recovery at all because there was no precedent for dividing possessions for cohabitators absent marriage.¹⁵¹ The current law in Illinois that governs an agreement between cohabitators is from the Illinois Supreme Court decision, *Hewitt v. Hewitt*.¹⁵² In *Hewitt*, the court held that a contract between unmarried persons would only be legally binding and enforceable when the consideration for the contract did not include sexual relations and the contract was otherwise valid according to contract law.¹⁵³

This decision continues to be a complete bar for unmarried couples when the agreement is an effort to secure the interests and benefits of their

143. See Brief of Nat'l Ass'n of Soc. Workers, as Amici Curiae Supporting Appellants at 20, *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (No. A-2244-03T5).

144. See *Support Civil Unions in Illinois – House Bill 2234*, *supra* note 8.

145. *Id.*

146. 750 ILL. COMP. STAT. 5/501 (2006).

147. See Richard A. Wilson, *The State of the Law of Protecting and Securing the Rights of Same-Sex Partners in Illinois Without Benefit of Statutory Rights Accorded Heterosexual Couples*, 38 LOY. U. CHI. L. J. 323 (2007).

148. See, e.g., *Bramlett v. Selman*, 597 S.W.2d 80 (Ark. 1980); *Spafford v. Coats*, 455 N.E.2d 241 (Ill. 1983); *Small v. Harper*, 638 S.W.2d 24 (Tex. 1982).

149. *Hay v. Hay*, 678 P.2d 672 (Nev. 1984).

150. *Collins v. Davis*, 315 S.E.2d 759 (N.C. 1984).

151. *Seward v. Mentrup*, 622 N.E.2d 756 (Ohio Ct. App. 1993); *Maria v. Freitas*, 832 P.2d 259 (Haw. 1992).

152. *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

153. *Id.* at 1209 (holding that judicial recognition of joint property rights, between unmarried cohabitators, would violate the public policy of Illinois because in essence the court would be granting a legal status that is reserved for the institution of marriage, to a private arrangement).

union and the claims develop from that union.¹⁵⁴ While there is no case law guidance in Illinois with respect to remedies for same-sex couples under the theories of constructive trust, implied contract, or unjust enrichment it is likely, given the *Hewitt* holding, that the claim would have to be independent of the relationship itself.¹⁵⁵

4) *Civil Actions*

Same-sex couples were also denied rights and privileges for a number of civil matters that are dependent on spousal status.¹⁵⁶ One such civil claim is that for wrongful death, which, under Illinois law, can only be made for the “exclusive benefit of the surviving spouse and next of kin of such deceased person.”¹⁵⁷ Another civil claim that was not extended to same-sex couples due to its dependency of spousal status was that of emotional distress.¹⁵⁸ Lastly, previous to the passage of the Civil Union Act, same-sex couples lacked the privilege of not having to testify against their partners, as this privilege is only extended to spouses.¹⁵⁹

The inability for same-sex couples to be included in these numerous state benefits, denied same-sex couples the right of equal protection of the laws, which was in violation of the Illinois Constitution.¹⁶⁰ The constitutional promise of equal protection does not require that all laws apply uniformly to all people; however, it does require that “similarly situated people” must be treated the same under the law.¹⁶¹ As a result, the creation or application of laws may not arbitrarily burden a group of persons, and the legislature must be able to show, at least, a rational reason for its decision making.¹⁶² Opponents of same-sex unions have argued that heterosexual and homosexual relationships are not “similarly situated;” therefore, the state can exclude same-sex couples from any legal recognition without vi-

154. See Wilson, *supra* note 147, at 340-41.

155. *Id.* at 344.

156. Stone, *supra* note 8, at 17.

157. 740 ILL. COMP. STAT.180/2 (2007).

158. See *Support Civil Unions in Illinois – House Bill 2234*, *supra* note 8.

159. *Id.*; 750 ILL. COMP. STAT. 5/8-801 (2008).

160. ILL. CONST. art. I, § 2 (“No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.”).

161. See *Varnum v. Brien*, 763 N.W.2d 862, 882-83 (Iowa 2009). The court in *Varnum* explained the process of determining whether the distinction of treatment of people different under the law is unlawful. *Id.* Further, it noted that the “similarly situated” prerequisite does not require that those burdened by the law be identical to those benefited by the law because groups of people are never identical in every way. *Id.*

162. See WILLIAM D. ARAIZA ET. AL., CONSTITUTIONAL LAW: CASES, HISTORY, AND DIALOGUES 803 (3d ed. 2006).

olating equal protection of laws, because the law is merely treating differently situated persons differently.¹⁶³

Further, some opponents to the recognition of same-sex unions have argued that the reason society affords benefits to married couples is because the institution of marriage benefits society, whereas same-sex relationships do not.¹⁶⁴ The next section of this Comment will delve into some of the challenges to affording benefits to same-sex couples and show why same-sex relationships are “similarly situated” to opposite-sex relationships and thus, are deserving the same rights and responsibilities under law, which in turn would benefit the individuals involved as well as society as a whole. Further, the next section will show why civil unions are the appropriate step in attaining legal recognition for same-sex couples in Illinois.

B. CHALLENGES TO LEGALLY RECOGNIZING SAME-SEX UNIONS

1) *Traditional Family Values Objections*

i. Tradition and Definition

The tradition and definition argument is based on the notion that marriage is between one woman and one man because that is how it has always been.¹⁶⁵ It does not assert what horrible things may happen if same-sex couples were allowed to marry, it purely argues same-sex marriage should not be allowed because marriage has customarily always been between one woman and one man.¹⁶⁶ This belief seems to be firmly rooted in the minds of the majority of the American public and has been used by the courts since the legal fight for same-sex marriage began.¹⁶⁷ In the 1970s, several states’ high courts relied upon the dictionary’s definition of marriage to show that it had always been a union between one man and one woman.¹⁶⁸ One court went so far as to say the definition of marriage was so obvious there was no reason to even look at the dictionary.¹⁶⁹

There are two logical problems with this argument. First, definitions are, by their very nature, arbitrary; and common usage and tradition evolves. In fact, Merriam-Webster’s Collegiate Dictionary and Oxford Eng-

163. See, e.g., *Varnum*, 763 N.W.2d at 882.

164. Jonathan Rauch, *A Moral Crossroads for Conservatives*, NAT’L J. MAG. (Aug. 8, 2009), [available at http://www.nationaljournal.com/njmagazine/st_20090808_9125.php?mrefid=site_search](http://www.nationaljournal.com/njmagazine/st_20090808_9125.php?mrefid=site_search).

165. Schuman, *supra* note 9, at 2114; GERSTMANN, *supra* note 123, at 19-20.

166. See GERSTMANN, *supra* note 123, at 20.

167. *Id.*

168. *Id.*; *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973).

169. See *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. Ct. App. 1974); see also GERSTMANN, *supra* note 123, at 20.

lish Dictionary have added secondary definitions of marriage including same-sex relationships.¹⁷⁰ One could question whether it is reasonable to continue to define a family unit solely based on how it has been defined in the past.¹⁷¹ Second, the definition of marriage as being stagnant and as only being between one woman and one man is not a true recollection of history.¹⁷² Fundamental perceptions of marriage have changed immensely throughout the history of western culture.¹⁷³ At one point in time, it was proper and accepted to marry a twelve year-old girl, to marry someone you had never met, to view the wife as property, to prohibit marriages among mixed-race couples and divorces, and to allow common-law marriages.¹⁷⁴ Further, many other nations and cultures throughout history have recognized same-sex unions, such as: ancient Rome and Greece, parts of China, Japan, Australia, Egypt, India, and South America.¹⁷⁵ Lastly, this argument—marriage is what it is because it is what it is—simply put, is “intellectually unsatisfying”.¹⁷⁶

Nonetheless, even if this view is accepted for “marriage,” it does not withstand arguments against legal recognition of same-sex couples in civil unions, because the definition of such is still being crafted. It would seem then that a more likely rationale for the “traditional definition” argument is that of morality,¹⁷⁷ which will be discussed later at more length.

ii. *Think of the Children*

Anti-gay marriage advocates argue that children, in order to be healthy and well-adjusted, need to be parented in a family that consists of a mother and father, preferably both being the biological parents, thus giving the state a legitimate interest in prohibiting the legal recognition of same-sex

170. Martha Neil, *Webster Makes It Official: Definition of Marriage Has Changed*, A.B.A. J., LAW NEWS NOW (Mar. 23, 2009), http://www.abajournal.com/news/article/webster_makes_it_official_definition_of_marriage_has_changed/ (last visited Feb. 14, 2010).

171. See *People v. Greenleaf*, 780 N.Y.S.2d 899, 901 (N.Y. 2004) (“Tradition does not justify unconstitutional treatment . . . concepts that were once considered essential to the definition have been abandoned, or even declared illegal . . . The definition of civil marriage, it appears, is flexible and subject to change – an ‘evolving paradigm.’”).

172. Schuman, *supra* note 9, at 2114.

173. See GERSTMANN, *supra* note 123, at 22.

174. *Id.*

175. Schuman, *supra* note 9, at 2114.

176. James Trosino, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 116 (1993) (summarizing the definitional argument as it “amounts to an intellectually unsatisfactory response: marriage is the union of a man and a woman because marriage is the union of a man and a woman.”).

177. See Schuman, *supra* note 9, at 2121.

relationships in order to provide and promote a healthy environment for raising children.¹⁷⁸

Proponents of this argument often argue that children raised by same-sex couples lack a sense of gender identity and self-esteem, do not perform as well throughout the developmental stages of young childhood or in their years of schooling, and will have problems adapting both socially and emotionally as adults.¹⁷⁹ However, leading professional associations, such as the American Academy of Pediatrics, the American Psychological Association, the National Association of Social Workers, and the American Psychiatric Association, overwhelmingly disagree.¹⁸⁰

After years of research and careful review of the results, all of the abovementioned organizations agree that children of same-sex couples fare as well as children in opposite-sex couples in every respect.¹⁸¹ In fact, the American Psychological Association has declared, “[T]he abilities of gay and lesbian persons as parents and the positive outcomes for their children are *not* areas where credible scientific researchers disagree.”¹⁸²

Further, many leading professional associations argue that the legal recognition of same-sex couples would indeed benefit the well-being of children.¹⁸³ By doing so, the children of same-sex marriages would profit

178. See, e.g., A. Dean Byrd, *Conjugal Marriage Fosters Healthy Human and Societal Development*, in WHAT’S THE HARM?: DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY? 3, 5-8 (Lynn D. Wardle ed., 2008).

179. *Id.* at 5.

180. Proof Brief of the Am. Psychol. Ass’n as Amicus Curiae In Support of Plaintiff-Appellees, *supra* note 123, at 2; Brief of Nat’l Ass’n of Soc. Workers and Nat’l Ass’n of Soc. Workers N.J. Chapter as Amici Curiae In Support of Plaintiffs-Appellants, *supra* note 143, at 4 (“There are no scientifically valid social science studies that establish a negative impact on the adjustment of children raised by an intact same-sex couple as compared with those raised by an intact opposite-sex couple.”); Ellen C. Perrin, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 AM. ACAD. OF PEDIATRICS, at 341, 341, Feb. 2002, available at <http://aappolicy.aappublications.org/cgi/content/full/pediatrics;109/2/341> (“A growing body of scientific literature demonstrates that children who grow up with 1 or 2 gay and/or lesbian parents fare as well in emotional, cognitive, social, and sexual functioning as do children whose parents are heterosexual. Children’s optimal development seems to be influenced more by the nature of the relationships and interactions within the family unit than by the particular structural form it takes”); Am. Psychiatric Ass’n, *Position Statement: Support of Legal Recognition of Same-Sex Civil Marriage* (2005), <http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements/200502.aspx> (“[N]o research has shown that the children raised by lesbians and gay men are less well adjusted than those reared within heterosexual relationships.”).

181. See, e.g., Proof Brief of the Am. Psychol. Ass’n as Amicus Curiae In Support of Plaintiff-Appellees *supra* note 123 at 2.

182. *Id.* at 21-22.

183. *Id.* at 23.; Brief of Nat’l Ass’n of Soc. Workers and Nat’l Ass’n of Soc. Workers N.J., as Amici Curiae In Support of Plaintiffs-Appellants, *supra* note 143, at 9-13.

from a clear legal relationship with both of their parents (something of great importance in times of emergency), would garner greater stability in their lives, and would likely lessen the stigma that, at this time, is associated with their statuses.¹⁸⁴ In addition, it has long been acknowledged that one may not exclude the adoption of a child merely on the basis of sexual orientation.¹⁸⁵ Instead, the courts have held a same-sex partner may adopt the child of his or her partner, or both partners may adopt a child as long as the court determines it is in “the best interest of the child.”¹⁸⁶

iii. Homosexuality is a Sin and the Recognition of Same-Sex Marriage is an Intolerable Broadening of that Sin

By and large, people in the United States who consider themselves Christian oppose same-sex marriage.¹⁸⁷ According to a 2009 survey by the Pew Research Center, seventy-seven percent of white and sixty-six percent of black evangelical Protestants oppose same-sex marriage, as do fifty percent of mainstream Protestants.¹⁸⁸ These arguments for opposing same-sex marriage are based on biblical references in both the Old Testament and New Testament that many Christians assert both condemn homosexuality and define marriage as between one woman and one man.¹⁸⁹ Thus, recognizing same-sex relationships becomes an issue of morality and an attack on traditional sexual mores and the sacred institution of traditional marriage.¹⁹⁰

Proponents of these arguments assert that traditional marriage, a monogamous union between one man and one woman, is the foundation of a stable and healthy American society.¹⁹¹ Accordingly, if marriage was extended to same-sex couples, it would rewrite the sexual morals that have successfully guided American humanity for centuries, causing great detri-

184. Proof Brief of the Am. Psychol. Ass’n, as Amicus Curiae In Support of Plaintiff-Appellees, *supra* note 123, at 23.

185. See *In re* Petition of K.M. & D.M., 653 N.E.2d 888, 892 (Ill. App. 1995).

186. *Id.* at 897.

187. Schuman, *supra* note 9, at 2108.

188. PEW RESEARCH CTR., *supra* note 64, at 2.

189. See, e.g., Ben Witherington III, *Was Sodom into Sodomy?: What the Bible Says About Sodomy, Homosexuality, and Sin*, BELIEFNET, http://www.beliefnet.com/story/128/story_12885_2.html (last visited Jan. 5, 2010). Non-exclusive list of biblical references include: *Leviticus* 20:13 (King James); *Genesis* 2:24 (King James); *Romans* 1:27 (King James); 1 *Corinthians* 6:9-10. *Id.*

190. See, e.g., JAMES DOBSON, *MARRIAGE UNDER FIRE: WHY WE MUST WIN THIS WAR* 19 (2004).

191. See, e.g., Lynn D. Wardle, *The Morality of Marriage and the Transformative Power of Inclusion*, in *WHAT’S THE HARM?: DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY?* 207, 207-08 (Lynn D. Wardle ed., 2008).

ment to the family unit and to society as a whole.¹⁹² A morality argument against same-sex marriage resonates strongly in modern American society and continues to be the most persuasive line of reasoning used by opponents of same-sex marriage; in fact, many of the other arguments against the legal recognition of same-sex unions have morality undertones.¹⁹³

In both California and Maine, where voters chose to repeal the right for same-sex couples to marry, the successful campaign efforts touted the abovementioned morality arguments and were majorly funded by religious organizations, such as Focus on the Family, The Church of Jesus Christ of Latter-day Saints, The Catholic Church, and The National Organization for Marriage.¹⁹⁴ This is important to note, as many supporters of same-sex marriage argue that importing religious beliefs and values into law is contradictory with the Constitution's Establishment Clause.¹⁹⁵ This argument fails for many reasons;¹⁹⁶ however, the most obvious is the fact that moral disapproval has long been the underpinnings of laws in the United States, and while moral disapproval of a class of persons is not considered a legitimate state interest,¹⁹⁷ many laws do in fact regulate our behavior due to the fact that society finds the action "immoral and unacceptable."¹⁹⁸

While the morality argument has proven to be a force to be reckoned with, it should be noted that the American public's perception of what is moral changes with time; and, as history has shown, when the law chooses to go against the grain it has, at times, helped shape American society into a more healthy and inclusive populace.¹⁹⁹ Take, for example, the landscape of

192. *See id.* at 226-28

193. *See* Schuman, *supra* note 9, at 2112.

194. Karl Vick, *Maine Set to Vote on Gay Marriage*, WASH. POST, Nov. 2, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/02/AR2009110201107.html>.

195. *See* Schuman, *supra* note 9, at 2129-34

196. *See id.* Schuman argues that the prohibition against same-sex marriage would not violate the Establishment Clause even though the arguments are based on covert religious beliefs, because you could not maintain such a claim with the four tests currently used by the Court to determine whether a violation has occurred. *Id.* The four tests used are the *Lemon* test, the "historical" test, the "endorsement" test, and the "coercion" test. *Id.*

197. *Lawrence v. Texas*, 539 U.S. 558, 583 (2003).

198. *Id.* at 589 (Scalia, J., dissenting).

199. *See* ESKRIDGE, *supra* note 31, at 145

With a few exceptions, most scholars praise *Brown* not only for moving the law in a liberal direction, but also for contributing to a sociolegal regime where liberal values of rationality, mutual respect, and tolerance . . . could flourish Social psychologists have formed a consensus that the best strategy for ameliorating prejudice is cooperation between ingroup and outgroup members, working on an equal status basis in pursuit of common goals. If the state itself refuses to discriminate, its tolerant policy will create many opportunities for this kind of

interracial marriage in America merely forty years ago.²⁰⁰ The majority of Americans were opposed to the marriage of two people from different races, many of whom claimed their opposition was based on Christian beliefs, and anti-miscegenation laws made such unions illegal.²⁰¹

In the famous *Loving v. Virginia* case, the Supreme Court put an end to anti-miscegenation laws by holding such laws were unconstitutional.²⁰² Interestingly, the rhetoric used by the Assistant Attorney General for Virginia in the Supreme Court case, is eerily familiar to that used today. He argued:

We start with the proposition, on this connection, that it is the family which constitutes the structural element of society; and that marriage is the legal basis upon which families are formed. Consequently, this Court has held, in numerous decisions over the years, that society is structured on the institution of marriage; that is has more to do with the welfare and civilizations of a people than any other institutions; and that out of the fruits of marriage spring relationships and responsibilities with which the state is necessarily required to deal. . . . [T]he state has a natural, direct, and vital interest in maximizing the number of successful marriages which lead to stable homes and families and in minimizing those which do not. It is clear, from the most recent available evidence on the psycho-sociological aspect of this question that intermarried families are subjected to much greater pressures and problems than are those of the intramarried, and that the state's prohibition of interracial marriage, for this reason, stands on the same footing as the prohibition of polygamous marriage, or incestuous marriage²⁰³

cooperation Not only does intergroup cooperation contribute to better understanding about outgroup members, but it also fosters feelings of empathy for them. The former reduces stereotyping, the latter ameliorates prejudice.

Id.

200. See Trosino, *supra* note 176, at 97-108; see also Peggy Pascoe, *Why the Ugly Rhetoric Against Gay Marriage is Familiar to this Historian of Miscegenation*, HISTORY NEWS NETWORK, <http://hnn.us/articles/4708.html> (last visited Jan. 6, 2010).

201. See, e.g., *Scott v. State*, 39 Ga. 321, 325 (1869) (rationalizing anti-miscegenation laws, because “[t]he God of nature made it otherwise”); see also Trosino, *supra* note 176, at 103-04.

202. *Loving v. Virginia*, 388 U.S. 1 (1967).

203. See MELLO, *supra* note 42, at 169-70 (quoting oral arguments in *Loving v. Virginia*).

Similarly, the trial judge in *Loving*, who had upheld the interracial couple's conviction for violating the state's Racial Integrity Act, declared:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.²⁰⁴

However, following the Supreme Court's decision in *Loving*, the arguments that allowing interracial couples to marry was immoral or unnatural and would harm society, lessened over time, until at this point many Americans do not even realize such laws existed; and this part of our history is often seen as an embarrassment.²⁰⁵ It is true that acceptance of interracial marriage has not been universal and that instances of persecution of interracial couples still exist; however, the overall acceptance of such unions at this point is overwhelming.²⁰⁶

It is important to clarify that a direct analogy between the ban on interracial marriage and same-sex marriage is tenuous. There are many differences both socially and legally between the two.²⁰⁷ Nonetheless, there are significant similarities—anti-miscegenation laws forbid two consenting adults from marrying based on the socially constructed ideas of race at that time, whereas the ban on same-sex marriage also forbids two consenting adults from marrying based on the socially constructed ideas of sexual orientation.²⁰⁸

204. *Loving*, 388 U.S. at 3 (quoting trial court).

205. See Pascoe, *supra* note 200.

206. David Crary, *Interracial Marriages Surge Across U.S.*, ASSOCIATED PRESS, Apr. 12, 2007, available at www.bookrags.com/news/interracial-marriages-surge-across-moc/.

207. See Pascoe, *supra* note 200 (detailing social differences between the ban on same-sex marriage and interracial, such as “the specter of lynching hovered over discussions of interracial sex”). The legal differences between the two largely focus on the fact that the Constitution explicitly speaks to the equal protection based on race whereas there is a debate over whether a fundamental right is involved in same-sex marriage and whether sexual orientation should be considered a suspect class. See *ARAIZA ET. AL.*, *supra* note 162, at 1176 (explaining that the Supreme Court has never mentioned a fundamental right nor overtly extended heightened scrutiny to a sexual orientation class even though it had the chance to do so in *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) and *Romer v. Evans*, 517 U.S. 620 (1996).); see also *Lawrence v. Texas*, 539 U.S. 558, 600 (2003) (Scalia, J., dissenting) (arguing heightened scrutiny was used in *Loving*, because the law was premised on racial discrimination whereas a rational-basis scrutiny is what is appropriate in *Lawrence* because no such fundamental right or suspect class is involved).

208. See Pascoe, *supra* note 200.

While it is gravely important in the democratic process for legislators to consider how the populace feels on a given subject, especially one as hotly debated as same-sex marriage, history has shown that it is also important to protect the rights of the unpopular.²⁰⁹ However, while the same-sex marriage debate seems to be at a stalemate, there is a shift in society's support of legal recognition of same-sex couples in the form of civil unions. In fact, the Pew Research Center's 2009 survey found that the majority of Americans (57%) support civil unions, and even among those that patently oppose same-sex marriage, three-in-ten, say they would support civil unions.²¹⁰

As has been shown, none of the challenges to recognizing same-sex unions aptly demonstrate how same-sex couples are not "similarly situated" to opposite-sex couples.²¹¹ Same-sex couples, just like opposite-sex couples, are engaged in loving and committed relationships, many of which involve the raising of children.²¹² Plus, moral disapproval of a group of persons is not a legitimate state interest.²¹³ Thus, the question becomes what were the reasonable legal justifications to continue excluding same-sex couples from the benefits and protections afforded to opposite-sex couples?

Prior to the passage of the Civil Union Act, Illinois already recognized the need to provide equal benefits and protections to same-sex individuals in regards to adopting children,²¹⁴ employment, housing, access to credit, and accessibility to public accommodations.²¹⁵ When one considers history, research, and logic, none of the asserted challenges to legally recognizing same-sex unions provided a rational basis for excluding same-sex couples from the benefits and protections afforded to married couples.²¹⁶

Thus, the legislature, by enacting the Civil Union Act, took an imperative first step of extending equal protection under the law, to same-sex couples, by providing same-sex couples a vehicle to obtain the same legal

209. See, e.g., ESKRIDGE, *supra* note 31, at 148.

210. PEW RESEARCH CTR., *supra* note 64, at 4.

211. See *Varnum v. Brien*, 763 N.W.2d 862, 883 (Iowa 2009) (holding that the County's argument that the same-sex plaintiffs were not similarly situated for reasons similar to those listed in this Comment are invalid); see also *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (finding same-sex couples are similarly situated as opposite-sex couples for the purposes of equal protection analysis).

212. See Proof Brief of the Am. Psychol. Ass'n as Amicus Curiae In Support of Plaintiff-Appellees *supra* note 123 at 5; see also Johnson, *supra* note 119, at 7-10.

213. *Lawrence v. Texas*, 539 U.S. 558, 583 (2003).

214. See *In re* Petition of K.M. & D.M., 653 N.E.2d 888, 899 (Ill. 1995).

215. 775 ILL. COMP. STAT. 5/1-102 (2005 & Supp. 2009).

216. See *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999).

benefits and responsibilities as married couples.²¹⁷ Further, in doing so, the legislature was able to acknowledge the opinion of the populace regarding same-sex marriage and allow time for the shift in society's view of same-sex unions to continue to evolve.²¹⁸ Further, the Act allows societal and religious connotations of "marriage" to remain intact.²¹⁹

2) *Civil Unions: Separate but Not Equal?*

Civil unions are opposed by more than just those who contest legal recognition of same-sex unions.²²⁰ A number of supporters of same-sex marriage feel that civil unions create an inferior institution for same-sex partners that stigmatize their status,²²¹ akin to the separate but equal decision handed down in *Plessy v. Ferguson*.²²²

However, many leading gay rights intellectuals and advocates disagree with this premise.²²³ Yale Law School professor and vociferous advocate of gay rights, William N. Eskridge Jr., has vigorously argued that civil unions in fact do not consign same-sex unions to an unequal status and that the analogy to apartheid is patently inapt.²²⁴ Instead, Professor Eskridge maintains that the passage of civil union laws provides legal rights and responsibilities that are urgently needed for same-sex couples and, in fact, is more akin to *Brown v. Board of Education*.²²⁵

Like *Brown*, which shifted the landscape of equality for African Americans by declaring apartheid an unconstitutional violation of the Equal Pro-

217. S.B. 1716, 96th Gen. Assemb., Reg. Sess. (Ill. 2010), available at <http://www.ilga.gov/legislation/96/SB/PDF/09600SB1716lv.pdf>; see also *Baker*, 744 A.2d at 886-87 (noting the Vermont legislature was the correct state body to decide how to implement its decision that same-sex couples must be granted the same legal benefits as opposite-sex couples).

218. See ESKRIDGE, *supra* note 31, at 115-18; see also Long, *supra* note 4, at 1 ("The civil unions success is the latest in a quickly evolving attitude about gay rights in Illinois.").

219. See Stone, *supra* note 8, at 17.

220. See, e.g., David S. Buckel, *Government Affixes a Label of Inferiority on Same-Sex Couples when it Imposes Civil Unions & Denies Access to Marriage*, 16 STAN. L. & POL'Y REV. 73 (2005).

221. *Id.* at 73-74; Barbara Cox, *But Why Not Marriage: An Essay on Vermont's Civil Unions Law, Same-Sex Marriage, and Separate but (Un)Equal*, 25 VT. L. REV. 113, 116-19 (2000); MELLO, *supra* note 42, at 160-68 (arguing that the Vermont legislators' decision to create domestic partnership unions, instead of grant same-sex marriage, after the *Baker* decision created an inappropriate separate-but-equal system for marriage).

222. 163 U.S. 537 (1896).

223. See, e.g., ESKRIDGE, *supra* note 31, at 140-42; Greg Johnson, *Vermont Civil Unions: A Success Story*, in MARRIAGE AND SAME-SEX UNIONS: A DEBATE 283, 291-92 (2003).

224. ESKRIDGE, *supra* note 31, at 140-45.

225. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see also ESKRIDGE, *supra* note 31, at 140-45.

tection Clause and requiring racial integration,²²⁶ Eskridge argues that the passage of civil unions “reflects an advancement of gay people’s politics of recognition, from outlaw status . . . to the status of substantially equal citizens before the law.”²²⁷

In addition, Greg Johnson, a Vermont Law School professor and fellow gay rights advocate, concedes that civil unions are a compromise but still defends the unions stating, “I have come to believe that civil unions are equal to marriage in law and in status.”²²⁸ Further still, Professor Johnson argues that civil unions can actually become a new institution of pride for same-sex couples by asserting, “Why borrow every term and tradition from heterosexual culture? Why not create a new language of marriage?”²²⁹

While civil unions are certainly different than marriages and are definitely unequal in terms of benefits offered to marriage by federal law and interstate portability,²³⁰ they are, at this juncture in time, an appropriate compromise.²³¹ The passage of the Civil Union Act in Illinois is a huge leap forward for same-sex couples who were in desperate need of equal protection under the law, while still allowing religious freedom and respecting the differing views of others in terms of the institution of marriage.²³²

Further, using an incremental process in attaining legal recognition for same-sex couples, allows a gradual shift in public opinion regarding same-sex relationships.²³³ As has been shown, the support for legal recognition of same-sex partners has grown in recent years. In 2003 only forty-five percent of Americans supported civil unions; however, now a clear majority of Americans (fifty-seven percent) favor such laws.²³⁴ Support has even increased in those who oppose same-sex marriage, from 24% in 2008, to 30% in 2009.²³⁵ Arguably, the incremental process is the best approach in a democratic society where citizens have strong and diverse views that may be changed as the law gradually changes, and they are able to see anti-same-sex arguments discredited.²³⁶

226. *Brown*, 347 U.S. at 494-95.

227. ESKRIDGE, *supra* note 31, at 140-45.

228. Greg Johnson, *supra* note 223, at 284-85.

229. *Id.*

230. ESKRIDGE, *supra* note 31, at 133-39.

231. *See* Stone, *supra* note 8, at 17.

232. *Id.*

233. *See* ESKRIDGE, *supra* note 31, at 115-18.

234. Pew Research Ctr., *supra* note 64, at 1.

235. *Id.*

236. *See* ESKRIDGE, *supra* note 31, at 148-54 (“A process that forces minority rights onto an unwilling populace will often not ‘stick’ in a democracy; a process that is incremental and persuades the people or their representatives of the acceptability or even desirability of minority rights is much more likely to stick.”).

IV. CONCLUSION: ENACTING THE CIVIL UNION ACT WAS THE RIGHT STEP FOR ILLINOIS

Legal recognition of same-sex unions, via the Civil Union Act, will benefit not only the individuals involved but will also benefit society at large and has aligned Illinois with the drafters' ambition of equality that is seen in the equality provisions of the 1970 Illinois Constitution.²³⁷

Unlike the Fourteenth Amendment of the U.S. Constitution, which merely grants "equal protection of the laws," the Illinois drafters chose to include a catalog of rights for equality of all citizens and made these rights self-enforceable.²³⁸ The reason for doing so was to "recognize the fundamental nature of the right to be free from discrimination" and "to prevent 'drag' on the Illinois economy by those suffering from discrimination."²³⁹

Before the historic passage of the Civil Union Act, we did see some fruit from the drafters' goals in already existing laws that prohibited individuals from being discriminated against based on their sexual orientation.²⁴⁰ For example, the Illinois Human Rights Act explicitly protects individuals from discrimination based on sexual orientation in employment, housing, access to credit, and accessibility to public accommodations.²⁴¹ Further, some cities had begun giving limited benefits to same-sex couples; for example, the city of Chicago passed a domestic partnership ordinance, which extends the same benefits that are given to a spouse of a city employee to a qualified same-sex partner of a city employee.²⁴²

However, those laws certainly did not fully live up to "the fundamental nature of the right to be free from discrimination."²⁴³ Further, it may indeed have caused a "drag" on the economy, as the drafters feared, if Illinois had continued to exclude same-sex couples from legal recognition.²⁴⁴ With both Wisconsin and Iowa now allowing some form of same-sex legal recognition, it was possible that Illinois gays and lesbians may have decided to move to one of these neighboring states. Additionally, allowing same-sex couples to enter into civil unions could lead to more spending within the state on such things as ceremonies, honeymoons, and travel. Forbes Maga-

237. ILL. CONST. art. I, §§ 17-19.

238. Jeffrey A. Parness & Laura J. Lee, *Inequalities in Illinois Constitutional Equality*, 30 N. ILL. U. L. REV. 169, 184 (2009).

239. *Id.*

240. Christi Parsons, *Gay Rights Legislation Sails Through House*, CHI. TRIB., Jan. 12, 2005, § 2, at 1.

241. 775 ILL. COMP. STAT. 5/1-102 (2005 & Supp. 2009).

242. *Crawford v. City of Chicago*, 710 N.E.2d 91, 98-100 (Ill. App. 3d 1999) (holding the city had authority to legislate in this area – there is not state law that completely deals with this subject matter and the public policy was not opposed to it).

243. Parness & Lee, *supra* note 238, at 184.

244. *Id.*

zine has estimated the value of same-sex “weddings” over the last several years to be over \$16 billion in the \$70 billion-per-year U.S. wedding industry.²⁴⁵

As this Comment has shown, before the enactment of the Civil Union Act, the lack of legal recognition for same-sex unions prohibited same-sex couples from enjoying hundreds of Illinois laws in which marriage was the only means to access the benefits.²⁴⁶ This created discriminatory and unfair legal, mental, physical, and economic inequalities between opposite-sex individuals and same-sex individuals that are in committed relationships.²⁴⁷

Moreover, this Comment argues that the legislature took the correct and honorable action in enacting the Civil Union Act, which will strengthen, not weaken, society by allowing same-sex couples and their children to take part in the benefits of a legally recognized union.²⁴⁸ The federal government estimated in 2005 that there are approximately 777,000 same-sex family units in the United States, raising at least one million children, and are living in every county.²⁴⁹ As the laws currently stand, these children finally will have the rewards and protections that legal recognition of their parents’ relationship will offer under the Civil Union Act.²⁵⁰

This Comment also points out that there is still a strong sentiment for “traditional” marriage resonating throughout the American populace.²⁵¹ However, much of this emotion is tied to the way in which society defines “marriage” — not the majority wishing to exclude civil rights to same-sex couples.²⁵² Thus, legislators had an exciting opportunity to do what is right

245. *Media Usage, Purchasing Decisions, and the Value of Gay Marriage*, GAY & LESBIAN ALLIANCE AGAINST DEFAMATION, <http://www.commercialcloset.org/common/news/reports/detail.cfm?Classification=report&QID=5428&ClientID=11064&TopicID=384&subsection=resources&subnav=resources> (last visited Jan. 9, 2010).

246. *See, e.g.*, Stone, *supra* note 8, at 17; *Support Civil Unions in Illinois – House Bill 1826*, ACLU, *supra* note 8.

247. *See, e.g.*, Stone, *supra* note 8, at 17; *Support Civil Unions in Illinois – House Bill 1826*, *supra* note 8.

248. *See* Proof Brief of the Am. Psychol. Ass’n, as Amici Curiae Supporting Plaintiff-Appellees, *supra* note 123 at 23-24.

249. Dale Carpenter, *The Unconservative Consequences of Conservative Opposition to Gay Marriage*, in *WHAT’S THE HARM?: DOES LEGALIZING SAME-SEX MARRIAGE REALLY HARM INDIVIDUALS, FAMILIES OR SOCIETY?*, 319, 320 (2008).

250. *See id.* at 320-22; Brief of the Am. Psychol. Ass’n as Amici Curiae Supporting Plaintiff-Appellees, *supra* note 123, at 23-24.

251. *See* PEW RESEARCH CTR., *supra* note 64, at 4; *see also* Abby Goodnough, *A Setback in Maine for Gay Marriage, but Medical Marijuana Law Expands*, N.Y. TIMES, NOV. 4, 2009, <http://www.nytimes.com/2009/11/05/us/politics/05maine.html> (describing Maine’s repeal of same-sex marriage as the thirty-first state to do so).

252. *See* Chapman, *supra* note 91, at 31 (“[I]t’s not the idea of treating gay couples equally that bothers most Americans. It’s the name of the legal arrangement.”); PEW RESEARCH CTR., *supra* note 64, at 4.

and constitutionally required by extending the same legal rights and benefits that are offered to spouses to same-sex couples, while still respecting the traditional definition of marriage, and it took the appropriate and historic action by enacting the Civil Union Act. As the President of ACLU declared, “[t]oday is an historic and proud day for Illinois . . . [t]housands of couples will now breathe a bit easier and enjoy fewer worries in facing everyday life complications because of the courage and decency of every legislator who voted yes on SB 1716.”²⁵³

The compromise found in the Civil Union Act is inevitably objectionable to some of those who hold deep religious beliefs that homosexuality is immoral conduct, and to some gay advocates who feel only marriage is an acceptable outcome; however, at this juncture, the Civil Union Act is the best method for allowing justice and fairness to all involved, especially to the Sams and Janes living in Illinois.²⁵⁴

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253. Cindy Wojdyla, *Civil Unions Pass; Local Lawmakers Vote Along Party Lines*, THE HERALD NEWS, Dec. 1, 2010, <http://heraldnews.suntimes.com/news/2640043-418/civil-bill-couples-state-illinois.html>.

254. See Garcia, *supra* note 102, at 1.

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