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# **BANNING STATE RECOGNITION OF SAME-SEX RELATIONSHIPS: CONSTITUTIONAL IMPLICATIONS OF NEBRASKA'S INITIATIVE 416**

*Christopher Rizzo\**

## INTRODUCTION

Nebraska is not unique in having passed a ban on state recognition of some same-sex relationships—dozens of states have done so.<sup>1</sup> What is unprecedented is the breadth of

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<sup>1</sup> See Partners Task Force for Gay & Lesbian Couples, *State Legislative Reactions to Suits for Same-Sex Marriage* (April 2002) (listing Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Indiana, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington and West Virginia as states, in addition to Nebraska, that have passed anti-marriage laws intended to block in and out of state marriage licenses of same-sex couples), available at <http://www.buddybuddy.com/t-line-2.html>; ALA. CODE § 30-1-19 (2002); ALASKA STAT. § 25.05.013 (Michie 2002); ARIZ. REV. STAT. § 25-901 (2002); ARK. CODE ANN. § 9-11-109 (Michie 2002); CAL. FAM. CODE § 300 (West 2002); COLO. REV. STAT. § 14-2-104 (2002); FLA. STAT. ch. 741.212 (2002); GA. CODE ANN. § 19-3-31 (2002); HAW. REV. STAT. § 572-1 (2002); IDAHO CODE § 32-201 (Michie 2002); ILL.

Nebraska's law and the wide margin, seventy percent, by which it was passed by voters in November 2000.<sup>2</sup> The law, referred to as "Initiative 416," is the most far-reaching ban on same-sex relationships in the United States, providing:

Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.<sup>3</sup>

This constitutional amendment, passed by popular initiative,<sup>4</sup> reflects nationwide concern that recognition of marriage by persons of the same sex will be mandated in states where no explicit ban exists.<sup>5</sup>

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COMP. STAT. 5/201 (2002); KAN. STAT. ANN. § 23-115 (2001); KY. REV. STAT. ANN. § 402.005 (Banks-Baldwin 2002); LA. REV. STAT. ANN. § 89 (West 2002); ME. REV. STAT. ANN. tit. 19-A, §§ 650, 701 (West 2002); MD. CODE ANN. FAM. LAW § 2-201 (2002); MICH. COMP. LAWS §§ 551.1, 551.271-72 (2002); MINN. STAT. § 517.01 (2002); MO. REV. STAT. § 451.022 (2002); MONT. CODE ANN. § 40-1-103 (2002); N.D. CENT. CODE §§ 14-03-01, 14-03-08 (2001); OKLA. STAT. tit. 43, § 3 (2002); 23 PA. CONS. STAT. ANN. § 1704 (West 2002); S.C. CODE ANN. § 20-1-10 (Law. Co-op. 2002); S.D. CODIFIED LAWS § 25-1-1 (Michie 2002); TENN. CODE ANN. § 36-3-113 (2002); WASH. REV. CODE § 26.04.020 (2002); W. VA. CODE § 48-2-104 (2002).

<sup>2</sup> See Leslie Reed, *Three Turning Points Shaped Mills*, OMAHA WORLD-HERALD, Nov. 27, 2000, at 11 (describing popular support for the initiative and the extensive campaign launched by Guyla Mills, a born-again Christian, to gain support for the legislation). For an examination of the breadth of the initiative, see *infra* Part II (setting forth the scope of the law and range of relationships and legal arrangements affected).

<sup>3</sup> NEB. CONST. art. 1, § 29.

<sup>4</sup> Laws passed by popular initiative are typically proposed, campaigned for and voted upon by citizens rather than lawmakers. Initiative is defined as "[a]n electoral process by which a percentage of voters can propose legislation and compel a vote on it by the legislature or by the full electorate." BLACK'S LAW DICTIONARY 788 (7th ed. 1999).

<sup>5</sup> The most tangible example of this concern is the federal Defense of Marriage Act ("DOMA"), passed by Congress in 1996. See 28 U.S.C. § 1738C (2002). DOMA grants states permission to deny recognition to same-sex marriages created in other states and provides, in relevant part, "[n]o State, territory, or possession of the United States, or Indian tribe, shall be

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The concern stems from decisions by state courts in Alaska, Hawaii and Vermont holding that denying gays the right to marry, and the rights associated with marriage, is unlawful.<sup>6</sup> Other states, like Nebraska, feared that these decisions would

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required to give effect to any public act . . . respecting a relationship between persons of the same sex that is treated as a marriage . . . .” See also 1 U.S.C. § 7 (defining marriage as a legal union between a man and a woman). For further discussion of DOMA’s effects upon state law and recognition of same-sex relationships, see *supra* Part I.B (exploring the provisions of DOMA as a response to potential state court recognition of same-sex marriage rights and setting forth provisions of the statute). See also Evelyn Nieves, *Ballot Initiative That Would Thwart Gay Marriage is Embroiling California*, N.Y. TIMES, Feb. 25, 2000, at A12 (discussing the controversial nature of California’s Knight Initiative, which asks California voters to define marriage in such a way that same-sex marriages from other states would not be recognized).

<sup>6</sup> See *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998), *aff’d*, 21 P.3d 357 (Alaska 2001) (holding that Alaska’s statutory ban on same-sex marriages denied plaintiffs their fundamental right to choose life partners and implicated privacy and equal protection issues under the Alaska Constitution); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (requiring the state to show that its statute banning same-sex marriage met strict scrutiny review to overcome the presumption of unconstitutionality); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (finding that the Common Benefits Clause of the Vermont Constitution entitles same-sex couples to obtain the same benefits and protections afforded opposite-sex couples under state law).

State legislatures in Hawaii and Vermont responded by offering varying levels of marriage-like rights to gays. See, e.g., HAW. REV. STAT. ANN. § 431:10-234 (addressing reciprocal beneficiaries’ rights in life insurance policies) (2000); HAW. REV. STAT. ANN. § 560:2-212 (2000) (regarding the right of election to surviving reciprocal beneficiaries); HAW. REV. STAT. ANN. § 572c (1999) (providing for “reciprocal beneficiary relationships”); VT. STAT. ANN. tit. 15, § 1201(2) (2002) (allowing same-sex couples to establish “civil union” relationships, which enables them to receive the benefits and protections and be subject to the responsibilities of married spouses); VT. STAT. ANN. tit. 15, § 1204 (2002) (describing the benefits, protections and responsibilities of parties to a civil union, which include the responsibility for support, application of laws relating to annulment, separation, divorce, child custody, property division and maintenance, group insurance for state employees, medical care, family leave benefits, workers’ compensation benefits, public assistance benefits and marital evidentiary privilege among others).

foster gay marriage in their states and responded with bans.<sup>7</sup> The underlying source of these concerns is the requirement under the Full Faith and Credit Clause of the United States Constitution that the states recognize legal decisions of other states.<sup>8</sup> Thus, numerous states have passed laws prohibiting recognition of a same-sex marriage, even if valid when performed in another state.<sup>9</sup> The ban enacted in Nebraska, however, goes beyond marriage and discusses other relationships like “domestic partnerships,” “civil unions” and “other” relationships.<sup>10</sup> States are permitted to regulate marriage, but the scope and content of Initiative 416 raises questions about whether the amendment is a

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<sup>7</sup> The federal government responded as well with DOMA. *See* H.R. REP. NO. 104-664 (1996) (stating that the report is “a response to a very particular development in the State of Hawaii. . . . The prospect of permitting homosexual couples to ‘marry’ in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States.”). *Id.*; *see also* YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 229 (2002) (noting that in response to the Hawaii decision, thirty-five states passed laws in the five year period between 1996 and 2001 that “restrict marriage to opposite-sex couples by specifically defining marriage as a union between persons of the opposite sex, specifically prohibiting marriage between persons of the same sex in the state, and avoiding recognition of same-sex marriages lawfully performed in other states”). For further discussion of DOMA, *see infra* Part I.B.

<sup>8</sup> U.S. CONST. art. IV, § 1. The Full Faith and Credit Clause reads, “[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” *Id.* *See also* MERIN, *supra* note 7, at 231. Merin notes:

If same sex marriage is legalized in one or more states, the question will arise whether marriages performed there are to be recognized in other jurisdictions. It is debatable whether the U.S. Constitution will compel such recognition, because the Full Faith and Credit Clause has not commonly been relied upon by courts in determining whether they should recognize out-of-state marriages (e.g., common law marriages) that could not have been performed within the jurisdiction.

*Id.*

<sup>9</sup> *See supra* note 1 (listing states that have passed DOMAs).

<sup>10</sup> NEB. CONST. art. 1, § 29.

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valid exercise of the state's power to determine who can and cannot be married.<sup>11</sup>

Litigation over the amendment's constitutionality is almost certain.<sup>12</sup> The real conflict, however, is taking place among American citizens as changing values and attitudes towards homosexuality are reflected in courts and legislatures across the country.<sup>13</sup> As the Supreme Court of Hawaii aptly noted, "with all

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<sup>11</sup> Marriage is inarguably a domestic matter, and it is well established that "there is no federal law of domestic relations." *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (holding that the court must look to state law in determining whether an illegitimate child is included within the term "children" as used in the federal Copyright Act); *see also* *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (finding no subject matter jurisdiction in federal courts for domestic relations cases); *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the law of the states, and not to the laws of the United States."); *Salisbury v. Lust*, 501 F. Supp. 105, 107 (D. Nev. 1980) ("The power to regulate marriage is a sovereign function retained by the states; it has not been granted to the federal government."); *O'Neill v. Dent*, 364 F. Supp. 565, 569 n.6 (E.D.N.Y. 1973) ("[S]ubject to constitutional limitations, the legislatures of the States are authorized to regulate the qualifications of the contracting parties, the forms or procedures necessary to solemnize the marriage, the various duties and obligations which it creates, and the procedures for dissolution").

<sup>12</sup> *See* American Civil Liberties Union, *Statewide Anti-Gay Marriage Laws* (Jan. 31, 1998), at <http://www.aclu.org/LesbianGayRights/LesbianGayRights.cfm?ID=9211&c=>. The ACLU maintains that anti-gay marriage laws violate various constitutional provisions, including full faith and credit and equal protection, as well as the right to interstate travel as established by the Supreme Court. *Id.*

<sup>13</sup> In fact, the number of states with nondiscrimination laws banning discrimination on the basis of sexual orientation increases nearly every year. For an updated, annual compilation and analysis of such legislation, see National Gay Lesbian and Lesbian Task Force, *State Legislative Tracking and Reporting* (providing year-round legislative tracking and reporting as well as an annual analysis report for all state legislative activity pertaining to lesbian, gay, bi-sexual and trans-gendered issues), at <http://www.nglrf.org/statelocal/tracking.htm> (last visited Mar. 4, 2003).

For example, New Jersey's non-discrimination statute protects gays from discrimination in employment and public accommodations:

All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges

due respect to the Virginia Courts of a bygone era, we do not believe that trial judges are the ultimate authorities on Divine Will, and . . . constitutional law may mandate, like it or not, that customs change with an evolving social order.”<sup>14</sup> The court was referring to the opinion by the Virginia courts upholding the ban on mixed-race marriages, an opinion that was overturned by the United States Supreme Court in *Loving v. Commonwealth of Virginia*.<sup>15</sup> Similarly, state courts in Alaska, Hawaii and Vermont mandated equal rights for gays, even though the legislatures had not previously done so.<sup>16</sup>

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of any place of public accommodation . . . without discrimination because of . . . sexual orientation . . . . This opportunity is recognized as and declared to be a civil right.

N.J. STAT. ANN. § 10:5-4 (West 2001).

Additionally, contentious public hearings held in Nebraska while Initiative 416 was under consideration demonstrate the deep divisions that exist over this issue. For a full account of these debates and the issues raised therein, see generally *Initiative Measures 415 and 416: Hearing Before the Committee on Education*, 96th Leg., 2d Sess. (2000) [hereinafter *Hearing Before the Committee on Education*]; *Initiative Measures 415 and 416; Hearing Conducted by Nebraska Secretary of State*, 96th Leg., 2d Sess. (Oct. 11, 12, 2000) [hereinafter *Hearing Conducted by Nebraska Secretary of State*].

<sup>14</sup> See *Baehr v. Lewin*, 852 P.2d 44, 63 (Haw. 1993) (stating that although the Virginia courts in the 1800s may have “declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural, and, in effect, because it had theretofore never been the ‘custom’ of the state to recognize mixed marriages,” current courts must apply constitutional law recognizing changing customs and social standards) (quoting *Loving v. Virginia*, 388 U.S. 1, 3 (1967))). This article references *Baehr v. Lewin* in short citation form as *Baehr I* to distinguish it from *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *on remand from* 910 P.2d 112 (Haw. 1996), *aff’d*, 950 P.2d 1234 (Haw. 1997), which involved the same group of plaintiffs.

<sup>15</sup> 147 S.E.2d 78 (Va. 1966), *rev’d* 388 U.S. 1 (1967).

<sup>16</sup> See *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998) (finding that the “recognition of one’s choice of a life partner is a fundamental right and therefore the state must have a compelling interest to refuse the exercise of that right by same-sex partners”); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (reversing the trial court’s judgment and retaining jurisdiction pending legislative action because the State was constitutionally required to extend to same-sex couples the common benefits

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This article does not focus on the fundamental right to marry or the first sentence of the Nebraska law concerning same-sex marriage.<sup>17</sup> Rather, the article explores the second sentence of Initiative 416, which goes beyond a mere ban on marriage and states that Nebraska shall not recognize “a civil union, domestic partnership, or other similar same-sex relationship.”<sup>18</sup> Part I provides the history of state recognition of same-sex relationships and the controversy it has caused in many states.<sup>19</sup> Part II

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and protections that flow from marriage under Vermont law); *Baehr I*, 852 P.2d at 68 (remanding the case for a hearing to determine whether Hawaii's marriage license law furthered compelling state interests and was narrowly drawn to avoid unnecessarily violating plaintiffs' equal protection rights).

<sup>17</sup> This does not reflect the author's conclusions about the constitutionality of the ban on gay marriage. This ban has several constitutional implications, including violation of the fundamental right to marry, due process, gender discrimination, equal protection and discrimination based on sexual orientation. Hawaii's court first considered the ban on gay marriage as a denial of the fundamental right to marry and gender discrimination. *See generally Baehr I*, 852 P.2d 44. Alaska considered claims of gender discrimination as well as denial of the right to choose a life partner. *See Brause*, 1998 WL 88743 at \*5-6. Finally, Vermont's Supreme Court directly addressed the issue of sexual orientation discrimination. *See Baker*, 744 A.2d at 886-87.

A thorough examination of these issues is beyond the scope of this article. For thoughtful discussions and analysis of these and other similarly compelling matters, see Nan D. Hunter, *Millennium Speech the Sex Discrimination Argument In Gay Rights Cases*, 9 J.L. & POL'Y 397 (2001) (arguing that laws that discriminate on the basis of sexual orientation in fact discriminate on the basis of sex and examining the impacts of feminist jurisprudence, as well as lesbian, gay, bisexual and transgender rights); Arthur S. Leonard, *Ten Propositions About Legal Recognition of Same-Sex Partners*, 30 CAP. U. L. REV. 343 (2002) (discussing the various ramifications of legal recognition of same-sex partners on equality for homosexuals, as well as achieving access to marriage and strategies to do so); John P. Safranek & Stephen J. Safranek, *Can Homosexual Equal Protection Claims Withstand the Implications of Bowers v. Hardwick?*, 50 CATH. U. L. REV. 703 (2001) (discussing the difficulty for a homosexual to bring a federal equal protection claim as long as *Bowers v. Hardwick* remains good law).

<sup>18</sup> NEB. CONST. art. 1, § 29.

<sup>19</sup> It should be noted that some suggest that same-sex unions may not necessarily reflect the participants' sexual orientation, but rather the desire to take advantage of tenant or inheritance laws. *See, e.g.*, HAW. REV. STAT.

considers the scope of the Nebraska amendment with its broad language, and the potential impact it may have beyond the context of gay marriage. Once the scope of the law is established, Part III considers equal protection concerns raised by the second sentence of Initiative 416, which bars recognition of non-marriage unions between same-sex partners but not opposite-sex partners. Given that state courts are generally required to recognize judicial decisions and contracts from other states, Section IV examines the Full Faith and Credit Clause of the United States Constitution and issues that the law will raise in this context.<sup>20</sup> Section V considers whether Initiative 416 will impair contracts between same-sex partners, implicating the Contract Clause of the United States Constitution.<sup>21</sup> Finally, Section VI concludes that the Initiative 416 does violate the Constitution in light of the Supreme Court's decision in *Romer v. Evans*.<sup>22</sup>

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ANN. § 572C-2 (2000) (establishing that persons with significant emotional, personal and economic relationships who are legally prohibited from marrying, for example brothers and sisters, uncles and nieces, or individuals of the same sex, can receive the same rights and benefits as married couples as reciprocal beneficiaries); Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 42 n.152 (2000) (discussing how any two people can register as reciprocal beneficiaries under Hawaii Law and obtain benefits similar to those received by registered lesbian or gay couples). This article uses the terms "gay relationship" and "same-sex relationship" interchangeably.

<sup>20</sup> U.S. CONST. art. IV, § 1; see *Atherton v. Atherton*, 181 U.S. 155, 160 (1901) (explaining that the purpose of the Full Faith and Credit clause is to "give the same conclusive effect to the judgments of all the States, so as to promote certainty and uniformity in the rule among them"); *supra* note 8 (quoting the Full Faith and Credit Clause). For further explanation, see *infra* Part IV.

<sup>21</sup> U.S. CONST. art. I, § 10, cl. 1. The Contracts Clause reads, "No State shall . . . pass any . . . law impairing the obligation of contracts . . ." *Id.*; see also GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 506 (13th ed. 1997) (explaining the main purpose of the "contracts clause was to restrain state laws affecting private contracts," especially as they related to debtor relief laws). For further explanation, see *infra* Part V.

<sup>22</sup> 517 U.S. 620 (1996). In *Romer*, homosexuals and municipalities challenged the validity and enforcement of Amendment 2 to the Colorado

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## I. THE SAME-SEX MARRIAGE CONTROVERSY

For many years marriage was universally considered a relationship between a man and a woman.<sup>23</sup> Same-sex couples that challenged state laws that denied them the right to marry invariably lost.<sup>24</sup> For example in 1974 in *Singer v. Hara*, the Supreme Court of Washington found that the state's law clearly defined marriage as between a man and a woman.<sup>25</sup> The court first noted that states are given the exclusive power to regulate marriage and determine which persons are eligible to be married.<sup>26</sup> Accordingly, in *Singer*, the legal challenge to Washington's law ended with the judicial determination that the state had exercised this authority and defined marriage as

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Constitution which precludes all legislative, executive or judicial action at the state or local level designed to protect the status of persons based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Id.* at 624. The Court held that Amendment 2 violated the Equal Protection Clause and "classified homosexuals . . . [so] to make them unequal to everyone else" and strangers to the laws of Colorado. *Id.* at 635.

<sup>23</sup> See Laurence Drew Borten, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089 (2002) (stating that marriage revolves around sexual intercourse and has always been the legal union of a man and woman); Lynne Marie Kohm & Mark A. Yarhouse, *Fairness, Accuracy and Honesty in Discussing Homosexuality and Marriage*, 14 REGENT U. L. REV. 249 (2001) (stating that marriage has always been a fundamental constitutional right but that there are "minimum requirements to marry [,which] include: the parties being of minimum age, one at a time, unrelated by blood or marriage, and of different sexes").

<sup>24</sup> See *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) (holding that the Washington marriage statute prohibits same-sex marriages and does not violate the equal rights amendment to the Washington State Constitution); see also *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973) (holding that there is no constitutional protection of the right of marriage between persons of the same sex, and that two women cannot enter into a marriage).

<sup>25</sup> *Singer*, 522 P.2d at 1189. Specifically, the court noted that, despite a 1970 amendment that replaced "male" and "female" with "persons," the legislature still intended not to authorize same-sex marriage, as was evident in the use of "male" and "female" on the affidavit for issuance of a marriage license. *Id.*

<sup>26</sup> *Id.* at 1197.

between a man and a woman.<sup>27</sup> Specifically, the court noted that the law made reference to “‘the male’ and ‘the female’ which clearly dispel[led] any suggestion that the legislature intended to authorize same-sex marriages.”<sup>28</sup>

#### A. State Responses

The first changes came when state courts in Hawaii and Alaska interpreted their state constitutions to guarantee gays the right to marry.<sup>29</sup> In *Baehr v. Lewin*, the Supreme Court of Hawaii found that denying gays the right to marry was gender discrimination.<sup>30</sup> The court applied “strict scrutiny” to what it called a sex-based classification.<sup>31</sup> The state was ordered to demonstrate that the law “further[ed] compelling state interests and [was] narrowly drawn to avoid unnecessary abridgement of constitutional rights.”<sup>32</sup> Later, when the state’s response to the court order was considered in *Baehr v. Miike*, the court found that the state had failed to show a compelling reason for denying gays this right.<sup>33</sup> Faced with the prospect that the state’s court

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<sup>27</sup> *Id.* (“[W]e are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman.”).

<sup>28</sup> *Id.* at 1189. The court also rejected a challenge based upon gender discrimination, as plaintiffs claimed that the Washington marriage statutes violated their equal rights under the Washington State Constitution because allowing a man to marry a woman but not another man is a classification made based upon sex. *Id.* at 1191-92. The court pointed out, however, that same-sex marriage licenses are denied equally to both male and female pairs, and therefore the marriage statutes do not violate equal rights. *Id.*

<sup>29</sup> *See* *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that Hawaii’s Constitution restricting marriage to male and female is sex-based discrimination); *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998) (holding that the marriage code in Alaska’s Constitution is also sex-based discrimination).

<sup>30</sup> *Baehr I*, 852 P.2d at 44.

<sup>31</sup> *Id.* at 67.

<sup>32</sup> *Id.* at 68.

<sup>33</sup> *See* *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *on remand from* 910 P.2d 112 (Haw. 1996), *aff’d*, 950 P.2d 1234 (Haw. 1997). The court declared that sex based discrimination invoked strict

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would require gay marriage in the state, Hawaiians amended their constitution to read that “the legislature shall have the power to reserve marriage to opposite-sex couples.”<sup>34</sup> Unlike Nebraska’s Initiative 416, however, Hawaii’s amendment does not address non-marital same-sex relationships like “domestic partnerships.”<sup>35</sup> Hawaii’s law is also limited to public recognition of marriage rights, stating that private solemnization is not unlawful.<sup>36</sup>

To remedy some of the inequities acknowledged by the court,

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scrutiny, and thus the state bore the burden of showing that it had a compelling interest and narrowly tailored means for achieving that interest. *Id.* at \*19. The state failed to overcome its presumption that the restriction was unconstitutional because it failed to present sufficient evidence that the optimal development of children is adversely affected when same-sex couples raise children. *Id.* at \*21. Further, the state failed to show that allowing same-sex marriage would negatively affect public policy, assure that Hawaii marriages are recognized in other states, or any other important state interest. *Id.* at \*22.

<sup>34</sup> HAW. CONST. art. 1, § 23. See David Orgon Coolidge, *The Hawaii Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19, 26-27 (2000) (noting that the “Marriage Amendment” was a direct response by opponents of the *Baehr I* decision seeking to prevent the inevitable ability of same-sex couples to obtain marriage licenses in the state).

<sup>35</sup> The significance of this legislative approach is illustrated by comparing the text of Hawaii’s amendment to Nebraska’s. Hawaii’s legislature focused only on marriage and used terminology making the act of marriage one that is “reserved” for opposite sex couples, and there is no mention of same-sex couples. See HAW. CONST. art. I, § 23. Hawaii’s Constitution states simply, “[t]he legislature shall have the power to reserve *marriage* to opposite-sex couples.” *Id.* (*emphasis added*). Instead of reserving the right for some, the Nebraska legislature framed the issue as a restriction against the behavior of same-sex couples. See NEB. CONST. art. I, § 29. It states, “[o]nly marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a *civil union, domestic partnership, or other similar same-sex relationship* shall not be valid or recognized in Nebraska.” *Id.* (*emphasis added*).

<sup>36</sup> See HAW. REV. STAT. § 572-1.6 (2002). The statute states, “Nothing in this chapter shall be construed to render unlawful, or otherwise affirmatively punishable at law, the solemnization of same-sex relationships by religious organizations; provided that nothing in this section shall be construed to confer any of the benefits, burdens or obligations of marriage under the laws of Hawaii.” *Id.*

Hawaii's legislature quickly moved to provide same-sex couples with some rights traditionally reserved to married couples.<sup>37</sup> For example, same-sex partners in Hawaii can now register to become "reciprocal beneficiaries."<sup>38</sup> Parties to these agreements need not be gay, simply of the same-sex and willing to prepare a notarized declaration of their relationship.<sup>39</sup> Some of the rights extended include the right of election for surviving spouses and reciprocal beneficiaries,<sup>40</sup> the right to life insurance for a partner<sup>41</sup> and hospital visitation rights.<sup>42</sup>

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<sup>37</sup> See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 56 (Haw. 1993) (noting that on its face the statute "denies same-sex couples access to the marital status and its concomitant rights and benefits. It is the State's regulation of access to the status of married persons, on the basis of the applicants' sex, that gives rise to the question whether the applicant couples have been denied the equal protection of the laws.").

<sup>38</sup> See HAW. REV. STAT. § 572C-5 (2002). The statute states that "[t]wo persons . . . may enter into a reciprocal beneficiary relationship and register their relationship as reciprocal beneficiaries by filing a signed notarized declaration of reciprocal beneficiary relationship with the director." *Id.*

<sup>39</sup> See *id.*

<sup>40</sup> See HAW. REV. STAT. § 560:2-212 (2002).

The right of election may be exercised only by a surviving spouse *or reciprocal beneficiary* who is living when the petition for the elective share is filed in the court under section 560:2-211(a). If the election is not exercised by the surviving spouse *or reciprocal beneficiary* personally, it may be exercised on the surviving spouse's *or reciprocal beneficiary's* behalf by the spouse's *or reciprocal beneficiary's* conservator, guardian, or agent under the authority of a power of attorney.

*Id.* (emphasis added).

<sup>41</sup> See HAW. REV. STAT. § 431:10-234 (2002).

Every life insurance policy made payable to or for the benefit of the spouse or the reciprocal beneficiary of the insured, and every life insurance policy assigned, transferred, or in any way made payable to a spouse or reciprocal beneficiary, or to a trustee for the benefit of a spouse or a reciprocal beneficiary, regardless of how the assignment or transfer is procured, shall, unless contrary to the terms of the policy, inure to the separate use and benefit of such spouse or reciprocal beneficiary.

*Id.*

<sup>42</sup> HAW. REV. STAT. § 323-2 (2002). The statute states that a "reciprocal

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State courts in Alaska also addressed this issue and found denying gays and lesbians the right to marry unconstitutional under state law.<sup>43</sup> The court first considered the right to privacy and the right to “choice of life partner.”<sup>44</sup> Although marriage to a partner of the same-sex is not a fundamental right in Alaska, because no such right is rooted in tradition, the court found that the right to choose a life partner is.<sup>45</sup> Denial of this right merited

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beneficiary, as defined in chapter 572C, of a patient shall have the same rights as a spouse with respect to visitation and making health care decisions for the patient.” *Id.*

<sup>43</sup> See *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998). Plaintiffs, two men, sought and were denied a marriage license by the State of Alaska. *Id.* at \*1. Thereafter, they filed a complaint seeking a declaration that the prohibition of same-gender marriage violated the Alaska Constitution. *Id.* Specifically, the plaintiffs sought a ruling on the level of scrutiny to be applied in review of the Marriage Code. *Id.* In finding that the choice of a life partner implicates constitutional provisions, namely the right to privacy and equal protection, the parties were ordered to determine whether a compelling state interest could be shown for the ban on same-sex marriage. *Id.* at \*6. In 2001, the Alaska Supreme Court heard from the same plaintiffs on the matter of whether a same-sex couple precluded from marrying may be denied benefits that are legally available only to married people. See *Brause v. State of Alaska, Dep’t of Health & Human Services*, 21 P.3d 357 (Alaska 2001). The court affirmed dismissal of the claim on the grounds that no actual controversy was ripe for adjudication. *Id.* The standard for determining ripeness, as articulated by the Alaska Supreme Court, depended on “the fitness of the issues for judicial decision” and “the hardship to the parties of withholding court consideration.” *Id.* at 359 (quoting *Lake Carriers’ Ass’n v. MacMullan*, 406 U.S. 498, 506 (1972)). According to the court, the plaintiffs did not allege that they ever had or would be deprived rights available exclusively to married persons and “to the extent that the need to decide is a function of the probability that they will suffer an anticipated injury, [plaintiffs] failed to demonstrate such a need.” *Id.* at 360.

<sup>44</sup> *Brause*, 1998 WL 88743, at \*1. The plaintiffs claimed that the right of privacy encompassed the right to choose one’s life partner as an important and personal choice, necessitating a compelling interest by the State to justify interference. *Id.*

<sup>45</sup> *Id.* at \*4. The court recognized that marriage between a man and woman is a deeply rooted tradition and, therefore, a fundamental right. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967); *Griswold v. Connecticut*, 381 U.S. 479 (1965)). Yet the question invoked here—“whether the personal decision [to] choose a mate of the same gender will be recognized as the same

strict scrutiny, and the court ordered the state to demonstrate a compelling interest.<sup>46</sup> In fact, it criticized the Hawaiian court's historical approach to determining if gay marriage was a fundamental right, stating: "It is self-evident that same-sex marriage is not 'accepted' or 'rooted in the traditions and collective conscience' of the people. Were this not the case [the plaintiffs] would not have had to file complaints seeking precisely this right."<sup>47</sup> Rather, the relevant question was whether the choice of a "life partner" was rooted in tradition.<sup>48</sup> The court found that it clearly was.<sup>49</sup>

Like the court in Hawaii, Alaska's court also found that the ban on same-sex relationships was gender discrimination, saying, "Sex-based classification can hardly be more obvious."<sup>50</sup> The Alaskan constitution contains a strongly worded anti-discrimination clause that states, "Civil Rights: no person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex or national origin."<sup>51</sup> As in Hawaii, strict

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fundamental right"—is decided by answering whether the choice, as opposed to the existence of same-sex marriage, is within the realm of the fundamental right of privacy. *Id.*

<sup>46</sup> *Id.* at \*6.

<sup>47</sup> *Id.* at \*4. The court referred to *Baehr v. Lewin*, and concluded that "the Hawaii court could reach such a conclusion because of the question it chose to ask"—whether same-sex marriage is a deeply rooted tradition. *Id.*; see also *Baehr I*, 852 P.2d 44 (Haw. 1993).

<sup>48</sup> *Brause*, 1998 WL 88743 at \*4.

<sup>49</sup> *Id.* The court found that freedom to choose a life partner is a fundamental right subject to denial only if the state had a compelling interest. *Id.* at \*1. Government intrusion into the choice of a life partner "encroache[d] on the intimate personal decisions of the individual," and the choice can include persons of the opposite or of the same sex. *Id.* at \*5. The court noted that because the right to marry and raise a traditional family is constitutionally protected, the right to "choose one's life partner and have a recognized non-traditional family" should also be protected. *Id.* at \*6.

<sup>50</sup> *Id.* See also *Baehr I*, 852 P.2d at 562-79 (finding that the Hawaii statute limiting marriage certificates to male-female couples was a clear showing of discrimination based on sex, implicating the Equal Protection Clause of the Hawaii Constitution).

<sup>51</sup> ALASKA CONST. art. 1, § 3.

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scrutiny was applied.<sup>52</sup> Ultimately, however, the litigation ended by a constitutional amendment defining marriage to exist “only between one man and one woman.”<sup>53</sup>

Advocates of same-sex marriage had their most significant legal victory in Vermont.<sup>54</sup> Vermont's constitution contains a unique “Common Benefits Clause,” stating “that government is, or ought to be, instituted for the common benefit, protection and security of the people, nation or community and not for the

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<sup>52</sup> See *Baehr I*, 852 P.2d at 571 (stating that whenever denial of equal protection of laws is alleged, a strict scrutiny standard should be applied to determine whether there is a compelling state interest and whether the statute in question is narrowly drawn to avoid unnecessarily violating a plaintiff's equal protection under the law); see also *Brause*, 1998 WL 88743 at \*6 (holding that the strict scrutiny test is applicable to review a statute when it denies the fundamental right to choose one's life partner).

<sup>53</sup> See ALASKA CONST. art. I, § 25 (“To be valid or recognized in this State, a marriage may exist only between one man and one woman.”). This section took effect on January 3, 1999, and the amendment is the result of a referendum voted on by the Alaska electorate in November 1998, shortly after *Brause* was decided. *Id.* See also Mark Strasser, *From Colorado to Alaska by Way of Cincinnati: On Romer, Equality Foundation, and the Constitutionality of Referenda*, 36 HOUS. L. REV. 1193, 1194 (1999). The referendum reportedly passed by a 2 to 1 majority. *Id.* at 1247 n.373. The amendment forms a strong barrier to same-sex marriages being allowed in Alaska because now the power to allow such unions no longer exists in the legislator but instead the ban is embedded in the State's constitution. *Id.* at 1247-49. The Alaska Supreme Court acknowledged the amendment by declaring the relevant counts of an appeal of a same-sex couple's denial of a marriage licenses to be “moot” in light of the amendment. See *Brause v. State Dep't of Health & Soc. Servs.*, 21 P.3d 357, 358 (Alaska 2001).

<sup>54</sup> See *Baker v. State*, 744 A.2d 864 (Vt. 1999). Same-sex couples brought an action against the State of Vermont seeking a declaratory judgment that a refusal to issue them marriage licenses violated the state's marriage statutes and Constitution. *Id.* The court held that the exclusion of same-sex couples from the benefits and protections granted under the state marriage law violated the common benefits clause of the State Constitution. *Id.* The significance of this legal battle was noted by the National Gay and Lesbian Task Force—Policy Institute director Paula Ettelbrick stated in a press release that “the decision is a significant step forward for our community.” See National Gay & Lesbian Task Force, *Vermont Begins to Pave the Way for Fairness for Same-Sex Couples* (Dec. 20, 1999), at <http://www.nglhf.org/news/release.cfm?releaseID=254>.

particular emolument or advantage of any single person, family or set of persons, who are of party only of the community.”<sup>55</sup> In *Baker v. Vermont*, the Supreme Court of Vermont directly addressed the issue of sexual orientation based discrimination under this Common Benefits Clause, rather than considering the issue of gender discrimination.<sup>56</sup> The decision held that barring gay marriage, or at least the rights associated with marriage, was unconstitutional.<sup>57</sup> Following this decision, and unlike in Hawaii and Alaska, Vermont’s legislators did not undertake complicated

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<sup>55</sup> See VT. CONST. art. 7, chap. I; see also *Baker*, 744 A.2d at 867. The plaintiffs argued that:

[I]n denying them access to a civil marriage license, the law effectively excludes them from a broad array of legal benefits and protections incident to the marital relation, including access to a spouse’s medical, life, and disability insurance, hospital visitation and other medical decision making privileges, spousal support, intestate succession, homestead protections, and many other statutory protections.

*Id.* at 870. In addition, the plaintiffs contested the trial court’s holding that the statute “served the State’s interest in promoting the ‘link between procreation and child rearing.’” *Id.* In support of this argument the plaintiffs asserted that a large number of married couples chose to remain childless, while a growing number of same-sex couples had children. *Id.* In essence, they demonstrated the paradox in “recognize[ing] the rights of same-sex partners as parents, yet deny[ing] them—and their children—the [rights of] spouses.” *Id.*

<sup>56</sup> See *Baker*, 744 A.2d at 880. The court held that the statute did not discriminate on the basis of gender because “the marriage laws are facially neutral; they do not single out men or women as a class for disparate treatment, but rather prohibit men and women equally from marrying a person of the same sex.” *Id.* But see *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (reversing a trial court decision barring same-sex marriages and remanding for further proceedings to determine whether the statute discriminated on the basis of gender).

<sup>57</sup> See *Baker*, 744 A.2d at 884.

The legal benefits and protections flowing from a marriage license are of such significance that any statutory exclusion must necessarily be grounded on public concerns of sufficient weight, cogency, and authority . . . . Considered in light of the extreme logical disjunction between the classification and the stated purposes of the law . . . the exclusion falls substantially short of this standard.

*Id.*

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constitutional amendments to bar legal recognition of same-sex relationships and marriages.<sup>58</sup> Rather, Vermont opted to provide gays with an alternative to marriage: "civil unions."<sup>59</sup> The civil

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<sup>58</sup> For a discussion of the constitutional amendments that followed judicial decisions in Hawaii and Alaska, see *supra* notes 36-42, 53 and accompanying text.

<sup>59</sup> VT. STAT. ANN. tit. 15, § 1202 (1999). Specifically, the statute provides that for a valid civil union to be established, the parties must "(1) [n]ot be party to another civil union or a marriage; (2) [b]e of the same sex and therefore excluded from the marriage laws of this state; [and] (3) [m]eet the criteria and obligations set forth in 18 V.S.A. chapter 106." *Id.* A full discussion of Vermont's civil union statute is beyond the scope of this article, although it has been the subject of substantial writing, research and analysis, both in the popular media and in academic journals. For further analysis, see Tonja Jacobi, *Same-Sex Marriage in Vermont: Implications of Legislative Remand for the Judiciary's Role*, 26 VT. L. REV. 381 (2002) (examining the judiciary's role in deferring to the legislature in determining social policy); Jill Jourdan, *The Effects of Civil Unions on Vermont Children*, VT. B.J., March 28, 2002, at 32 (discussing the benefits that children of same-sex couples receive as a result of Vermont's civil union legislation); Mary LaFrance, *Defining Marriage: What Ballot Question 2 Doesn't Do*, NEV. LAW., Oct. 10, 2002, at 15 (describing how the Vermont Assembly addressed the issue of religious freedom in adopting the Vermont civil union law); Arthur S. Leonard, *Chronicling a Movement: 20 Years of Lesbian/Gay Law Notes*, 17 N.Y.L. SCH. J. HUM. RTS. 415, 556 (2000) (stating that Vermont's legislation, by avoiding labeling the civil union a marriage, "has deprived couples who are civilly united from being able to argue that other states are required to recognize their status under the settled principles of comity that states follow in recognizing out-of-state marriages"); Mark Strasser, *Same-Sex Marriages and Civil Unions: On Meaning, Free Exercise and Constitutional Guarantees*, 33 LOY. U. CHI. L.J. 597, 608 (2002) (analyzing the array of reactions to Vermont's civil union statute and concluding that although Vermont's approach currently strikes an appropriate balance, future amendments should remove the separate status and allow same-sex marriage).

Various advocacy groups and organizations also provide updated legal information regarding laws that affect same-sex couples and the legal options available under civil union legislation. See generally Lambda Legal Defense & Education Fund, at <http://www.lambdalegal.org> (last visited Mar. 3, 2003); American Civil Liberties Union, at <http://www.aclu.org/LesbianGayRights/LesbianGayRightsMain.cfm>; National Gay and Lesbian Task Force, at <http://www.nglftf.org>; Lesbian/Gay Law Notes, at <http://www.qrd.org/qrd/www/legal/iglntf> (providing monthly legal updates on court rulings, legislation, and

union is available only to couples that are “of the same sex and [are] therefore excluded from the marriage laws of this state.”<sup>60</sup> The law essentially grants to gay couples all the rights and responsibilities associated with marriage. These include divorce laws, estate laws, joint tax status, adoption rights and insurance rights.<sup>61</sup>

### *B. The Federal Response*

The federal government has also enacted legislation barring recognition of same-sex relationships.<sup>62</sup> The federal Defense of Marriage Act (DOMA) was passed in 1996, following the Supreme Court of Hawaii’s decision in *Baehr I*, and prior to the Vermont court’s decision in *Baker v. Vermont*.<sup>63</sup> The law has two

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other legal developments affecting gays and lesbians) (last visited Mar. 3, 2003).

<sup>60</sup> VT. STAT. ANN. tit. 23, § 1202 (2002).

<sup>61</sup> See *id.* at § 1204. Section 1204 provides a “nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union.” *Id.* Some of the protections and responsibilities include domestic relation law, probate and adoption law and procedure, state employee insurance, and state and local tax laws. *Id.* For a full discussion of domestic partnership rules and arrangements as they pertain to conflict of law issues and recognition of such arrangement between and amongst the various states, see generally Ralph U. Whitten, *Exporting and Importing Domestic Partnerships: Some Conflicts of Laws Questions and Concerns*, 2001 B.Y.U. L. Rev. 1235 (2001) (addressing potential conflicts of laws recognizing domestic partnerships with issues of personal jurisdiction and choice of law).

<sup>62</sup> See 28 U.S.C. § 1738C (2002); 1 U.S.C. § 7 (2002).

<sup>63</sup> See H.R. REP. NO. 104-664, at 5 (1996). Congress, responding directly to developments in Hawaii, stated:

It is, of course, no business of Congress how the Hawaiian Supreme Court interprets the Hawaiian Constitution, and the Committee expresses no opinion on the propriety of the ruling in *Baehr*. But the Committee does think it significant that the threat to traditional marriage laws in Hawaii and elsewhere has come about because two judges of one state Supreme Court have given credence to a legal theory being advanced by gay rights lawyers.

*Id.*

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operative provisions. The first provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.<sup>64</sup>

The second provision states:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies or of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.<sup>65</sup>

Relying on *Singer v. Hara*,<sup>66</sup> Congress passed DOMA not only to "defend traditional marriage" at the federal level, but to allow states to avoid the "orchestrated legal assault being waged against" state control of the definition of marriage.<sup>67</sup> The result

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Other commentators have also noted that the federal DOMA statute was passed in response to the Hawaii court decision. *See, e.g.*, Theodora Ooms, *The Role of the Federal Government in Strengthening Marriage*, 9 VA. J. SOC. POL'Y & L. 163, 172 (2001) (explaining how conservative advocacy groups' anxieties about same-sex marriages "increased in light of state court of Hawaii rulings," which urged Congress to pass DOMA by a large majority); Brett P. Ryan, *Love and Let Love: Same-Sex Marriage, Past, Present, and Future, and the Constitutionality of DOMA*, 22 U. HAW. L. REV. 185, 214 (2000) (utilizing the fact that DOMA was developed in response to the "possibility—and fear—that same-sex marriage might soon become legal, at least in Hawaii" in an argument that DOMA is unconstitutional).

<sup>64</sup> 28 U.S.C. § 1738 (2000).

<sup>65</sup> 1 U.S.C. § 7 (2000).

<sup>66</sup> *See* H.R. REP. NO. 104-664, at 32 (1996). Specifically, a prepared statement by Lynn D. Wardle noted, "the definition of 'marriage' is derived from a case from the State of Washington, *Singer v. Hara*, 522 P.2d 1187, 1191-92 (Wash. App. 1974)." *Id.*

<sup>67</sup> *See* H.R. REP. NO. 104-664, at 10 (1996). The "background and need

for same-sex couples is profound—1,049 federal statutes deal with married couples, conferring hundreds of rights and responsibilities upon them.<sup>68</sup> The federal law, however, is not nearly as broad as Nebraska's Initiative 416. In fact, not only does the text explicitly mention only marriage, the legislative committee that drafted the law stated that "the committee would emphasize the narrowness of this provision."<sup>69</sup>

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for legislation" section of the report states that "the Committee believes it is important to place that development in its larger context. In particular, it is critical to understand the nature of the orchestrated legal assault being waged against traditional heterosexual marriage by gay rights groups and their lawyers." *Id.*

<sup>68</sup> See Lambda Legal Defense and Education Fund, *Denying Access to Marriage Harms the Family* (noting that "[a]t the federal level, civil marriage is a gateway to more than 1049 protections, benefits, and obligations"), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=873> (last visited Mar. 3, 2003). The statute count was performed by the Lambda Legal Defense and Educational Fund and presented by Robert Pileggi, at a lecture at Columbia Law School on February 24, 2000.

<sup>69</sup> See H.R. REP. NO. 104-664, at 21 (1996). Specifically, the Committee stated:

This section provides that '(n)o State . . . shall be required to give effect' to same-sex 'marriage' licenses issued by another State. The Committee would emphasize the narrowness of this provision. Section 2 merely provides that, in the event Hawaii (or some other State) permits same-sex couples to 'marry, other States will not be obligated or required, by operation of the Full Faith and Credit Clause of the United States Constitution, to recognize that 'marriage,' or any right or claim arising from it.

*Id.*

This is not to suggest that, if challenged, the federal DOMA would necessarily pass constitutional muster. In fact, a number of commentators have suggested that it would not. See, e.g., Leonard G. Brown III, *Constitutionally Defending Marriage: The Defense of Marriage Act*, *Romer v. Evans and the Cultural Battle They Represent*, 19 CAMPBELL L. REV. 159, 165 (1996) (discussing the debate over the constitutionality of DOMA); James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335, 338 (1997) (concluding that DOMA is unconstitutional because it has crossed the line between secular and religious and betrays the Establishment Clause of the Constitution); Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of*

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Passage of the federal DOMA was followed by thirty-five “mini DOMAs” at the state level.<sup>70</sup> Like the federal law, these state statutes ban recognition of gay marriage performed within or without the state. For example, Idaho passed a ban on recognition of gay marriages performed in other states.<sup>71</sup> The ban was particularly meaningful because Idaho’s constitution contains

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*Congressional Authority*, 97 COLUM. L. REV. 1435, 1450 (1997) (finding that Congress exceeded its authority in interpreting the Full Faith and Credit Clause); Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in H.R. 3396 and S. 1740, the Proposed Federal Legislation on Marriage and the Constitution*, Lambda Legal, Sept. 1, 1996 (finding that the proposed statutes are unconstitutional because the statutes attempt to circumvent the Full Faith and Credit Clause, abridge fundamental rights including the right to marry and the right to travel, and nationalize domestic law), available at [http://www.lambdalegal.org/cgibin/iowa/documents/record?record=80#N\\_25\\_](http://www.lambdalegal.org/cgibin/iowa/documents/record?record=80#N_25_).

<sup>70</sup> See *supra* note 1 (listing states that have passed DOMAs); see also Bradley J. Betlach, *The Unconstitutionality of the Minnesota Defense of Marriage Act: Ignoring Judgments, Restricting Travel and Purposeful Discrimination*, 24 WM. MITCHELL L. REV. 407 (1998) (discussing the constitutionality of the Minnesota Defense of Marriage Act); Nancy J. Feather, *Defense of Marriage Acts: An Analysis Under State Constitutional Law*, 70 TEMP. L. REV. 1017 (1997) (arguing that state enacted defense of marriage acts may often be unconstitutional because state constitutions tend to offer greater protection than the Federal Constitution in the area of individual rights including privacy, equal rights and equal protection); Mark Strasser, *When is a Parent Not a Parent? On DOMA, Civil Unions, and Presumptions of Parenthood*, 23 CARDOZO L. REV. 299, 305 (2001) (discussing state versions of the Defense of Marriage Act); Partners Task Force for Gay & Lesbian Couples, *State Legislative Reactions to Suits for Same-Sex Marriage* (April 2002) (noting which states have passed anti-marriage laws and detailing the years in which these laws were enacted), available at <http://www.buddybuddy.com/toc.html>.

<sup>71</sup> See IDAHO CODE § 32-209 (Michie 2000).

All marriages contracted without this state, which would be valid by the laws of the state or country in which the same were contracted, are valid in this state, unless they violate the public policy of this state. Marriages that violate the public policy of this state include, but are not limited to, same-sex marriages, and marriages entered into under the laws of another state or country with the intent to evade the prohibitions of the marriage laws of this state.

*Id.*

a common benefits clause similar to Vermont's.<sup>72</sup>

*C. Nebraska Law and Same-Sex Partners*

Nebraska sought to pass its own ban on gay marriage as well. For example, the attorney general of Nebraska was asked by the legislature to recommend the best method of defending the state's "traditional" marriage against the court decision in Hawaii.<sup>73</sup> This report suggested that the nation's only unicameral legislature pass a ban on gay marriage to allow the federal DOMA to be effective in Nebraska.<sup>74</sup> It stated that "[w]ithout affirmative legislation on the subject, Nebraska would most likely be subjected to litigation in an attempt to force recognition of same-sex marriage licenses issued in Hawaii."<sup>75</sup> Hawaii never did recognize same-sex marriage, and Nebraska never passed such a

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<sup>72</sup> See IDAHO CONST. art. 1, § 2. This clause, titled "Political power inherent in the people," states:

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform or abolish the same whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the legislature.

*Id.* For a discussion of Vermont's Common Benefits Clause, see *supra* note 55.

<sup>73</sup> See Same-sex Marriage - Impact of *Baehr v. Lewin* and the Defense of Marriage Act on Nebraska Law, Op. Neb. Att'y. Gen. 96090 (1996) [hereinafter Op. Neb. Att'y Gen.]. With respect to the decision in Hawaii, the Attorney General said:

New Legislation expressly prohibiting or excluding recognition of same-sex marriages under Nebraska law is the only certain way to avoid the possibility that Nebraska could be forced to recognize same-sex marriage licenses issued in Hawaii. Given the existing uncertainty under Nebraska law, additional legislation would be required to ensure that Nebraska would be protected under DOMA.

*Id.*

<sup>74</sup> *Id.* See also Kim Robak, *The Nebraska Unicameral and Its Lasting Benefits*, 76 NEB. L. REV. 791 (1997) (explaining Nebraska's unicameral system, the way in which bills and legislation are passed by unicameral government and how it differs from other states' bicameral legislatures).

<sup>75</sup> See Op. Neb. Att'y Gen., *supra* note 73, at 2.

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ban.<sup>76</sup> This prompted activists opposing same-sex marriage to pursue a popular initiative.<sup>77</sup> The result is Initiative 416 and a near-certain legal challenge.<sup>78</sup>

## II. THE SCOPE OF INITIATIVE 416

The scope of the second sentence of Initiative 416 is not immediately clear on the face of the law. In addition to the first sentence's ban on gay marriage, the second sentence encompasses "civil unions, domestic partnerships, and other similar same-sex relationships."<sup>79</sup> While Nebraska courts have yet to define these terms, they have plenty of guiding precedent from other jurisdictions to interpret the second sentence of Initiative 416 to mean something more than a marriage.<sup>80</sup> Additionally, drafts of the law that were not submitted to the voters also demonstrate that the second sentence of the amendment targets other forms of same-sex relationships.<sup>81</sup>

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<sup>76</sup> See *Hearing Conducted by Nebraska Secretary of State*, *supra* note 13, at 28-31 (Oct. 11, 2000). The first attempts to pass legislation banning gay marriage in Nebraska began in 1996 and were led by the Nebraska Family Council ("NFC"). *Id.* at 28. The group's efforts, including general communication to legislators, a rally at the state Capitol and petition drives, were inspired by the recent introduction of L.B. 1260, proposed legislation that would have legalized same-sex marriage. *Id.* The NFC's work did not have any effect that year because it was too late in the session to introduce new legislation. *Id.* The grass-roots foundation laid by these opponents of same-sex marriage, however, would inspire others to push for similar legislation a few years later. *Id.* at 28-30.

<sup>77</sup> *Id.*

<sup>78</sup> See Tom Shaw, *Lawsuit Over 416 Readied*, OMAHA WORLD-HERALD, Nov. 19, 2000 at 1B; John Fulwider, *ACLU Hopes to Have 416 in Court by January*, NEB. ST. PAPER, November 19, 2000.

<sup>79</sup> NEB. CONST. art. I, § 29.

<sup>80</sup> For an examination of opinions from other jurisdictions, see *infra* Part II.C.

<sup>81</sup> For an examination of the proposed drafts of Initiative 416, see *infra* Part II.B.

*A. Relationships Covered by Initiative 416*

Nebraska's legislators clearly targeted civil unions created for same-sex partners in Vermont. The chief proponent of Initiative 416 stated at a public hearing:

Nebraska will be the first state though to address *counterfeit or look-alike marriages* if this amendment passes. Since Vermont sanctioned civil unions during the time that we were drafting this amendment, it would have been remiss not to have a stated public policy regarding backdoor attempts to define marriage by calling it another name.<sup>82</sup>

Supporters also attempted to address the meaning of "domestic partnership" and "other similar same-sex relationship" at these public hearings.<sup>83</sup> As supporter Guyla Mills stated at a public hearing before Initiative 416 was passed:

Opponents of this initiative also state that this language is ambiguous and vague. The terms civil unions and domestic partnerships are terms that have been coined to grant homosexual partner relationships.<sup>84</sup>

Unfortunately, statements like this do not clarify the law's true breadth, and reveal only that the drafters targeted more than just marriage.

Initiative 416 may also implicate privately created benefits. Hawaii's gay marriage ban states, for example, that the law has

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<sup>82</sup> *Hearing Conducted by Nebraska Secretary of State, supra* note 13, at 31 (Oct. 11, 2000). Guyla Mills, a lobbyist for the Nonpartisan Family Coalition, was one of the sponsors of the Nebraska amendment defining marriage as a union between a man and a woman. *Id.* She also serves as Chairperson of the Defense of Marriage Amendment Committee, which was the group responsible for securing enough signatures to place this amendment on the ballot.

<sup>83</sup> *Id.* at 32. Domestic partnerships have commonly been understood to mean either business relationships or cohabitation. *Id.* The proponents of this amendment contend that sanctioning same-sex unions will inevitably result in businesses being forced to provide state benefits because they too are domestic partnerships. *Id.*

<sup>84</sup> *Id.*

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no implications on private solemnization of marriage, while Nebraska's does not.<sup>85</sup> Many businesses offer insurance benefits and bereavement leave to employees with same-sex partners.<sup>86</sup> To obtain these benefits, an employee may have to sign a "domestic partner affidavit" to establish that their partner is entitled to health benefits.<sup>87</sup> Initiative 416 could be used by insurance companies to justify denying benefits to same-sex domestic partners in Nebraska.

Domestic partnerships are also occasionally established at the local or municipal level. For example, San Francisco and New York have created registries through which city employees can obtain health benefits for their partners.<sup>88</sup> This may also be an issue for other governmental entities, like the University of Nebraska, which recently proposed to grant same-sex partner benefits.<sup>89</sup> Because the University is a government entity,

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<sup>85</sup> See HAW. REV. STAT. § 572-1.6 (1999).

<sup>86</sup> See *More Companies Offering Same-Sex Partner Benefits*, N.Y. TIMES, Sept. 26, 2000, at C2 (finding more companies than ever before are offering health benefits to partners of gay and lesbian employees); Leigh Strobe, *More Same-Sex Benefits Offered*, ASSOC. PRESS, Oct. 2, 2001 (reporting that the number of "Fortune 500" employers offering same-sex domestic partnership benefits rose from 61 in 1998 to 145 in 2001 and the larger and more prominent the corporation is, the more likely it is to offer such benefits), available at [http://www.biz.yahoo.com/apf/011002/domestic\\_partners\\_1.html](http://www.biz.yahoo.com/apf/011002/domestic_partners_1.html) (last visited Nov. 20, 2002). See also Lambda Legal Defense and Education Fund, *Partial Summary of Domestic Partner Benefits Listings*, available at [www.lambdalegal.org](http://www.lambdalegal.org).

<sup>87</sup> See *Hearing Conducted by Nebraska Secretary of State*, *supra* note 13, at 69 (Oct. 12, 2000).

<sup>88</sup> See *Slattery v. City of New York*, 686 N.Y.S. 2d 683 (Sup. Ct. 1999) (upholding New York City's jurisdiction for domestic partnership benefits and holding New York City domestic partnership law does not conflict with New York State law or public policy); Associated Press, *Domestic-Partner Law is Upheld in Court*, N.Y. TIMES, Nov. 7, 1999, at 40; see also Katherine Q. Seelye, *Gay Policy in San Francisco Draws Penalty in House*, N.Y. TIMES, July 30, 1998, at 18A (reporting that the San Francisco House of Representatives narrowly passed a measure that would deny Federal housing money to San Francisco because the city supports live-in homosexual partners).

<sup>89</sup> See Ray Parker, *University of Nebraska-Lincoln Approves Health*

Initiative 416 could prohibit it from recognizing same-sex relationships.

In addition to programs and laws that specifically provide benefits to same-sex partners, some laws of general applicability have been interpreted to protect same-sex partners in Nebraska. For example the state law offering domestic violence protection and restraining orders is used to protect same-sex partners.<sup>90</sup> It is as yet unclear whether a court order of protection pursuant to this law would be deemed governmental recognition of a “similar same sex relationship.” Judicial recognition and enforcement of contracts entered into by same-sex partners could also be banned under Initiative 416. Gay partners routinely create contracts to establish some of the rights and obligations obtained automatically upon marriage—416 could bar judicial enforcement of these contracts.<sup>91</sup>

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*Benefits to Same-Sex Couples*, at [http://www.inform.umd.edu/EdRes/Topic/Diversity/Specific/Sexual\\_Orientation/Issues/Benefits/unl.html](http://www.inform.umd.edu/EdRes/Topic/Diversity/Specific/Sexual_Orientation/Issues/Benefits/unl.html) (last modified Apr. 18, 2000). The University of Nebraska proposed to grant same-sex partners of faculty members the same health and insurance benefits that spouses of heterosexual faculty members receive. *Id.*

<sup>90</sup> See NEB. REV. STAT. § 42-928 (2000). The statute, titled “Protection order; restraining order; violation; arrest,” reads:

A peace officer shall with or without a warrant arrest a person if (1) the officer has probable cause to believe that the person has committed a violation of an order issued pursuant to section 42-924, a violation of section 42-925, a violation of an order excluding a person from certain premises issued pursuant to section 42-357, or a violation of a valid foreign protection order recognized pursuant to section 42-931 and (2) a petitioner under section 42-924 or 42-925, an applicant for an order excluding a person from certain premises issued pursuant to section 42-357, or a person protected under a valid foreign protection order recognized pursuant to section 42-931 provides the peace officer with a copy of a protection order or an order excluding a person from certain premises issued under such sections or the peace officer determines that such an order exists after communicating with the local law enforcement agency.

*Id.*

<sup>91</sup> See JOHNETTE DUFF, SPOUSAL EQUIVALENT HANDBOOK (1992). This book advises couples of ways to use comprehensive agreements and contracts in lieu of a state-sanctioned marriage. See also Lambda Legal Defense and

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Education Fund, *Life Planning: Legal Documents for Lesbians and Gay Men* (1998) [hereinafter *Lambda Life Planning*] (discussing documents gay and lesbian couples are advised to draft in order to counter state legal presumptions regarding property, health care, and family in the event of death or disability), available at <http://lambdalegal.org/sections/library/lifeplanning.pdf>. The handbook promotes documents including powers of attorney, wills, living wills, revocable trusts, parenting agreements, living together agreements and funeral arrangement agreements. *Id.* Wills and revocable trusts are both tools that allow a deceased party to pass property upon death and defeat state intestate succession laws that distribute property based on familial ties. While a will must be recorded in a public office, a revocable trust does not, making it a more attractive alternative to lesbian and gay couples because it bypasses probate administration. *Id.* at 7, 19. Living together agreements deal with the division of property during the partner's lifetime as opposed to after death. These agreements address financial obligations regarding income and expenses, ownership of property and the distribution of property in the event the relationship ends. *Id.* at 9. A power of attorney authorizes a specified party to act on the principal's behalf regarding personal, medical, business, or financial decisions. *Id.* at 6, 14. The power of attorney can be drafted to authorize such decisions for general activities, for specific transactions and time periods, or only upon the principal's incapacity. *Id.* While living wills do not provide any benefits to partners, they do provide instructions to health care providers regarding life support systems in the event of a terminal illness or injury and an original copy of the document should be provided to a trusted companion. *Id.* at 6, 16. Additionally, a health care proxy allows the designation of a representative authorized to make health care decisions when the principal is unable to do so. *See also* Lambda Legal Defense and Education Fund, *Advance Planning* (Dec. 18, 2001), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=935>. Parenting agreements allow partners to nominate a guardian who is not a legally recognized parent of a child. *Lambda Life Planning, supra*, at 20. Although the contract itself is not enforceable in court because courts must use the best interest of the child standard in awarding custody of minor children, the document can be used as evidence of a relationship in the court proceeding. *Id.* at 7, 20.

While any legally competent adult can draft these documents, such documents are always open to attack on the grounds of incompetence, undue influence, fraud or duress. *Id.* at 3. Courts, however, have consistently held such contracts enforceable absent any of the above grounds. *See, e.g.*, Posik v. Layton, 695 So.2d 759 (Fla. 1997) (finding that contracts between unmarried adults are enforceable unless based on sexual services, thereby validating a lesbian couple's contract containing a provision requiring a monthly living expense payments if the contract was breached); Crooke v.

*B. Proposed Drafts—Defining the Scope of 416*

Read in sum, the various drafts and object clauses preceding the language actually adopted for Initiative 416 clearly demonstrate the intent to encompass more than marriage. One un-adopted draft states, “Only a marriage between one man and one woman shall be recognized in Nebraska.”<sup>92</sup> Rejection of this version indicates that supporters of the law deemed it inadequate for their purposes.

The earlier drafts also suggest that the supporters’ true goal was not simply to ban gay marriage, but to deny any other method of conferring the rights and benefits of marriage upon same-sex partners. One version states “[t]he unique status, benefits, rights and protections of marriage as of January 1, 2000, shall be reserved solely to a man and a woman united in marriage.”<sup>93</sup> This version implies that insurance and inheritance rights, for example, could not be conferred upon unmarried same-sex partners.

Finally, the “object clause” of the version submitted to voters fails to elucidate the intended scope.<sup>94</sup> It states:

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Gilden, 414 S.E.2d 645 (Ga.1992) (finding a contract addressing the division of lesbian couple’s property was valid, reversing the lower court’s decision to the contrary); *Silver v. Starrett*, 176 Misc. 2d 511 (N.Y. Sup. Ct. 1998) (finding that there was no duress in the execution of a separation agreement granting property rights between a lesbian couple, and, therefore, the agreement was enforceable).

If such contracts are now banned for gays, they remain a viable option for heterosexuals. This raises equal protection issues that will be addressed in this paper. *See supra* Part V.

<sup>92</sup> *See* Nonpartisan Family Coalition, *Draft Petitions to Add Language to Nebraska Constitution* (April 19, 2000; May 24, 2000) [hereinafter *Draft Petitions*] (on file with author).

<sup>93</sup> *Draft Petitions* (April 19, 2000), *supra* note 92, at 5.

<sup>94</sup> Nebraska law requires that public initiative measures have an “object clause.” NEB. REV. STAT. § 32-1401 (2002). The law directs the public to “print a concise statement in large type of the legal effect of the filing of the petition and the object sought to be secured by submitting the measure to the vote.” *Id.* (describing the form of petition required for initiating any law or any amendment to Nebraska’s Constitution). *See also* Alan E. Peterson, *Term Limits: The Law Review Article, Not The Movie*, 31 CREIGHTON L. REV. 767,

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The purpose of this proposed change in the Nebraska Constitution is to define clearly marriage as a union between one man and one woman, to provide that only marriage between one man and one woman, whether contracted in Nebraska or outside Nebraska, shall be recognized in Nebraska, and to declare that same-sex civil unions, domestic partnerships, or similar same-sex relationships are not valid or recognized in Nebraska.<sup>95</sup>

Because this clause merely restates the petition language, it does little to reveal the objective of the law. When read together with various proposed drafts, however, the object clause strongly suggests that the adopted version of 416 covers much more than marriage.

*C. Guidance from Other Jurisdictions to Determine the Scope of Initiative 416*

Nebraska's courts have not addressed many of the definitional issues regarding the terms employed in Initiative 416. In fact, the only place in Nebraska law that currently includes any of these terms is business law, which uses the term "domestic partnership."<sup>96</sup> Others states and cities recognizing same-sex partnerships have faced court challenges to define these terms.<sup>97</sup>

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782, 783 (1998) (discussing the misleading nature of the object clause in the Nebraska term limits initiative in that it failed to mention that the limits applied to state legislators).

<sup>95</sup> *Draft Petitions* (May 24, 2000), *supra* note 92.

<sup>96</sup> *See* NEB. REV. STAT. § 67-451(2) (2000). Although the statute is part of the Uniform Partnership Act governing the effect of a business partnership merger, it explicitly refers to a domestic partnership. *Id.* In relevant part, the statute reads, "The Secretary of State of this state is the agent for service of process in an action or proceeding against a surviving foreign partnership or limited partnership to enforce an obligation of a domestic partnership or limited partnership that is a party to a merger." *Id.*

<sup>97</sup> *See, e.g.,* Rutgers Council of AAUP Chapters v. Rutgers, The State Univ., 689 A.2d 828 (N.J. Super. Ct. 1997) (refusing to include domestic partners in the definition of dependents for the purpose of health insurance coverage); Lilly v. City of Minneapolis, 527 N.W.2d 107 (Minn. 1995) (holding that the city did not have the power to grant health care benefits to

For example, in *Slattery v. City of New York*, a taxpayer group unsuccessfully challenged the City's extension of health benefits to domestic partners of municipal employees of both the same and opposite sex.<sup>98</sup> The plaintiffs argued that the City attempted to define marriage, recognize a de-facto common law marriage, acted in conflict with the state's power to confer health benefits and granted gay domestic partners marital status.<sup>99</sup> The court rejected these arguments, finding that benefits and municipal registries did not constitute marriage.<sup>100</sup> One important distinction for the court was that "domestic partnerships" were created without any of the formal requirements of marriage.<sup>101</sup>

The Supreme Court of Colorado reached a similar conclusion in *Schaefer v. City & County of Denver*.<sup>102</sup> There, a local law

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domestic partners because such benefits were limited to "spouses" and "dependants" in the state enabling statute and domestic partners do not fall within either of those definitions).

<sup>98</sup> 686 N.Y.S.2d 683 (Sup. Ct. 1999).

<sup>99</sup> *Id.* at 685. Plaintiffs also alleged that the laws illegally recognized common law marriages and that the City had exceeded statutory and constitutional authority and attempted to give domestic partnerships a marital status despite the absence of authority. *Id.*

<sup>100</sup> *Id.* at 686. The court stated:

Requirements regulating marriages . . . are far more stringent than those regulating domestic partnerships. . . . [A] marriage must be solemnized by an authorized religious leader or an authorized leader of the Society for Ethical Culture; the Mayor, city clerk or other authorized local official; a New York State or a Federal Judge, or an authorized judicial officer. Furthermore, although no particular form of ceremony is required, the parties must solemnly declare in the presence of the officiator that "they take each other as husband and wife."

*Id.* (citations omitted).

<sup>101</sup> *Id.*

<sup>102</sup> 973 P.2d 717 (Colo. 1998). In *Schaefer*, residents challenged the City's authority to provide health benefits to spousal equivalents of public employees. *Id.* The lower court allowed the City of Denver to extend the definition of marriage, thereby allowing a city employee's domestic partner to enjoy the same health benefits as that of a city employee's marriage partner. *Id.* As in *Slattery*, the plaintiffs asserted that the City had acted illegally to define marriage, an area reserved to the state. *Id.* at 719. *See also supra* note

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creating “spousal equivalents” for the purposes of extending health care benefits was held not to be an illegal attempt to re-define marriage.<sup>103</sup> The court stated that “[t]he ordinance qualifies a separate and distinct group of people who are not eligible to contract a state-sanctioned marriage to receive health and dental insurance benefits from the City. Therefore, the ordinance does not adversely impact the integrity and importance of the institution of marriage.”<sup>104</sup>

Additionally, judicial invalidation of municipal provision of health benefits for gay couples does not require that the provision be construed as re-defining marriage.<sup>105</sup> For example, in *Lilly v. City of Minneapolis* the Supreme Court of Minnesota found that only the State could determine who was entitled to government health care benefits.<sup>106</sup> Municipalities can extend benefits only as

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99 and accompanying text (articulating the legal challenges presented in *Slattery*).

<sup>103</sup> *Schaefer*, 973 P.2d at 721.

<sup>104</sup> *Id.*

<sup>105</sup> *See, e.g.*, *Johnson v. City of Minneapolis*, 152 F.3d 859, 862 (8th Cir. 1998) (finding the municipality’s interpretation of a statute to benefit same-sex domestic partners as usurping the legislature’s intent in crafting the law); *City of Atlanta v. McKinney*, 454 S.E.2d 517, 521 (Ga. 1995) (concluding that the city exceeded its power to provide benefits to employees and their dependents by recognizing domestic partners as “a family relationship” and providing employee benefits to them “in a comparable manner . . . as for a spouse”); *Devlin v. City of Phila.*, 809 A.2d 980, 993 (Pa. Commw. Ct. 2002) (holding that inclusion of two unmarried, unrelated people who live together as life partners did not fall within the statutory guidelines enumerating the class for tax benefits).

<sup>106</sup> 527 N.W.2d 107, 111 (Minn. 1995). The City of Minneapolis passed a resolution providing reimbursement to city employees for health care insurance costs for same-sex domestic partners. *Id.* at 108. The resolution also permitted health insurance reimbursement for certain classes of blood relatives. *Id.* The ordinance attempted to “provide employee health care benefits to persons not defined as ‘spouse’ or ‘dependents’ in a general state statute concerning the grant of health care benefits to municipal employees.” *Id.* at 109. The plaintiff in *Lilly* was a resident of Minneapolis who sought to enjoin the City from enforcing the ordinance. *Id.* The court noted that Minneapolis was a “home rule” charter city, which meant that the city could legislate as to “matters of a purely local nature.” *Id.* at 113. Since conferring health insurance is a statewide matter, the court found that Minneapolis’

permitted by the state.<sup>107</sup> Accordingly, the City of Minneapolis' attempt to grant benefits to city employees' "domestic partners" was illegal on this basis, not because the law constituted local recognition of gay marriage.<sup>108</sup>

These decisions are significant because, when supporters of Initiative 416 speak of "domestic partnerships" and "same-sex relationships," they refer to relationships that courts have defined as *not* meaning marriage. This includes state-sanctioned civil unions,<sup>109</sup> contracts creating domestic partnerships,<sup>110</sup> as well as informal partnerships created when health benefits are offered to same-sex partners.<sup>111</sup> Initiative 416 has potential implications for gay couples in myriad contexts, therefore, including denial of recognition of non-marriage partnerships, contracts, health benefits, municipally created registries and requests for protection from domestic violence.

### III. INITIATIVE 416 AND EQUAL PROTECTION

Nebraska's Initiative 416 does more than deny same-sex partners the right to have extra-jurisdictionally created civil

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actions were *ultra vires* and "without legal force or effect." *Id.*

<sup>107</sup> *Id.* at 111.

<sup>108</sup> *Id.* at 108.

<sup>109</sup> See Sarah Schweitzer, *Civil Unions in VT: Easier to Enter Than Exit*, BOSTON GLOBE, Nov. 15, 2002, at A1 (noting that civil unions are marriages in all but name).

<sup>110</sup> Contracts between non-marital partners are routinely enforced. See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (holding that express contracts between non-marital co-habitants may be enforced and in the absence of an express contract, the court may find a contract implied in law); *Salzman v. Bachrach*, 999 P.2d 1263 (Colo. 2000) (holding that agreement between non-marital cohabitants did not violate public policy); *Boland v. Catalano*, 521 A.2d 142 (Conn. 1987) (holding that the existence of a sexual relationship between the parties did not preclude the existence of an express agreement between a non-marital couple).

<sup>111</sup> See *Schaefer v. City & County of Denver*, 973 P.2d 717 (Colo. 1998) (holding that a city ordinance granting health care benefits to spousal equivalents was matter of local concern that was not preempted by state statute).

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unions and reciprocal beneficiary status recognized in the state. It also denies gays the right to petition Nebraska's legislature for the creation or recognition of non-marriage relationships like civil unions, domestic partnerships,<sup>112</sup> registries<sup>113</sup> and perhaps even partner health benefits, by foreclosing legal recognition of virtually any domestic arrangement or agreement between same-sex couples.<sup>114</sup> This sweeping, extraordinary limitation presents distinct questions as to whether the amendment violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>115</sup>

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<sup>112</sup> See *Slattery v. City of New York*, 686 N.Y.S.2d 683, 683 (Sup. Ct. 1999) (discussing a New York City law that recognizes certain rights of a domestic partnership, while emphasizing the difference between a domestic partnership and a marriage).

<sup>113</sup> While these types of unions are not widely available for heterosexual or homosexual couples in the United States, they do exist for gays in several European countries. France has created an unmarried partners registry that is like a contract for same-sex and opposite-sex couples. See Suzanne Daley, *France Gives Legal Status to Unmarried Couples*, N.Y. TIMES, Oct. 14, 1999, at A3 (discussing a law passed by the French Parliament that gives legal status to unmarried couples as well as homosexual couples allowing them the same rights as married couples with respect to tax advantages, inheritances, housing, and social welfare). Despite passage of the French law, activists protested the law, stating that it gave homosexual unions a lower status than marriage. *Id.* Denmark, Germany, Iceland, Norway and Sweden have also created civil unions for gay couples, followed by the Netherlands, which has recently permitted same-sex partners to marry. See Reuters, *Same Sex Dutch Couples Gain Marriage and Adoption Rights*, N.Y. TIMES, Dec. 20, 2000, at A8. (discussing a new law passed in the Netherlands that affords same-sex couples the same rights as heterosexual couples to marry and adopt children and acknowledging similar laws in other European countries). The Netherlands is the first nation to offer gays the right to marry. *Id.*

<sup>114</sup> As noted, the second sentence of Nebraska's Initiative 416 was broadly drafted and declares that a "civil union, domestic partnership or other similar same-sex relationship shall not be valid or recognized in Nebraska." See NEB. CONST. art. I, § 29.

<sup>115</sup> U.S. CONST. amend. XIV, § 1.

*A. Protection of Gays, As a Class, Under the Fourteenth Amendment*

Initiative 416 implicates the Fourteenth Amendment because non-married heterosexuals can petition the state legislature to confer legal rights to opposite-sex partners, while homosexuals cannot.<sup>116</sup> Additionally, depending upon the scope of the law in application, Initiative 416 may deny homosexuals the right to petition for domestic partner benefits programs and registries at the state or municipal level.<sup>117</sup> Finally, if Initiative 416 does implicate contractual relationships, gay cohabitation contracts that create domestic partnerships would be unenforceable in courts, while unmarried heterosexual couples would retain this alternative to marriage.<sup>118</sup>

Homosexuals are a cognizable group under the Equal Protection Clause, which bars any state from denying “to any

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<sup>116</sup> The inclusion of “same-sex” in the text of Nebraska’s amendment explicitly treats individuals involved in same-sex relationships differently than those in opposite-sex relationships. This unequal treatment conflicts with the principles of the Equal Protection Clause of the United States Constitution as it has been construed and applied by the United States Supreme Court. *See, e.g., Romer v. Evans*, 517 U.S. 620, 633-35 (1996). The Romer Court stated that “[c]entral both to the idea of the rule of law and to our own Constitution’s guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.” *Id.* at 633. The Court further added, “‘Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.’” *Id.*

<sup>117</sup> For an explanation as to whether Initiative 416 could prevent recognition of same-sex contracts and relationships in the context of municipal, local or even employment level, see *supra* Part IV.C (discussing cases from other jurisdictions in which local and municipal laws governing same-sex relationships were struck down on the basis that the laws usurped the State’s power to define marriage and marital relations).

<sup>118</sup> As noted, the second sentence of Initiative 416 explicitly bans recognition of non-marital unions or contracts only in the context of same-sex relationships, allowing opposite-sex non-marital unions or contracts to be cognizable by courts or the legislature. *See supra* Part III (discussing the scope of Initiative 416 and the legislative intent to reach all permutations of homosexual unions).

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person within its jurisdiction the equal protection of its laws.”<sup>119</sup> The United States Supreme Court addressed this issue in *Romer v. Evans*, and found that laws based on sexual orientation are not subjected to strict scrutiny.<sup>120</sup> Rather, the applicable standard in this context is “if a law neither burdens a fundamental right nor targets a suspect class . . . the legislative classification [will be upheld] so long as it bears a rational relation to some legitimate end.”<sup>121</sup> In *Romer*, the Court reviewed a Colorado constitutional amendment that barred government protection for sexual orientation based discrimination.<sup>122</sup> Several municipalities in the state had passed laws attempting to do just that—make discrimination based on sexual orientation illegal.<sup>123</sup> The Supreme Court determined that the Colorado law violated the Equal Protection Clause because gays as a class were barred from

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<sup>119</sup> U.S. CONST. amend. XIV, § 1.

<sup>120</sup> 517 U.S. 620 (1996). In *Romer* the court struck down an amendment to Colorado's Constitution that precluded all legislative, executive or judicial action designed to protect the status of persons based on their homosexual, lesbian or bisexual orientation, conduct, practices or relationships. *Id.* The level of scrutiny eventually agreed upon by the Colorado Supreme Court was strict scrutiny, which was not satisfied and the enforcement of the amendment was enjoined. *Id.* The United States Supreme Court affirmed but did not apply strict scrutiny and struck down the law on the basis that it seemed “inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.” *Id.* at 632. *See also* Gay Students Org. of Univ. of N.H. v. Bonner, 367 F.Supp. 1088 (D.N.H. 1974). *Bonner* was a civil rights action arising out of the denial by University of New Hampshire officials of the right of the Gay Students Organization, a homosexual organization to hold “social functions” on the campus. *Id.* at 1901. The organization claimed that the denial violated its First and Fourteenth Amendment rights and requested that the court declare its rights to organize and function on the University campus. *Id.* The New Hampshire District Court found that gays students could not be treated dissimilarly from other students, rejecting morality as a sound basis for such discrimination, and held that once the University granted a particular privilege of holding social functions to other campus organizations, the Fourteenth Amendment required that the privilege be available to all organizations on an equal basis. *Id.* at 1097.

<sup>121</sup> *Romer*, 517 U.S. at 631.

<sup>122</sup> *Id.* at 629.

<sup>123</sup> *Id.*

seeking official state protection.<sup>124</sup> Although this right remained available for all other groups, the Court acknowledged that under the challenged legislation “[h]omosexuals [were] forbidden the safeguards that others enjoy or may seek without constraint.”<sup>125</sup> Similarly, heterosexual couples in Nebraska may petition the government for recognition of non-marriage relationships, while homosexuals are effectively barred from doing so. Diluting a group’s political or voting power based on a characteristic that has no relation to a legitimate state interest is unconstitutional.<sup>126</sup> Under Initiative 416, a distinct group of politically unpopular persons is burdened and barred from petitioning elected officials for civil unions, domestic partnerships, and other same-sex relationships as a means of obtaining the rights associated with marriage.<sup>127</sup>

Legislation that targets a group of politically unpopular persons and denies governmental protection or voting power to

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<sup>124</sup> *Id.* at 635. The court stated, “A State cannot so deem a class of persons a stranger to its laws. [The Colorado Amendment] violates the Equal Protection Clause.” *Id.*

<sup>125</sup> *Id.* at 631. *See also* Citizens for Responsible Behavior v. Riverside City Council, 2 Cal. Rptr. 2d 648 (Ct. App. 1991) (rejecting a legislative proposal that would deny gays the ability to petition their local council for laws barring discrimination).

<sup>126</sup> *See* Gordon v. Lance, 403 U.S. 1, 4 (1971). In *Gordon*, the Supreme Court found that requiring sixty percent approval by the municipality’s voters for bond indebtedness gave a minority of the population greater voting power than the majority. *Id.* at 6. Despite this finding, the Court held that in this case the voting requirement did not violate the Equal Protection Clause because there is nothing in the language of the constitution requiring that a majority always prevail on every issue. *Id.*

<sup>127</sup> *See Romer*, 517 U.S. 620, 635 (1996) (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” (citing Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973))); *see also* Equal. Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289, 299 (6th Cir. 1997) (citing *Romer’s* description of homosexuals as a “politically unpopular minority”); Phillips v. Perry, 106 F.3d 1420, 1436 (9th Cir. 1997) (Fletcher, J., dissenting) (characterizing discrimination against gay military service members as “discrimination against an unpopular class”).

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obtain such protection is also plainly unconstitutional. For example in *Hunter v. Erickson* the Supreme Court refused to permit Akron, Ohio to deny racial minorities the right to petition for protection against housing discrimination.<sup>128</sup> The municipal ordinance at issue denied protections in housing, leasing or renting based on race, color, religion, national origin or ancestry without a voter referendum.<sup>129</sup> Protective measures for other groups, like those based on gender, political affiliation or pet ownership, could merely be enacted by the city council.<sup>130</sup> The Supreme Court articulated, “[T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.”<sup>131</sup> Accordingly, the ordinance was deemed to discriminate against minorities and “constitute[d] a real, substantial, and invidious denial of the equal protection of the laws.”<sup>132</sup>

Initiative 416 has an effect similar to the ordinance at issue in *Hunter*, inasmuch as protective measures, like domestic partnership status, offer considerable life security to couples.<sup>133</sup>

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<sup>128</sup> 393 U.S. 385 (1969). Minority citizens sought a writ of mandamus against city officials to prevent them from implementing an Akron city ordinance providing that a majority of city voters had to approve any amendment to the city charter that would allow the city council to pass an ordinance regulating the use, sale, advertisement, transfer, listing, lease, sublease, or financing of real estate on basis of race, color, religion, national origin or ancestry. *Id.* The United Court Supreme Court reversed the Ohio Supreme Court and found that the ordinance violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. *Id.*

<sup>129</sup> *Id.* at 387.

<sup>130</sup> *Id.* at 390-91.

<sup>131</sup> *Id.* at 393.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 387. *See, e.g.,* Women’s Institute for Leadership Development for Human Rights, *All Our Families Deserve Human Rights* (2000) (discussing the protective benefits deprived by legislation denying domestic partnership, such as hospital visitation rights, shared health insurance coverage and property inheritance and ownership rights), *available at* [http://www.wildforhumanrights.org/all\\_families.html](http://www.wildforhumanrights.org/all_families.html) (last visited Jan. 20, 2003).

These are now nearly impossible for gays to obtain. Heterosexuals can petition their representatives for a host of rights and protections, although gays cannot. Additionally, as noted in *Hunter*, passage by voter referendum does not immunize a law from the Equal Protection Clause.<sup>134</sup> Initiative 416 could be found unconstitutional based upon the rationale of *Hunter* because it does not bar creation of marriage alternatives or benefit programs for all unmarried persons.

The mere fact that a suspect class is not targeted in Nebraska does not mean that the rational basis test will be passed.<sup>135</sup> Politically unpopular groups, whether a suspect class or not, cannot be targeted by laws that bear no relation to a legitimate state interest.<sup>136</sup> The burden Initiative 416 places on gays

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<sup>134</sup> See *Hunter*, 393 U.S. at 392 (noting that “[c]haracterizing [the ordinance] simply as a public decision to move slowly in the delicate area of race relations emphasizes the impact and burden . . . but does not justify it”).

<sup>135</sup> Supreme Court precedent establishes that the rational basis test applies in the context of challenges to laws that discriminate on the basis of sexual orientation because homosexuals are not a suspect class. See, e.g., *Romer v. Evans*, 517 U.S. 620, 641-43 (1996) (stating that rational basis, the normal test for compliance with the Equal Protection Clause, is the governing standard and affirming the Supreme Court of Colorado’s decision that homosexuality is not a distinct class); see also *Equal. Found. of Greater Cincinnati v. City of Cincinnati*, 54 F.3d 261, 267 (6th Cir. 1995) (holding that it is virtually impossible to distinguish or separate individuals of a particular orientation according to a particular sexual conduct); *Beller v. Middendorf*, 632 F.2d 788, 808-09 n.20 (9th Cir. 1980) (holding that the military discharge for engaging in homosexual acts would be rational under minimal scrutiny because the general military policy of discharging all homosexuals is rational).

<sup>136</sup> See *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 532 (1973). In this case, several groups brought a class action lawsuit against the Department of Agriculture, its Secretary and other departmental officials seeking injunctive and declaratory relief against the implementation of section 3(e) of the Food Stamp Act. *Id.* Each one of the groups was deemed ineligible to participate in the Food Stamp Program because they had one or more unrelated individuals living in their households. *Id.* at 531. For example, one member of the class, Jacinta Moreno, lived with Ermina Sanchez and Ms. Sanchez’s three children. *Id.* Ms. Sanchez cared for Ms. Moreno, a diabetic, and they shared common living expenses. *Id.* Although without Ms. Moreno’s residence in the household, Ms. Sanchez and her children would be eligible

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resembles the issue presented to the Supreme Court in *United States Department of Agriculture v. Moreno*.<sup>137</sup> *Moreno* was a class action challenge to an amendment to the Federal Food Stamp Act that rendered ineligible for federal assistance any household containing an individual unrelated by blood or marriage to any other household member.<sup>138</sup> The Court found that the law was created to deny federal assistance to people regarded as “hippies,” but the government’s expressed goal to eliminate fraudulent claims for federal assistance bore no rational relation to whether needy persons sharing a household were related.<sup>139</sup> Ultimately, the Court stated, “[B]are congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>140</sup> Similarly, Initiative 416 is narrowly drafted, targeting unmarried gay couples, but lacks any determination that unmarried gay couples pose a greater threat to society than unmarried heterosexual couples.

*B. Initiative 416 Lacks a Rational Relationship to a Legitimate State Interest*

Because gays as a class are afforded some protection under the Equal Protection Clause, evaluation of the constitutionality of the law requires application of the rational basis test.<sup>141</sup> No

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for \$108 worth of food stamps per month, the fact that Ms. Moreno lived in the same household with them rendered them all ineligible for assistance. *Id.* at 531-32. The Supreme Court held that the “unrelated person” provision was an irrational classification and was invalid under the Due Process Clause of the Fifth Amendment. *Id.* at 533.

<sup>137</sup> *Id.* at 529.

<sup>138</sup> *Id.* The statute at issue was the Food Stamp Act of 1964, 7 U.S.C. § 2012(e) (1964), amended by 84 Stat. 2048 (1971).

<sup>139</sup> *Moreno*, 413 U.S. at 534-35.

<sup>140</sup> *Id.* at 534.

<sup>141</sup> See *supra* note 135 (discussing application of the rational basis test in the context of classification based on sexual orientation); see also *Equal Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997) (finding classification on the basis of sexual orientation in a city ordinance subject to the rational basis test); *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987) (holding the Federal Bureau of Investigation’s decision not

rational basis is discernable on the face of the law, nor from the three hearings that were conducted to do exactly that—provide a record of the proponents’ goals in enacting the law.<sup>142</sup>

The Supreme Court set forth the analytical framework for determining whether a law has a rational relation to a legitimate state interest in *City of Cleburne, Texas v. Cleburne Living Center*.<sup>143</sup> The Texas law at issue in *Cleburne* required a special use permit for group homes for the mentally retarded.<sup>144</sup> Laws concerning mentally retarded persons are subject to the rational basis test.<sup>145</sup> The Court, however, found the zoning law’s “relationship to an asserted goal so attenuated as to render the distinction arbitrary and irrational.”<sup>146</sup> Apartment buildings, hospitals, sanitariums, dormitories, nursing homes and private

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to hire a female homosexual applicant subject to the rational basis test under the Equal Protection Clause); Scott Patrick Johnson, *An Analysis of the U.S. Supreme Court’s Decision Making in Gay Rights Cases (1985-2000)*, 27 OHIO N.U. L. REV. 197 (2001) (discussing the future of homosexual rights in light of the Supreme Court’s application of the Equal Protection Clause to sexual orientation in *Romer*); Kyle C. Velte, *Paths to Protection: A Comparison of Federal Protection Based on Disability and Sexual Orientation*, 6 WM. & MARY J. WOMEN & L. 323, 351-54 (2000) (discussing cases where the Equal Protection Clause was applied to classifications based on sexual orientation).

<sup>142</sup> See *supra* Parts I.C, II.A (discussing the intent of Nebraska’s legislators in passing Initiative 416); see also *supra* Part II.B (setting forth the various proposed drafts to Initiative 416 and determining the breadth of the amendment’s language).

<sup>143</sup> 473 U.S. 432 (1985). The “rational basis” test has also been applied, for example, to state laws that discriminate on the basis of property ownership and when a state prevents aliens from holding local jobs that mimic government functions. See, e.g., *Quinn v. Millsap* 491 U.S. 95, 106-07 (1989) (using the rational basis test to invalidate a Missouri law that required an individual to own real property in the state to be appointed to a government board). But see *Ambach v. Norwick*, 441 U.S. 68 (1979) (upholding a New York law that required public school teachers to be United States citizens as rationally related to a legitimate state interest).

<sup>144</sup> *Cleburne*, 473 U.S. at 436. Specifically, the statute required that a special use permit would be required “for the construction of ‘[h]ospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions.’” *Id.* at 436-37.

<sup>145</sup> *Id.* at 442.

<sup>146</sup> *Id.* at 446.

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clubs, among other types of uses, did not require special use permits.<sup>147</sup> The distinction between many of these uses and group homes was particularly elusive, and the Court found that the City Council was apparently trying to assuage residents' prejudice against and fears of the mentally retarded, without any supporting evidence that a group home posed a special threat to the community.<sup>148</sup> The Court specifically noted the irrationality of barring group homes but permitting facilities of similar densities.<sup>149</sup> Rather than being based on the legitimate government purposes of safety and community stability, "this case appear[ed] . . . to rest on an irrational prejudice against the mentally retarded . . . ." <sup>150</sup>

One example of a law that constitutionally and rationally distinguished between two classes of individuals was addressed in *Heller v. Doe*.<sup>151</sup> There, the Court upheld a law that distinguished between the "mentally retarded" and the "mentally ill,"<sup>152</sup> Where the State of Kentucky had different standards for the involuntary commitment of the two groups.<sup>153</sup> Specifically, the mentally

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<sup>147</sup> For example, homes for drug addicts and the insane did require special use permits. *Id.* at 447.

<sup>148</sup> *Cleburne*, 473 U.S. at 448. The other factors included the location of the home near a school, or within a flood plain. Neither of these concerns was unique to the group home, which had been singled out as requiring a permit. *Id.* at 449.

<sup>149</sup> *Id.* at 449. The Court noted:

If there is no concern about legal responsibility with respect to other uses that would be permitted in the area, such as boarding and fraternity houses, it is difficult to believe that the groups of mildly or moderately mentally retarded individuals who would live at 201 Featherston would present any different or special hazard.

*Id.*

<sup>150</sup> *Id.* at 450.

<sup>151</sup> 509 U.S. 312 (1993).

<sup>152</sup> *Id.* at 315.

<sup>153</sup> *Id.* The court noted:

[A]t a final commitment hearing, the applicable burden of proof for involuntary commitment based on mental retardation is clear and convincing evidence, while the standard for involuntary commitment based on mental illness is beyond a reasonable doubt. . . . [I]n

retarded could be committed when their incapacity was established by clear and convincing evidence, while the mentally ill had to be proven incapacitated at a higher standard, beyond a reasonable doubt.<sup>154</sup> This distinction was deemed appropriate because mental retardation was usually diagnosed at an earlier age and with greater certainty than mental illness.<sup>155</sup> Thus the distinction bore a rational relation to a legitimate state interest—preventing inappropriate involuntary confinement.<sup>156</sup> Heterosexual and homosexual unmarried persons, however, are not distinguishable in the same manner as the groups in *Heller*, and Initiative 416 appears to be grounded, absent any other stated purpose, solely in prejudice against gays.

### 1. Religious Beliefs and Prejudicial Animus

One common basis propounded at the hearings for Initiative 416 was religion, an illegitimate basis for state laws.<sup>157</sup>

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commitment hearings for mental retardation, unlike for mental illness, ‘guardians and immediate family members’ of the subject of the proceeding ‘may participate . . . as if a party to the proceedings,’ with all attendant rights, including the right to present evidence and to appeal.

*Id.* (citations omitted).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 321.

<sup>156</sup> *Id.* at 328.

<sup>157</sup> The Nebraska statute, according to many of its supporters, is an effort to codify a Christian perspective on homosexual partnerships. *See, e.g., Hearing Conducted by Nebraska Secretary of State, supra* note 13, at 100 (Oct. 12, 2000) (“The wrath of God is being revealed from heaven against all the godlessness and wickedness of men who suppress the truth by their wickedness.”).

The Constitution expressly forbids the establishment of any state religion. *See* U.S. CONST. amend. I. The test generally applied to such laws examines “[f]irst, the statute must have a secular legislative purpose; second, its principal effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster an excessive government entanglement with religion.” *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *See also* *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994) (declaring that a state statute delegating authority over public schools to a religious group as

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Supporters of the amendment repeatedly referred to the biblical story of Adam and Eve.<sup>158</sup> There were also references to the “Judeo-Christian” foundation of the United States.<sup>159</sup> For example, one commentator noted, “Nebraska was settled by men and women of Christian faith who worked hard to produce their freedom to worship their God in the Church of their choice. The foundation of our ancestors’ faith was the Bible, the inspired word of God.”<sup>160</sup>

In *Loving v. Commonwealth of Virginia*, the Supreme Court rejected the contention that anti-miscegenation laws could be constitutionally based in religious beliefs.<sup>161</sup> There, the trial judge, whose decision was later overturned by the Court, invoked the intent of “almighty God” to keep the races separate.<sup>162</sup> This justification plainly did not pass constitutional muster.<sup>163</sup>

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unconstitutional).

<sup>158</sup> See *Hearing Conducted by Nebraska Secretary of State*, *supra* note 13, at 49 (Oct. 11, 2000), 84 (Oct. 12, 2000), 96 (Oct. 12, 2000).

<sup>159</sup> See *Hearing Conducted by Nebraska Secretary of State*, *supra* note 13, at 64 (Oct. 11, 2000) (“It will be determined if we continue to use the Judeo-Christian mind-set of the founding fathers that established the greatest nation ever, or if we will abandon what works and begin changing to a pagan mind-set that has demonstrated self-destructive repercussions for those using it”).

<sup>160</sup> See *Hearing Conducted by Nebraska Secretary of State*, *supra* note 13, at 96 (Oct. 12, 2000). Mark Bonkiewicz, a businessman residing in southwest Omaha, made this statement.

<sup>161</sup> 388 U.S. 1 (1967) (declaring that Virginia’s statute banning interracial marriage was an unconstitutional racial classification, in violation of the constitutional liberty to marry under due process of law).

<sup>162</sup> *Id.* at 3. Chief Justice Warren’s opinion quotes the trial judge as stating:

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.

*Id.*

<sup>163</sup> *Id.* at 12 (holding that statutes prohibiting interracial marriage deprived plaintiffs of “liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment”). *Id.* The Court proceeded to say that “[t]he freedom to marry has long been recognized as one of the

Religious beliefs can certainly offer no more of a sound a basis for laws expressing intolerance for homosexuals than for those founded in racial intolerance.<sup>164</sup>

Neither can animus and intolerance of same-sex relationships be a constitutionally permissible basis for Initiative 416. As the Supreme Court noted in *Palmore v. Sidoti*, “[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”<sup>165</sup> In *Palmore*, parents were litigating the custody of their daughter.<sup>166</sup> The father sought to modify a prior judgment granting custody to the mother, due to “changed conditions”—the mother’s relationship with a black man.<sup>167</sup> The father proposed that a child growing up

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vital personal rights essential to the orderly pursuit of happiness by free men.”  
*Id.*

<sup>164</sup> See *Bowers v. Hardwick*, 478 U.S. 186, 211 (1986) (Blackman J., dissenting).

That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.

*Id.* A thorough analysis of attempts to invoke religion to validate legislative classifications on the basis of sexual orientation is beyond the scope of this article, although this has been thoughtfully explored elsewhere. See generally William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411 (1997) (drawing comparisons between sexual orientation and religion as “identity characteristic[s] that [are] both physically invisible and morally polarizing”); John V. Harrison, *Peeping Through the Closet Keyhole: Sodomy, Homosexuality, and the Amorphous Right of Privacy*, 74 ST. JOHN’S L. REV. 1087 (2000) (concluding that, despite the nation’s efforts to protect sexual liberties, many individuals are still considered criminals “because of the way they privately express the most basic of human instincts”).

<sup>165</sup> 466 U.S. 429, 433 (1984).

<sup>166</sup> *Id.* 430-31.

<sup>167</sup> *Id.* at 430. The Court articulated the father’s challenge as stating that “the child’s mother was then cohabiting with a Negro . . . whom she married two months later. Additionally, the father made several allegations of instances

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in a racially mixed household would potentially face community scorn.<sup>168</sup> The Florida state courts found credence in this argument, though the Supreme Court soundly rejected it.<sup>169</sup> Similarly, in order to uphold Initiative 416, the courts would have to come to the improbable conclusion that religious or societal intolerance are legitimate bases for unequal treatment of homosexuals, but are not adequate bases for unequal treatment of the races.<sup>170</sup>

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in which the mother had not properly cared for the child.” *Id.*

<sup>168</sup> *Id.* at 430. Specifically, the father presented recommendations from the court counselor in an earlier case describing the social consequences of an interracial marriage. *Id.* The lower court accepted the recommendation for a change in custody because the wife had “chosen for herself and for her child, a life-style unacceptable to the father and to society . . . . The child . . . is, or at school age will be subject to environmental pressures not of choice.” *Id.*

<sup>169</sup> *See id.* at 431. The Court noted:

The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother. The Constitution cannot control such prejudice, but neither can it tolerate it. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

*Id.*

<sup>170</sup> This conclusion has been noted in other judicial opinions ruling on the constitutionality of sexual orientation based legislative classifications. *See, e.g.,* Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995) (noting that sexual orientation appears to possess most or all of the characteristics that have persuaded the Supreme Court to apply strict or heightened constitutional scrutiny to legislative classifications under the Equal Protection Clause); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F.Supp. 1361 (N.D. Cal. 1987) (noting that a Department of Defense policy reflected irrational prejudice and outmoded stereotypes and notions about homosexuals); *see also* Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985).

Another commentator has noted that legislative bans on same-sex marriages ought to be declared unconstitutional on the same basis that the Supreme Court invalidated racially discriminatory marriage statutes. *See* MERIN, *supra* note 7, at 236. Specifically, Merin states:

Full recognition of same-sex marriages in the United States will be possible only if and when the U.S. Supreme Court decides that both

## 2. Preservation of Marriage

Another basis put forth for Initiative 416 is that it protects and stabilizes the institution of marriage in Nebraska.<sup>171</sup> There is no evidence, however, that barring gays access to their legislators enhances the stability of marriage.<sup>172</sup> While protecting

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state and federal DOMAs are unconstitutional and that states cannot constitutionally invoke a public policy exception to refuse recognition of out-of-state same-sex marriages, as it did in the case of anti-miscegenation laws more than thirty years ago.

*Id.*

<sup>171</sup> See Family First, *Capitol Watch*, at 3 (Apr. 3, 2002) (supporting Initiative 416 because it would reinforce the traditional understanding of marriage instead of weakening and destroying it by introducing other forms of marriage), available at <http://www.familyfirst.org/capitolwatch/1000.pdf>. See also Pam Belluck, *Nebraskans to Vote on Most Sweeping Ban on Gay Unions*, N.Y. TIMES, Oct. 21, 2000, at 9 (quoting former Governor Bob Nelson saying Initiative 416 “makes a statement for traditional marriage” and that a homosexual union “was not a moral relationship”); Stephen Buttry & Leslie Reed, *Voters OK Same Sex Union Ban*, OMAHA WORLD-HERALD, Nov. 8, 2000, at 1 (quoting Bill Ramsey, Co-Chairman of the Nebraska Coalition for the Protection of Marriage, hailing the passage of Initiative 416 as a vital message saying, “Marriage as we know it, respect it and love it has been preserved”).

<sup>172</sup> See Lambda Legal Defense and Education Fund, *Get the Facts: Talking About the Freedom to Marry: Why Same-Sex Couples Should Have Equality in Marriage* (June 20, 2001) (arguing that allowing same-sex couples to marry promotes stability in the community in the same way opposite sex marriage does) at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=47>. The article argues:

Same-sex couples build their lives together like other couples, working hard at their jobs, volunteering in their neighborhoods, and valuing the responsibilities and love that their family commitments provide to them and to the children they may have. These families have everyday concerns, like being financially sound, emotionally and physically healthy, and protected by adequate health insurance. These concerns heighten when there are children in the family. Marriage provides tangible protections that address many of these concerns. Promotion of support and security for families is a benefit to the entire community; it does not de-stabilize other families. Equal access to marriage will also emphasize equality and non-discrimination for all of society.

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families and marriages is indisputably a legitimate state interest, the amendment bears no rational relation to this end.<sup>173</sup>

Initiative 416 was enacted to protect marriage, undoubtedly a legitimate state interest. Yet the distinction made between unmarried homosexuals and heterosexuals undermines the assertion that the law is related to the protection of traditional marriage.<sup>174</sup> The law is under-inclusive inasmuch as it does not

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*Id.*

<sup>173</sup> State legislatures are permitted to regulate issues of domestic law, and state courts are granted jurisdiction to determine issues of application and interpretation of these issues. *See supra* note 11 (discussing the reservation of issues of domestic law to the states). Because Initiative 416 limits the rights of homosexuals in the State and establishes a legislative distinction between heterosexual relationships and homosexual relationships, the amendment will merit rational basis scrutiny for examination as to whether the distinction is rationally related to a legitimate government interest. *See supra* Part III.A (discussing the application of the rational basis test to legislative classifications based on sexual orientation).

<sup>174</sup> Proponents of anti-miscegenation laws in *Loving* noted that the laws applied equally to blacks and whites as an attempt to characterize the laws as equitable. *See Loving v. Virginia*, 388 U.S. 1, 7 (1967). Initiative 416, however, cannot be similarly defended, because gays and heterosexuals are treated dissimilarly.

Additionally, legislation protecting “traditional” family structures has occasionally been rejected by courts on the basis that there is no single established definition of the makeup of a “traditional” family. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (refusing to establish a bright line definition of family by “cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family”); *Smith v. Org. of Foster Families*, 431 U.S. 816, 843-44 (1977) (noting the difficulty of defining family for Due Process purposes and considering factors other courts have considered in making such a determination); *see, Alber v. Ill. Dep’t of Mental Health & Developmental Disabilities*, 786 F.Supp. 1340, 1367 n.25 (N.D. Ill. 1992). In *Alber*, the court noted:

[T]he Supreme Court has specified that neither the traditional “boundary of the nuclear family” nor the existence of blood relationships nor the legitimacy of a family arrangement under state law defines the boundaries of family rights. Lower courts are thus free, within the limits marked out by the Court, to determine that a particular non-nuclear or non-biological family merits constitutional protection.

ban non-marriage relationships between heterosexuals, belying the proponents' political animus towards homosexuals.<sup>175</sup> This sort of political animus rendered the Colorado law at issue in *Romer v. Evans* a violation of the Fourteenth Amendment.<sup>176</sup>

Moreover, Nebraska's courts have already upheld cohabitation agreements between unmarried heterosexual couples.<sup>177</sup> The Supreme Court of Nebraska considered a cohabitation agreement in *Kinkenon v. Hue* and stated that "[t]he record shows that sexual services did not form the basis for the agreement between the parties. For that reason, this agreement does not violate public policy."<sup>178</sup> Implicit in this decision is that contracts of cohabitation outside of marriage are not void or against the state's public policy, at least when created between heterosexual partners.

The distinction between gay and heterosexual unmarried couples is also undermined by decisions from other jurisdictions. For example, in *Baehr v. Miike*, the Hawaii court determined, after extensive hearings, that there were no negative implications for children raised by same-sex parents.<sup>179</sup> Additionally, the

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*Id.*

<sup>175</sup> As noted, Initiative 416 bans only "same-sex relationships" but does not apply to similar arrangements between opposite sex couples. *See* NEB. CONST. art. I, § 29.

<sup>176</sup> 517 U.S. 620, 631 (1996).

<sup>177</sup> *See* *Kinkenon v. Hue*, 301 N.W.2d 77 (Neb. 1981) (holding that parties entered into an oral contract whereby the appellant was to perform certain services, including housework, for the appellant in exchange for a home to live in for the rest of her life and that this contract was specifically enforceable). *See also* *Wolf v. Mangiamiele*, No. A-97-284, 1998 WL 902572 (Neb. Ct. App. Sept. 15, 1998) (noting that agreements between parties engaged in non-marital, but presumptively sexual, relationships, are valid and enforceable as long as sexual services do not form the basis of the agreement).

<sup>178</sup> *Kinkenon*, 301 N.W.2d at 80.

<sup>179</sup> 1996 WL 694235, at \*5 (Haw. Cir. Ct. Dec. 3, 1996). The Hawaii court found that there was insufficient evidence to establish or prove any adverse consequences resulting from same-sex marriage. *Id.* In its hearings, the court found that although a father and a mother provide a child with unique paternal and maternal contributions important to the development of a happy, healthy and well-adjusted child, such contributions are not essential. *Id.* The evidence presented established that the most important factor in the

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Supreme Court of Vermont found that denying the benefits and protections of marriage to children of same-sex households posed a greater risk to families.<sup>180</sup> Other courts have arrived at similar conclusions in the context of parental custody and adoption rights.<sup>181</sup> Thus, Initiative 416 not only runs afoul of the Fourteenth Amendment, it also destroys the very interests it seeks to protect—family stability and marriage.

## IV. FULL FAITH AND CREDIT AND INITIATIVE 416

The second sentence of Initiative 416 also violates the Full Faith and Credit Clause of the United States Constitution.<sup>182</sup> The Clause requires that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws

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development of a happy, healthy and well-adjusted child is the nurturing relationship between parent and child. *Id.* The sexual orientation of parents is not, alone, an indicator of parental fitness and does not automatically disqualify them from being good, fit, loving or successful parents. *Id.*

<sup>180</sup> See *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999); see also *Baehr v. Lewin*, 852 P.2d 44, 58 (Haw. 1993) (listing the numerous protections afforded families in marriage including child support rights).

<sup>181</sup> See, e.g., *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (holding that a biological mother's same-sex former domestic partner had standing to seek joint legal custody of, and visitation with, mother's biological children); *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002) (holding that unmarried same-sex partners could adopt a child without the legal parent relinquishing his or her parental rights); *Titchenal v. Dexter*, 693 A.2d 682 (Vt. 1997) (finding that same-sex couples may have recourse in the courts in the event that a custody dispute results from the breakup of relationship); *In re B.L.V.B.*, 628 A.2d 1271, 1275 (Vt. 1993) (holding that an unmarried same-sex partner could adopt her partner's biological child); see also Susan Becker, *Re-Orienting Law and Sexuality: Second-Parent Adoption by Same-Sex Couples in Ohio: Unsettled and Unsettling Law*, 48 CLEV. ST. L. REV. 101 (2000); Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341 (2002); Linda Whobrey Rohman et al., *The Best Interests of the Child in Custody Disputes*, in *PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS* 59 (L.A. Weithorn ed., 1987).

<sup>182</sup> U.S. CONST. art. IV, § 1.

prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effects thereof.”<sup>183</sup> Since no state currently allows same-sex marriage, the first sentence of Nebraska’s amendment has no immediate implications.<sup>184</sup> Additionally, the so-called “public policy exemption” to the Full Faith and Credit Clause may permit states to decline recognition of marriages that violate the state’s public policy.<sup>185</sup> The federal

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<sup>183</sup> *Id.*

<sup>184</sup> As noted, the first sentence of Initiative 416 bans only same-sex marriage, and other states have passed similar laws. *See supra* notes 1, 3 (discussing the text of Initiative 416 and noting that similar laws have been passed in other states). Moreover, the force of the Full Faith and Credit Clause has been questioned in the context of recognition of out-of-state marriages. *See, e.g., MERIN, supra* note 7, at 231 (noting that “it is debatable whether the U.S. Constitution will compel such recognition, because the Full Faith and Credit Clause has not commonly been relied upon by courts in determining whether they should recognize out-of-state marriages (e.g., common law marriages) that could not have been performed within the jurisdiction”).

<sup>185</sup> *See, e.g., Matlock v. R.R. Ret. Bd.*, 166 F.3d 347 (10th Cir. 1998). In *Matlock*, the plaintiff filed an application for disabled widow’s insurance benefits under the Railroad Retirement Act, on account of a deceased wage earner. *Id.* In denying the application, the court stated the general rule that “[a] marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.” *Id.* *See also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 283 (1996) (examining the “public policy” exception in the context of the Full Faith and Credit Clause).

There is debate as to whether, in the event one state recognizes the right of same-sex couples to marry, other states can avoid recognition of such marriages on the basis of this public policy exception. *See MERIN, supra* note 7, at 232. Specifically, MERIN notes:

Notwithstanding the Full Faith and Credit Clause, in situations involving marriage validity, and according to traditional choice-of-law rules, courts have generally followed the rule of *lex celebratonis*, which states that a marriage valid where entered into should be recognized as valid everywhere, and the tendency in American conflicts cases is to validate marriages entered into in other jurisdictions, unless the legislature has rejected the rule of validity or the marriage is so abominable that validating it would offend the

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DOMA reinforced this exception.<sup>186</sup> There is, however, no basis

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public policy sense of morality.

*Id.* Accordingly, and because “each state has its own conflicts doctrine, many states look to the *Restatement (Second) of Conflicts of Laws* (1996) for direction.” *Id.* Other commentators have made similar observations. *See, e.g.,* Sylvia Law, *Access to Justice: The Social Responsibility of Lawyers: Families and Federalism*, 4 WASH. U. J.L. & POL’Y 175, 217 (2000) (“Several states, such as California, adopted rules stating that any marriage valid in the place contracted is valid in their state. Other states take a more restrictive approach and refuse to recognize marriages that violate a strong public policy of the state.”); Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1439 (1997) (observing that while the general rule is *lex celebrationis*, some states employ an exception to the rule “if honoring a sister state’s marriage would violate an important public policy of the enforcing state”); Note, *In Sickness and in Health, in Hawaii and Where Else?: Conflicts of Laws and Recognition of Same-Sex Marriages*, 109 HARV. L. REV. 2038, 2043 (1996) (“Although each state has its own conflicts doctrine, many states look to the Restatement for direction.”).

<sup>186</sup> *See* H.R. REP. NO. 104-664, at 7 (1996) (finding that the purpose of the legislation is to defend the institution of traditional heterosexual marriage and to protect the rights of the states to formulate their own public policy regarding the legal recognition of same-sex marriages). It should be noted, however, DOMA does not require that states recognize same-sex unions.

Other commentators have made similar observations. *See, e.g.,* MERIN *supra* note 7, at 228-29. Merin notes that “[a]lthough a provision in DOMA allows states not to recognize same-sex marriages performed in another state, the act does not mandate that states disregard such marriages.” *Id.* He further states that, “each state needs to determine individually whether to take advantage of the act’s exception to the Full Faith and Credit Clause of the U.S. Constitution.” *Id.* at 229; *see also* Leonard G. Brown III, *Constitutionally Defending Marriage: The Defense of Marriage Act, Romer v. Evans and the Cultural Battle They Represent*, 19 CAMPBELL L. REV. 159, 169 (1996) (stating that section 2 of DOMA uses the words, “No State . . . shall be required,” which clearly shows that Congress did not intend to require a state to do anything; they are merely recognizing an already existing state right to disregard an act, judgment or decree when it violates a state’s legitimate public policy); Diane M. Gillerman, *The Defense of Marriage Act: The Latest Maneuver in the Continuing Battle to Legalize Same-Sex Marriage*, 34 HOUS. L. REV. 425, 463 (1997) (making the argument that DOMA does not attempt to govern the resolution of the same-sex marriage issue within each state, impose a choice of either recognition or non-recognition on the states, attempt to define marriage for state law purposes, impose any

for Nebraska to refuse to acknowledge contracts entered into by same-sex couples prior to entering the state, as legal instruments cannot be denied recognition based on a public policy exception.<sup>187</sup> Rather, conflicts of laws doctrines require a court to determine what law to apply to adjudicate a claim.<sup>188</sup>

Nor is there any “‘roving public policy exception’ to the full faith and credit due *judgments*.”<sup>189</sup> Cases that are routinely cited for such an exception were severely limited in scope by the Supreme Court in *Baker v. General Motors Corp.*<sup>190</sup> There, the Court stated that “[i]n assuming the existence of a ubiquitous ‘public policy exception’ permitting one State to resist recognition of another State’s judgment, the District Court . . . misread our precedent.”<sup>191</sup> Accordingly, a decision by one state’s court to recognize a contract as legally binding is not necessarily

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affirmative law regarding the issue or “commandee[r] the legislative processes of the States”).

<sup>187</sup> See MERIN, *supra* note 7, at 228-31 (discussing the issue of whether a state can disregard a legal same-sex marriage of another state based on policy reasons); see also Monrad G. Paulsen & Michael I. Sovern, “*Public Policy*” in *the Conflict of Laws*, 56 COLUM. L. REV. 969, 980-81 (1956) (discussing the dubious term “public policy” for a state’s justification for having its own law applied).

<sup>188</sup> For a more expansive discussion of the matters at issue in conflict of law cases, see generally Mark P. Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893 (1988) (explaining that conflict of laws is the body of legal doctrine that seeks to provide a basis for choosing a substantive rule, in tort or contract, over the conflicting rule of another state).

<sup>189</sup> *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (finding that an injunction, entered by a Michigan county court pursuant to parties’ stipulation in an employee’s wrongful discharge action, barring a former employee from testifying as a witness did not reach beyond the controversy between the employee and the manufacturer to control proceedings elsewhere, and, therefore, the employee could testify in a Missouri products liability case without violating the Full Faith and Credit Clause). *Id.*

<sup>190</sup> *Id.* at 234 (finding that there is no public policy exception to the Full Faith and Credit Clause). See also *Kent County v. Shephard*, 713 A.2d 290, 296-97 (Md. 1998) (stating that the forum state is not required to give Full Faith and Credit to the statutes of another state when contemplating an issue upon which the forum state is competent to legislate).

<sup>191</sup> *Baker*, 522 U.S. at 234.

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one that can be accepted or rejected in another jurisdiction based on a supposed divergent “public policy.”<sup>192</sup>

Legislators misstated the law in the Congressional Report on DOMA, claiming that the “U.S. Supreme Court has recognized a public policy exception that, in certain circumstances, would permit a State to decline to give effect to another state’s laws.”<sup>193</sup> In fact, one of the two cases Congress relied upon was limited by the Supreme Court to mean only that “a court may be guided by the forum State’s ‘public policy’ in determining the law applicable to a controversy” in court.<sup>194</sup> The case at issue, *Nevada v. Hall*, speaks only to choice of law.<sup>195</sup> There, a vehicle owned by the State of Nevada was involved in a traffic accident in California.<sup>196</sup> The law of Nevada limited the State’s liability for tort actions to \$25,000.<sup>197</sup> California law had no such limit, and the California state courts chose to apply California law in the case.<sup>198</sup> Addressing the controversy, the Supreme Court stated that the “Full Faith and Credit Clause does not require one state

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<sup>192</sup> *Id.* This question is a matter of significant debate, and the Supreme Court has not established a bright-line rule for determining what matters will necessarily fall within the domain of mandatory recognition under the Full Faith and Credit Clause. *See, e.g.,* Paulsen & Sovorn, *supra* note 187, at 980-81 (noting traditional but dubious use of the term “public policy” to obscure “an assertion of the forum’s right to have its [own] law applied to the [controversy] because of the forum’s relationship to it”).

<sup>193</sup> *See* H.R. REP. NO. 104-664, at 9 (1996). This statement was in reference to the Supreme Court’s decision in *Nevada v. Hall*, 440 U.S. 410, 424 (1979) (noting the Full Faith and Credit Clause does not require States to apply another’s law in violation of the State’s own public policy). *Id.* at 9 n.27.

<sup>194</sup> *See Baker*, 522 U.S. at 233. In *Baker*, the Supreme Court invoked *Nevada v. Hall* specifically for the proposition that “[a] court may be guided by the forum State’s ‘public policy’ in determining the law applicable to a controversy.” *Id.* (citing *Hall*, 440 U.S. at 421-24). The Court immediately clarified this position, stating that Supreme Court precedent “support[s] no roving ‘public policy exception’ to the full faith and credit due judgments.” *Baker*, 522 U.S. at 233 (citing *Estin v. Estin*, 334 U.S. 541, 546 (1948)).

<sup>195</sup> 440 U.S. at 414 (1979). *See also Baker*, 422 U.S. at 233.

<sup>196</sup> *Nevada*, 440 U.S. at 411.

<sup>197</sup> *Id.* at 412.

<sup>198</sup> *Id.* at 411.

to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state . . .” in the context of a court proceeding.<sup>199</sup>

The second case specifically cited in DOMA report dealt with a similar conflict of laws.<sup>200</sup> In *Alaska Packers Association v. Industrial Accident Commission of California* the conflict was whether, in the context of determining a worker’s compensation award for work-related injuries, “the full faith and credit clause [sic] require[d] the state of California to give effect to the Alaska statute rather than its own.”<sup>201</sup> Public policy was not an issue, and the Court examined only which state had greater interest in the controversy.<sup>202</sup> The Court rejected the argument that full faith and credit required application of Alaska law because the contract was signed in California and the accident at issue occurred there.<sup>203</sup> Ultimately, California’s interest in enforcing its compensation act outweighed any competing interests of the State of Alaska.<sup>204</sup>

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<sup>199</sup> *Id.* at 422-23.

<sup>200</sup> See H.R. REP. NO. 104-664, at 9 (1996) (citing *Alaska Packers Ass’n v. Industrial Comm’n*, 294 U.S. 532, 547 (1935), to support the proposition that “the U.S. Supreme Court has recognized a public policy exception that, in certain circumstances, would permit a State to decline to give effect to another State’s laws”).

<sup>201</sup> 294 U.S. at 546 (1935). In *Alaska Packers*, an employer challenged a compensation award that was made in conformity with the statutes of California, where the contract of employment was entered into, rather than Alaska, where the employment was performed and the injuries occurred. *Id.* at 550.

<sup>202</sup> *Id.* at 548-49. Specifically, the court noted that it was within the power of California’s legislature to enact the statute in question and that the state’s exercise of that power infringed no constitutional provision. *Id.* at 548. On the issue of conflicting state interests, the court stated that “[p]rima facie every state is entitled to enforce in its own courts its own statutes . . . One who challenges that right . . . assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum.” *Id.* at 547-48.

<sup>203</sup> *Id.* at 540.

<sup>204</sup> *Id.* at 550 (concluding that “[t]he interest of Alaska is not shown to be superior to that of California. No persuasive reasoning is shown for denying to California the right to enforce its own laws in its own court.”).

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The second sentence of Initiative 416, insofar as it attempts to invalidate domestic partnership unions and contracts entered into in other states, is therefore unconstitutional under current application of the Full Faith and Credit Clause.<sup>205</sup> Nebraska

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<sup>205</sup> Supporters of the Vermont civil unions law have also recognized that problems may exist for nonresidents who obtain a civil union license in Vermont but seek to enforce in their home state the rights granted by the civil union in Vermont. *See, e.g.*, Lambda Legal Defense and Education Fund, *Vermont Civil Unions Law to Take Effect: Putting Fairness in Full Swing* (June 30, 2000) (stating that it is unclear how home states will treat civil unions between residents obtaining a Vermont civil union), available at [http://www.lambdalegal.org/cgi\\_bin/iowa/documents/record?record=656](http://www.lambdalegal.org/cgi_bin/iowa/documents/record?record=656); Vermont Freedom to Marry Organization (cautioning that it is unknown how home states will respond to civil unions and encouraging nonresidents to continue using contractual means to protect their interests), at <http://www.vtfreetomarry.org/civilunions.html> (last visited Dec. 2, 2002). Additionally, the Vermont Secretary of State warns of potential problems nonresidents may encounter in the dissolution of a civil union. *See* Vermont Office of the Secretary of State, *The Vermont Guide to Civil Unions*, available at <http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html> (last visited Jan. 21, 2003) (warning that although dissolution of civil unions is handled by the Vermont Family Court, there is a residency requirement, and it is unclear how other states will handle civil union dissolutions).

Furthermore, it appears that states with statutes that conflict with the Vermont civil union law, or any law providing domestic partnership benefits, may have a slight barrier in applying state law to the enforcement of such contracts. The Supreme Court has held that a forum state does not violate the Full Faith and Credit Clause by electing to apply its own substantive law to a matter of contract interpretation as long as the forum state has sufficient contacts with the parties or occurrences that would not render the application of the law arbitrary or unfair. *See, e.g.*, *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (allowing Minnesota to apply its law to an insurance contract executed by Wisconsin drivers in Wisconsin); *Carroll v. Lanza*, 349 U.S. 408 (1955) (agreeing that an Arkansas court could apply Arkansas law to an employment contract executed between a Missouri employee and employer); *Watson v. Employers Liab. Assurance Corp.*, 348 U.S. 66 (1954) (upholding application of Louisiana law to an action against an insurer on a policy even though the contract was negotiated and issued in Massachusetts). The common theme in each of these cases is that the forum state had significant contacts with the parties, justifying application of its own law.

Another example is *Rosengarten v. Downes*, 802 A.2d 170 (Conn. App. Ct. 2002). In *Rosengarten*, Connecticut residents obtained a civil union in

cannot refuse to recognize rights or benefits extended to homosexuals under valid, enforceable contracts enacted in other states.<sup>206</sup> Supreme Court precedent sets forth a method to determine which state's law to apply to adjudicate a controversy regarding an incident, instrument or contract from another state, but does not permit a state to deny recognition of a contract on the basis of its fundamental validity. There is no public policy exception to the Full Faith and Credit Clause that would permit them to do so.<sup>207</sup>

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Vermont and sought to dissolve the union under Connecticut family relations law. *Id.* at 172-74. The Connecticut court, applying Connecticut family law, found that the Vermont civil union was not a family relations matter as defined in the Connecticut statute, and, therefore, the court lacked jurisdiction to dissolve a civil union not recognized by Connecticut law. *Id.* at 175-76, 179-80.

<sup>206</sup> As noted, the argument that such a decision would fall within the "public policy" exception of the Full Faith and Credit Clause is debatable, and some commentators have argued that only marriages performed in other states could be unenforceable if challenged. *See, e.g.,* MERIN, *supra* note 7, at 231. *But see* L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will States Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 30, 36 (1998) (noting the continued vitality of the public policy exception to choice of law and the ability of states to refuse to recognize same-sex marriages using the exception as a moral objection to homosexual acts); Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 47 (1998) (arguing that a home state clearly has the right to refuse recognition of an out-of-state same-sex marriage using the public policy doctrine and that constitutional objections to such a conclusion based on violation of the Establishment Clause or discrimination against the sister state are unfounded).

<sup>207</sup> Even if the public policy exception were well settled, it could be considered inconsistent with Supreme Court precedent to invoke the exception in the context of marriage. *See* MERIN, *supra* note 7, at 235. Merin points out that, even if the public policy exception in the Full Faith and Credit Clause were available to defend state and federal DOMAs, and these laws "passed constitutional muster, there are scholars who claim that states would still be obliged to recognize out-of-state marriages, building on precedents pertaining to recognition of interracial marriages, according to which it would be wrong to invoke a public policy exception for same-sex marriages." *Id.* at 235 n.289 (citing Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998); Mark Strasser, *For Whom the Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriage*, 66 U.

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## V. INITIATIVE 416 AND THE CONTRACTS CLAUSE

The Contracts Clause of the Constitution, mandating that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts” may also present fertile ground for legal challenges to Initiative 416.<sup>208</sup> Gay couples routinely enter into contracts to provide a measure of security in their relationships.<sup>209</sup> These contracts create, among other things, inheritance rights, powers of attorney and insurance rights.<sup>210</sup> The sum result is a relationship commonly referred to as a “domestic partnership.” Some commentators fear that the second sentence of Initiative 416 would bar judicial enforcement of such contracts in the event that a court interprets them as creating a “domestic partnership” or “same-sex relationship.”<sup>211</sup>

*A. Current Application of the Contracts Clause*

The Contracts Clause applies only to state laws that are very likely to implicate contracts, and the Supreme Court has

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CIN. L. REV. 339 (1998)).

<sup>208</sup> U.S. CONST. art. IV, § 1.

<sup>209</sup> See generally, DUFF, *supra* note 91 (discussing “spousal equivalent” contracts); see also *Lambda Life Planning*, *supra* note 91 (exploring the various types of documents drafted to create legal rights and remedies to same-sex couples).

<sup>210</sup> See *Lambda Life Planning*, *supra* note 91 and accompanying text (illustrating various contracts and legal documents protecting the rights of same-sex couples).

<sup>211</sup> See Pam Belluck, *Nebraskans to Vote on Most Sweeping Ban on Gay Unions*, N.Y. TIMES, Oct. 21, 2000, at A9 (discussing fear that the amendment would dissuade employers and insurers from offering health benefits for same-sex partners, and that government agencies and institutions would interpret Initiative 416 in such a way as to prevent gays from making decisions about their hospitalized partners or adoption of their partner’s children); Leslie Reed, *Gays Fear Measure’s Effect on Contracts*, OMAHA WORLD-HERALD, Oct. 15, 2000. Reed analogizes marriage to a contract, and suggests that without honoring the relationship, you cannot honor the contract. *Id.* Similarly, contracts held by a gay partner providing benefits might be legally challenged by “anti-gay groups, by estranged family members or even by insurance carriers reluctant to pay on a large claim.” *Id.*

explicitly declared that it “will not strain to reach a constitutional question by speculating that [one state’s] courts might in the future interpret” the law to implicate contracts.<sup>212</sup> There is, however, no leap of reasoning required to find that Initiative 416 will cover contracts between same-sex partners.

The Supreme Court has articulated two standards to examine claims of state imposed impairment of contracts. The more stringent rule was outlined in *Allied Structural Steel Co. v. Spannaus*.<sup>213</sup> First, there must be a substantial impairment of contractual rights.<sup>214</sup> To be upheld, the impairment must (1) address an emergency; (2) protect a basic societal interest and not a favored group; (3) be appropriately tailored; (4) impose only reasonable conditions on contracts; and (5) be of limited duration.<sup>215</sup> *Allied* involved a challenge to a Minnesota state law that targeted a specific corporation and altered its pension

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<sup>212</sup> *Exxon Corp. v. Eagerton*, 462 U.S. 176, 189 (1983). In *Exxon*, Alabama oil and gas producers sought a declaration that an Alabama statute increasing severance tax on oil and gas extracted from Alabama wells while exempting royalty owners from the increase and prohibiting producers from passing the cost increase on to their consumer-purchasers was unconstitutional. *Id.* The Supreme Court held that the royalty-owner exception did not violate the Contracts Clause because the exemption did not suggest that any contractual obligations of which appellants were the beneficiaries would be nullified. *Id.*

<sup>213</sup> 438 U.S. 234 (1978). In *Allied Structural Steel* an employer challenged a state law, the Private Pension Benefits Protection Act, under which a private employer of 100 or more employees who provided pension benefits and met other specified requirements, was subject to a “pension funding charge” if he terminated the plan or closed the Minnesota office. *Id.* at 236. The Supreme Court found the statute unconstitutional as a violation of the Contracts Clause. *Id.* at 251.

<sup>214</sup> *Id.* at 245 (“Severe impairment . . . will push the inquiry to a careful examination of the nature and purpose of the state legislation” in light of “the high value the Framers placed on the protection of private contracts.”). Here, the court found the Act severe because a basic term of the pension contract was substantially modified. *Id.* at 246. The change was one the company “relied on heavily, and reasonably . . . in calculating its annual contributions to the pension fund.” *Id.*

<sup>215</sup> *Id.* at 242.

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contracts,<sup>216</sup> expanding the company's payout obligations to retired employees.<sup>217</sup> The Supreme Court overturned the statute, finding that it violated each of the requirements of the Contracts Clause and stating that Minnesota "grossly distorted" the contractual relationships of the corporation to its employees.<sup>218</sup>

The second test applicable to laws allegedly impairing contracts was articulated in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*<sup>219</sup> The Court did not overturn the *Allied* test, but modified it to incorporate the following three questions: (1) has a substantial impairment of contractual rights taken place; (2) is there a significant and legitimate public purpose; (3) if there is a valid public purpose, is the adjustment of contractual rights appropriate to that public purpose?<sup>220</sup> The Court applied this test to a Kansas law placing price caps on the sale of natural gas that were more stringent than those to which suppliers and purchasers agreed.<sup>221</sup> There, the substantial impairment had an important public purpose—protecting consumers from indefinite price increases due to energy deregulation.<sup>222</sup> The law was appropriately tailored because it simply slowed price increases and supplemented federal regulation of intrastate gas prices.<sup>223</sup> These cases demonstrate

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<sup>216</sup> *Id.* at 239. Specifically, the plaintiff employer challenged the Minnesota Private Pension Benefits Protection Act. The 1974 law provided that a private employer with at least 100 employees, among which at least one was a Minnesota resident, was subject to a pension funding charge if he terminated the pension plan or closed the Minnesota office. MINN. STAT. § 181B.01 (1974).

<sup>217</sup> *Id.* at 240. The Minnesota law "substantially altered those relationships by superimposing pension obligations upon the company, conspicuously beyond those that it had voluntarily agreed to undertake." *Id.*

<sup>218</sup> *Id.* at 249.

<sup>219</sup> 459 U.S. 400 (1983).

<sup>220</sup> *Id.* at 411-12.

<sup>221</sup> *Id.* at 413-19.

<sup>222</sup> *Id.* at 417. The Court specifically noted that "Kansas has exercised its police power to protect consumers from the escalation of natural gas prices caused by deregulation." *Id.*

<sup>223</sup> *Id.* at 417. The Court reasoned that the state had a legitimate interest in "correcting the imbalance between the interstate and intrastate markets,"

that, while the Contracts Clause does not obliterate states' police power, the Constitution limits the extent to which states can interfere with contracts.<sup>224</sup>

*B. Application of Contracts Clause Principles to Initiative 416*

Analysis of the Nebraska law begins with considering whether it actually impairs contractual rights. Scrutiny would then turn on whether adjustment of those contractual rights furthers a significant and legitimate public interest.

*1. Substantial Impairment*

The reality of gay couples in the United States is that contracts are essential mechanisms to delineate relationships, both between same-sex partners and gay employees and their employers.<sup>225</sup> Therefore any court reviewing Initiative 416 need not "speculate" that the law will apply to same-sex relationships

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because it was "coordinat[ing] the intrastate and interstate prices by supplementing the federal Act's regulation of intrastate gas." *Id.* The Court further justified the Kansas act by stating that Congress had contemplated this type of supplementation, as evidenced in the House and Senate Conference Reports on the federal act. The court quoted the conference reports which stated that the federal act was not to invalidate any State's authority to establish or enforce any maximum lawful price for sales of gas in intrastate commerce, including any indefinite price escalator clause, not exceeding the applicable maximum lawful price, if any, under Title I of the Act. *Id.* at 417 (quoting S. CONF. REP. NO. 95-1126, at 124-25 (1978); H.R. REP. NO. 95-1752, at 124-25 (1978)).

<sup>224</sup> See *Allied Structural Steel Co. v. Spannaus*, 428 U.S. 234, 240 (1978) (noting that the Contracts Clause "is not, however, the Draconian provision that its words might seem to imply"); see also Samuel R. Olken, *Charles Evans Hughes and the Blaisdell Decision: A Historical Study of Contract Clause Jurisprudence*, 72 OR. L. REV. 513, 516 (1993) (providing a historical analysis of the Contracts Clause jurisprudence to suggest that the Supreme Court has tried to keep states from interfering with contracts while recognizing the importance of state governmental police powers).

<sup>225</sup> See *Lambda Life Planning*, *supra* note 91 and accompanying text (discussing the use of contracts and other legal documents created to protect and define the rights and obligations of same-sex couples).

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built upon contracts.<sup>226</sup>

In *Keystone Bituminous Coal Ass'n v. DeBenedictis* the Supreme Court addressed a law that did not directly implicate contractual relations but had a substantial impact on them.<sup>227</sup> The law at issue required coal-mining companies to leave fifty percent of coal in mines to prevent dangerous cave-ins at the surface.<sup>228</sup> Coal mining companies routinely owned or leased subsurface mineral rights, and the surface owners faced the risk of cave-ins.<sup>229</sup> Because the statute required that certain amounts of coal be

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<sup>226</sup> As noted, the Supreme Court has declared that it will refuse to speculate as to whether a legislative scheme will interfere with contract rights. *See Exxon Corp. v. Eagerton*, 462 U.S. 176, 189 (1983).

<sup>227</sup> 480 U.S. 470 (1987). The primary purpose of the law at issue in *DeBenedictis* was to impose financial liability on mine operators that caused damage. *Id.* at 486. Although this has a secondary effect on contractual negotiations because it prevented operators from holding surface owners to their contractual waiver of liability for surface damage, the Court found that Pennsylvania had appropriately exercised its police power. *Id.* at 488, 502.

<sup>228</sup> *Id.* Specifically, the act mandated that fifty percent of the coal beneath certain structures remain in place and provided that if removal damaged these designated structures, the Pennsylvania Department of Environmental Resources could revoke the operator's mining permit. *Id.* at 477. Coal companies challenged the Pennsylvania Subsidence Act as a violation of the Takings and Contracts clauses of the Constitution. *Id.* *See also* U.S. CONST. art. I, § 10; U.S. CONST. amend. V, § 6. To prevent revocation, operators had to either repair the damage within six months, satisfy any claims arising from the damage or deposit as security the cost of the repairs. *Keystone*, 480 U.S. at 477.

<sup>229</sup> *Id.* When coal is mined and extracted, the strata and land surface lower. *Id.* at 474. This lowering can have adverse effects on the structural integrity of buildings and houses, as well as the ability to successfully farm land, and can cause losses to groundwater and surface ponds. *Id.* at 474-75. Since 1966, Pennsylvania has restricted the amount of coal that can be extracted in order to prevent these problems. *Id.* at 475-76. The Pennsylvania Subsidence Act furthered legislation by prohibiting mining that caused damage to "public buildings and noncommercial buildings generally used by the public, dwellings used for human habitation, and cemeteries." PA. STAT. ANN. tit. 52, § 1406.6 (West 1986). The Court in *Keystone* held that Pennsylvania's legislature had a legitimate interest in preventing this damage and the legislative response was a valid exercise of police power. *Keystone*, 480 U.S. at 486, 488.

left in the ground, mining companies could not reap the full benefits of the land rights they had purchased or leased, and the Court found that contract rights were indirectly, but substantially, affected.<sup>230</sup> The Court upheld the law, however, because it addressed and was appropriately tailored to an essential public purpose—preventing dangerous subsidence.<sup>231</sup> Similarly, although the text of Initiative 416 does not specifically mention same-sex contracts, the broad language and potential applications of the amendment threaten the enforceability of these contracts.

## 2. Public Interest

Initiative 416 is not founded upon the protection of a valid public interest, and consideration of whether it is appropriately tailored is therefore unnecessary.<sup>232</sup> States are entitled to void contracts to uphold moral standards, but there is no such standard at issue in same-sex relationships.<sup>233</sup> Non-marital cohabitation

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<sup>230</sup> *Id.* at 504-05. The Court agreed with petitioners' claim that the statute substantially impaired contract rights because it prevented petitioners from waiving liability for land surface damage. *Id.* at 504. The Court also found a "significant and legitimate public purpose" in preventing the type of harm caused by the mining and extraction of coal. *Id.* at 505. To balance these competing interests, the Court followed its precedent of deferring to legislative judgment when the state is not a contracting party. *Id.* at 505 (citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 413 (1983); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 23 (1977)).

<sup>231</sup> *Id.* at 505.

<sup>232</sup> *See supra* Parts II.B, III.B (analyzing and rejecting any potentially arguable legitimate public interest furthered by Initiative 416 by exploring the legitimate intent and history of Initiative 416 and illustrating why the law could not pass the rational basis test under Equal Protection jurisprudence).

<sup>233</sup> For example, a court can overturn a contract that is based on a promise to breach another contract, because the Contracts Clause would not be implicated. *See Burgess v. Gateway Communications, Inc.*, 26 F. Supp. 2d 888 (S.D.W.V. 1998). Many courts and commentators have rejected the contention that homosexuality is "immoral" in any legal context. *See, e.g., Williams v. Pryor*, 220 F. Supp. 2d 1257, 1290 (N.D. Ala. 2002). The court noted that:

Social tolerance for non-coercive deviant sexual acts, such as heterosexual sodomy between spouses and homosexual activity

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agreements are enforceable in Nebraska.<sup>234</sup> The only moral issue presented to a Nebraska court enforcing cohabitation agreements is that they cannot be based on an exchange of money or lodging for sexual intercourse.<sup>235</sup> Furthermore, Nebraska does not have a public policy against homosexuality in general, as evidenced by the fact that sodomy has been decriminalized,<sup>236</sup> sexual orientation has been rejected as a factor in child custody cases<sup>237</sup> and state non-discrimination laws are applied to harassment claims.<sup>238</sup>

Although Nebraska's courts have not addressed same-sex relationships or co-habitation agreements, courts in other jurisdictions have found them to comply with public policy.<sup>239</sup>

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between consenting adults, has increased to the point where these acts have been decriminalized in many nations and in many states of the United States. Even where they remain prohibited, efforts at enforcement are perfunctory at best.

*Id.* The *Williams* court also noted that the influential Kinsey sex studies revealed that "men and women regularly and widely engaged in . . . sodomy . . ." and that "[t]he findings of these studies served to demonstrate that what was once considered 'deviant' is in fact quite normal and common. As a result, American attitudes about sexuality changed drastically . . ." *Id.*

<sup>234</sup> See *Kinkenon v. Hue*, 301 N.W.2d 77 (Neb. 1981).

<sup>235</sup> *Id.* at 703 (noting that if a contract includes consideration of sexual intercourse it is void as against public policy).

<sup>236</sup> See NEB. REV. STAT. § 28-704 (repealed 1978).

<sup>237</sup> See *Hassenstab v. Hassenstab*, 570 N.W.2d 368 (Neb. Ct. App. 1997) (holding that "sexual activity by a parent, whether it is heterosexual or homosexual, is governed by the rule that to establish a material change in circumstances justifying a change in custody there must be a showing that the minor child or children were exposed to such activity or were adversely affected or damaged by reason of such activity").

<sup>238</sup> See Op. Neb. Att'y Gen. 96044 (1996) (stating that Nebraska's non-discrimination law's "gender-neutral definition demonstrates [that] there is nothing . . . to limit . . . sexual harassment to heterosexual harassment" because there is the "possibility [of] sexual harassment of men by women, or men by other men, or women by other women . . .").

<sup>239</sup> For example, many states have amended their laws to grant adoption and custody rights to gay couples or parents, and numerous judicial decrees have granted similar protection and rights to gays and lesbians throughout the country. See, e.g., *In re M.M.D.*, 662 A.2d 837 (D.C. 1995) (holding that unmarried, cohabiting couples, whether heterosexual or homosexual, could

For example, the California Court of Appeals enforced a cohabitation agreement between same-sex partners.<sup>240</sup> The court stated that “[a]dults who voluntarily live together and engage in sexual relations are competent to contract respecting their earnings and property rights.”<sup>241</sup> There is little support, therefore, for the argument that Initiative 416 codifies existing public policy against homosexuality or non-marital relations. Initiative 416 does not rest upon any public purpose sufficient to justify denying recognition of contracts between gay partners.

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petition for adoption of a child); *Van Driel v. Van Driel*, 525 N.W.2d 37 (S.D. 1994) (holding that a custodial parent’s sexual orientation is not a per se showing of lack of fitness); *see also* Karla J. Starr, *Adoption by Homosexual Couples: A Look at Differing State Court Opinions*, 40 ARIZ. L. REV. 1497 (1998) (discussing adoption rights of homosexual couples in different jurisdictions).

<sup>240</sup> *See Whorton v. Dillingham*, 248 Cal. Rptr. 405 (Ct. App. 1988) (reversing the trial court’s conclusion that an oral contract between homosexual partners was unenforceable and finding that, over the course of a seven year relationship, the plaintiff established “alleged consideration for the purported contract substantially independent of sexual services”). *But see* *Shahar v. Bowers*, 114 F.3d. 1097 (11th Cir. 1997). In *Shahar*, the Court of Appeals for the Eleventh Circuit permitted the rescission of an employment offer by the Georgia Attorney General based on the applicants lesbian “marriage.” *Id.* at 1099. This decision is significant because it allowed a private solemnization of a relationship to dictate a legal outcome, inasmuch as the Georgia Attorney General’s disapproval and concerns about the lesbian relationship provided legal justification to fire the plaintiff. *Id.* The Eleventh Circuit refused to recognize that intimate associational rights to extend to gay relationships. *Id.* at 1106. The court questioned the plaintiff’s judgment, saying that she “seemingly did not appreciate the importance of appearances and the need to avoid bringing ‘controversy’ to the Department, the Attorney General lost confidence in her ability to make good judgments for the Department.” *Id.* at 1105-06. The court analogized refusing employment to a partnered lesbian to refusing employment to a member of the Klu Klux Klan. *Id.* at 1108.

The decision raises the possibility that Nebraska courts could find private agreements between contracting gay partners unenforceable. Hawaii foresaw just this type of interference with private relationships, and specifically exempted private solemnization of gay relationships from the purview of its laws. *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). The drafters of Initiative 416 either did not foresee this potential or chose to ignore it.

<sup>241</sup> *See Whorton*, 238 Cal. Rptr. at 407.

## NEBRASKA'S INITIATIVE 416

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## CONCLUSION

Nebraska voters passed a law that some predict will bring the issue of equality for gays before the Supreme Court.<sup>242</sup> Indeed, the questions presented by Initiative 416 are perhaps even more distinct than in *Romer v. Evans*.<sup>243</sup> *Romer* pitted persons united

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<sup>242</sup> Immediately after Initiative 416 was passed, the American Civil Liberties Union ("ACLU") began preparations to challenge to the amendment. See John Barrette, *Bush-Gore Battle Not the Only Post Election Court Battle in the Works*, NEB. STATE PAPER, November 30, 2000; John Fulwider, *ACLU Hopes to Have 416 in Court by January*, NEB. ST. PAPER, November 19, 2000; John Fulwider, *Legal Challenge of 416 in Very Early Stage*, NEB. ST. PAPER, November 9, 2000. Progress on the lawsuit has moved slowly, however, and recent developments in the state have arguably frustrated the effort. For example, when the Nebraska Supreme Court barred the adoption of a lesbian woman's child by her female partner in March of 2002, the ACLU decided to accept the ruling and abandon any option for appeal. See John Fulwider, *Lesbian Asks High Court OK to Adopt Partner's Son*, NEB. ST. PAPER, October 2, 2001. After the decision, Executive Director of the Nebraska ACLU Tim Butz stated that the ruling, "when coupled with Initiative 416, just made the family feel like they were not wanted in this state. They decided not to fight it, and just move on." See John Fulwider, *ACLU Won't Appeal Gay Adoption Ruling*, NEB. ST. PAPER, March 18, 2002. Nevertheless, efforts to challenge the Amendment continue through the support of the ACLU and social-justice organizations in Nebraska such as Citizens for Equal Protection (CFEP) and Parents, Families and Friends of Lesbians and Gays (PFLAG). These groups have collaborated with attorneys from the Lambda Legal Defense and Education Fund in Nebraska as they prepare to address the law. Currently, their efforts include attempts to find examples of where the law is being applied and how it harms gay couples by banning recognition of their relationships. For further information about the efforts, see generally PFLAG Lincoln-Cornhusker, at <http://pflag.ineb.org> (last visited Jan. 22, 2003).

<sup>243</sup> 517 U.S. 620 (1996). It is interesting to note, however, that during the heated litigation of *Romer*, the plaintiffs sought to strike a sympathetic cord with the courts by stressing that the Colorado law was motivated primarily by philosophical opposition to homosexuality rather than any legitimate government interest. *Id.* For a thoughtful analysis of the efforts of the *Romer* litigants in the context of the contemporaneous religious conservative movement, see Sharon E. Debbage Alexander, *Romer v. Evans and the Amendment 2 Controversy: The Rhetoric and Reality of Sexual Orientation Discrimination in America*, 6 TEX. F. ON C.L. & C.R. 261 (2002). According

by sexual orientation against all other classes of people, whereas Initiative 416 makes a clear distinction between homosexuals and heterosexuals, with no basis that one group is more deserving of protection than the other. Thus, a court addressing Nebraska's amendment would reach the heart of constitutional issues involving gays. Any decision striking down the second sentence of this broad law would limit states' power to regulate gay marriage. It would also send a strong message to states that they must establish sound bases for legislation that distinguishes between homosexuals and heterosexuals. The Nebraska Amendment is vulnerable to a legal challenge; litigation would ensure that Initiative 416 is subjected to the scrutiny it merits and escaped in the popular initiative process.<sup>244</sup>

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to Alexander, the *Romer* plaintiffs provided the texts for all the statutes that would be invalidated by the Amendment and the text of communications between supporters of the Amendment that displayed a hateful nature and anti-gay sentiments. *Id.* at 285.

Whether *Romer* was an unequivocal victory for gay rights advocates, however, is a matter of some debate. See Robert D. Dodson, *Homosexual Discrimination and Gender: Was Romer v. Evans Really a Victory for Gay Rights?*, 35 CAL. W. L. REV. 271 (1999) (summarizing Justice Scalia's critique of the majority opinion because it "undermin[ed] democracy when homosexuals had the full right to participate in the process"); William C. Duncan, *The Legacy of Romer v. Evans—So Far*, 10 WIDENER J. PUB. L. 161 (2001) (suggesting that the opinion has not had a major impact on the law and that early predictions about the achievements of *Romer* have not been vindicated by courts).

<sup>244</sup> As noted, Initiative 416 was passed by popular referendum. See *supra* Part II (discussing the legislative background of Initiative 416 and margin by which Nebraska's voters adopted the amendment).