Writings on Marriage

The Journal of the Bishop's Task Force on Marriage

Convention Edition

Edited by Greg Jones

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Cover illustration is adapted from diocesan seal -- two persons in the stern are being married, four persons amidships are rowing, and one person in the bow is celebrating.

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MARRIAGE AND THE LAW

Hugh Stevens[Φ]

Marriage itself has never been simple,[14] but until recently marriage *laws* were.

Prior to 1996 the criteria for contracting legal marriages in the United States were prescribed exclusively by the various states; tended to be quite similar nationwide; and focused primarily on proof that the parties were of marriageable age (or, if not, that they had the requisite parental consent) and that neither was rendered ineligible to marry by reason of impotency, lack of mental capacity, or an existing marriage. Because marriage standards varied little across the country, states routinely treated marriages performed in other states as valid, even if they did not comport fully with their own laws.[15]

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[14] For a comprehensive and highly readable history of he cultural, social, economic and political complexities of marriage see *Marriage, a History: From Obedience to Intimacy, or How Love Conquered Marriage,* by Stephanie Koontz (Viking Press, 2005)

[15] During the late '50s and '60s, when the author was in high school in North Carolina, it was commonplace for young couples in need of "shotgun weddings" to slip across the border and marry in South Carolina, where the age of consent was lower than in North Carolina and surrounding states. Dillon, South Carolina was such a popular location for such "runaway" nuptials that it became known as the "Wedding Capital of the East."

The relative homogeneity among state marriage laws, and their general acceptability across state lines, began to erode in the 1990s after the supreme courts in Hawaii and Vermont interpreted their respective state constitutions to require that same-sex couples were entitled to the same rights and benefits of marriage that were afforded to opposite-sex couples, even if the state chose not to define these rights and benefits as marriage. Fearing that other courts would issue similar decisions, both the Congress and many state legislatures, including North Carolina's, passed "Defense of Marriage Acts" (DOMAs), which specifically defined marriage as a union between a man and a woman. In addition, several states amended their constitutions to prohibit same-sex marriage, hoping that such an explicit ban would prevent their courts from reading other constitutional provisions so broadly as to guarantee same-sex couples the right to marry. The divergence in state laws and policies concerning marriage widened and accelerated in 2003, when Massachusetts became the first state to authorize same-sex marriage.

Any discussion of "the theology of marriage" in the Episcopal Church necessarily occurs against a background of civil law, because marriage is the only rite, sacrament or ceremony of the Church that is defined and regulated not only by the Constitution and Canons[16] but also by state and federal statutes and by the constitutions of at least 30 states.[17] Neither state nor federal law purports to define or prescribe the criteria for baptism, communion, anointing the sick, reconciliation of a penitent or ordination, but state law sets limits on the ages, consanguinity and, in the majority of states, the genders of persons who may be married, and Congress has enacted a federal statute defining marriage. Section 1 of Canon 18 recognizes the anomalous regulatory duality affecting marriage by requiring that clergy "shall conform to the laws of the State governing the creation of the civil status of marriage, and also to the

[16] Canon 18 of the Canons of the General Convention governs the solemnization of Holy Matrimony; Canon 19 sets out regulations concerning "Preservation of Marriage, Dissolution of Marriage, and Remarriage."

[17] Most of the state constitutional provisions are recent amendments that prohibit same-sex marriages (and, in many cases, "civil unions.")

laws of this Church governing the solemnization of Holy Matrimony."[18]

Although the author holds to certain opinions (some firm, some not) concerning the wisdom, propriety or constitutionality of some of the laws described, this paper is not intended to condone or criticize them. Instead, it attempts to:

- summarize the standards and criteria for contracting a legal marriage in North Carolina;
- describe some of the key legal benefits that accrue to married couples;
- explain some of the legal and constitutional issues that arise out of the fact that some states authorize or recognize marriages that others do not;
- describe the nature and effects of state and federal "defense of marriage" laws; and,
- briefly discuss how state and federal marriage laws affect the relationship between the Church and the government.

1. Marriage in North Carolina.

Historically, the criteria for a legal marriage, and the scope of the rights and benefits conferred on the parties to a marriage, have been governed by state law almost exclusively.[19] The federal constitution makes no mention of marriage, and Congress did not codify a definition of marriage for purposes of federal law until 1996. Therefore, a logical

[18] I believe the conflation of "marriage" and "Holy Matrimony," which the Canon carefully avoids, muddies and complicates the public dialogue. In recognition of the critical distinction between the two, the term "marriage" in this paper should be read as referring to a *legal* relationship only.

[19] An exception occurred between 1878 and 1890, when the federal government successfully prosecuted polygamists and their supporters in Utah and Idaho, which were then U.S. territories.

place to begin any discussion of marriage and the law in North Carolina is with legal standards for marriage enacted by the General Assembly.

A. Age. North Carolina law generally permits unmarried persons over the age of 18, and legally emancipated persons aged 16 or 17, to marry. N.C. Gen. Stat. § 51-2. Un-emancipated persons aged 16 or 17 may marry with the consent of a custodial parent or legal guardian. *Id.* A female aged 14 or 15 may marry if she is pregnant or has given birth to a child and she and the putative father agree to marry; likewise, a male aged 14 or 15 who is the putative father of a child, born or unborn, may marry the mother if she agrees. In either case, however, a district court judge must enter an order approving the marriage of a 14- or 15-year-old. The order must find as a fact and conclude as a matter of law that the underage party is capable of assuming the responsibilities of marriage and that the marriage will serve his or her best interest. N.C. Gen. Stat. § 51-2.1(a).

B. Gender. In 1996 the General Assembly passed a "Defense of Marriage" statute, which provides that marriages between individuals of the same gender are not valid in North Carolina. N.C. Gen. Stat. § 51-1.2. (See § ___, below.)

C. Race. North Carolina law prohibited marriage between persons of different races until June 12, 1967, the date on which the Supreme Court of the United States declared all anti-miscegenation laws unconstitutional in *Loving v. Virginia,* 388 U.S. 1. In 1977 the General Assembly formally declared that all interracial marriages were valid, provided that the parties had complied with all other requirements for a legal marriage. N.C. Gen. Stat. § 51-3.1.

D. Capacity. Section 51-3 of the North Carolina General Statutes declares that marriages are void or voidable under any of the following circumstances:

1. The parties are "nearer of kin than first cousins," or are double first cousins;

2. Either party has a legal spouse living at the time of the marriage;[20]

3. Either party is "physically impotent" at the time of the marriage; or,

4. Either party is "incapable of contracting from want of will or understanding."

The courts have applied the foregoing statute to invalidate marriages procured under duress or by undue influence.

E. North Carolina marriage licenses.

Persons desiring to marry in North Carolina must obtain a license from a county Register of Deeds. The fee for a marriage license, which is valid anywhere in North Carolina, is $50.00 and must be paid in cash. Applicants need not be residents of North Carolina, but they must provide proof of their ages and identities by presenting a valid driver's license; an unexpired state-issued ID card, a current passport, a current military ID, or a certified copy of a birth certificate.[21] Each applicant also is required to provide and verify his or her Social Security number by presenting a Social Security card or a W-2 form or pay stub displaying the full Social Security number. Persons who are not eligible for a Social Security card, such as citizens of foreign countries, must provide a sworn affidavit attesting to their status. Every marriage license includes a certificate of marriage that must be completed by the officiant and returned to the register of deeds within 10 days following the ceremony.

[20] Marriage by a person who already has a living spouse constitutes bigamy, which is also a Class I felony under North Carolina *criminal* law. See N.C. Gen. Stat. § 14-183.

[21] An applicant who is age 20 or younger must present a certified copy of his or her birth certificate. Applicants who are 16 or 17 years of age also must present evidence of parental consent, and applicants age 15 must present a certified copy of a District Court order authorizing the marriage.

F. Solemnization of marriages in North Carolina.

Under North Carolina law, marriages may be solemnized by magistrates or by ordained or licensed clergy of any religious denomination. State law also recognizes marriages solemnized in ceremonies of federally or state recognized Indian nations or tribes. N. C. Gen. Stat. § 51-1. Any person authorized to celebrate marriages who performs a marriage ceremony without first being presented with a valid marriage license, or who fails to complete and return the certificate of marriage that accompanies the license, is guilty of a Class I misdemeanor and subject to a $200.00 penalty. N.C. Gen. Stat. § 51-7.

According to data compiled by the National Center for Health Statistics, approximately 68,000 marriages occurred in North Carolina during 2007, the last year for which complete data are available; this number represented an increase of approximately 3,400 over 2006 and 5,000 over 2005. Although North Carolina does not maintain specific data tracking the proportion of civil and religious ceremonies, an analysis of marriage fees by the Administrative Office of the Courts indicates that about 22,000 of the marriages performed in the state in 2007 were civil ceremonies performed by magistrates.[22] Regardless of whether the ceremony is civil or religious, it must be witnessed by at least two persons.

(i). Civil and religious marriage ceremonies in North Carolina. The data cited above suggest that more than two-thirds of marriage ceremonies in North Carolina are religious in nature – a percentage that appears to be well above the national average. In 2003 *USA Today* reported that the rate of civil marriage "is on the rise coast to coast" because "[f]ewer American couples who marry today see the need for religion's approval." Although there are no national data on how many marriages are performed by clergy versus civil authorities such as notaries, justices of the peace or magistrates, the newspaper's analysis of statistics from the 18 states that track such data showed that the percentage of civil ceremonies in those states had risen from about 30% in 1980 to about 40% in 2003. The author of *American Couples,* University of Washington sociologist Pepper Schwartz, attributed the

[22] Magistrates collect a $20.00 fee for each civil marriage ceremony they perform.

trend to high divorce and remarriage rates, the increasing incidence of interfaith marriages, and "more personalized ideas of spirituality."

(ii). Cohabitation in North Carolina. Data from a variety of sources clearly show that in recent decades cohabitation by unmarried couples has emerged as an important social and cultural institution, both as a predecessor to and as a substitute for marriage.[23] In 1960 the U.S. Census Bureau reported that 439,000 unmarried opposite-sex couples were living together in the United States; in 2008 that number had risen to 6.8 million. ("America's Families and Living Arrangements: 2008") Today in the U.S. one in three women chooses to live with her partner before marriage, compared to one in 10 in the 1950's. Nearly half of individuals in their twenties and thirties are involved in a cohabiting arrangement. According to a Gallup poll published in 2007, 55% of Americans approve of men and women living together without being married; 57% of respondents to a 2008 poll said they consider an unmarried couple who have lived together for five years just as committed in their relationship as couple who have lived together in marriage for the same amount of time.

In 2005 the Associated Press reported that about 144,000 unmarried couples were living together in North Carolina. However many such couples there are, all of them potentially are subject to arrest and prosecution, because North Carolina is one of seven states that makes cohabitation by unmarried couples a crime. N.C. Gen. Stat. § 14-184 provides that "If any man and woman, not being married to each other, shall lewdly and lasciviously associate, bed and cohabit together, they shall be guilty of a Class 2 misdemeanor . . ."

North Carolina's anti-cohabitation law came under attack after Deborah Lynn Hobbs, who was unmarried and had lived with her boyfriend for nine years, was hired as a dispatcher for the Pender County sheriff's office in 2004. Two weeks later Sheriff Carson Smith told her she must marry her boyfriend, move out of their common

[23] One index of cohabitation's status as a cultural, social and economic phenomenon is the number of guidebooks devoted to the subject, such as *Living Together: A Legal Guide for Unmarried Couples; Shacking Up: The Smart Girl's Guide to Living in Sin Without Getting Burned;* and *Happily Un-Married: Living Together and Loving It.*

home, or resign her position with his office. The sheriff did not file or threaten criminal charges against her under G.S. § 14-184. Ms. Hobbs resigned and then filed suit challenging the constitutionality of the anti-cohabitation statute. In 2006 Superior Court Judge Benjamin Alford declared the statute unconstitutional and enjoined the State from enforcing it, on the grounds that it violated Ms. Hobbs' right to substantive due process and was vague and overbroad. Attorney General Roy Cooper elected not to appeal Judge Alford's decision, leaving open the question whether it applies statewide or only in Pender County. Meanwhile the General Assembly has left the law unchanged.

2. State and federal benefits of marriage.

North Carolina, like all states, confers some important legal rights on married persons, including significant tax advantages (such as the right to file joint state income tax returns); rights, preferences and presumptions in connection with the probate of estates and intestacy proceedings (when someone dies without a will); the right to support from their spouses both during the marriage and after it is dissolved; enhanced protection of jointly-owned property against creditors and judgments; and rights to be treated as family members in obtaining insurance coverage and making health care decisions.[24]

[24] In its 2003 decision striking down Massachusetts' prohibition against same-sex marriage, the Supreme Judicial Court of that state noted that the following benefits and privileges were available only to married persons in Massachusetts: joint state income tax filing; tenancy by the entirety; extension of benefit of homestead protection to one's spouse and children; automatic rights to inherit property of deceased spouse who does not leave a will; rights of elective share and of dower; entitlement to wages owed to deceased employee; eligibility to continue certain businesses of deceased spouse; right to share medical policy of one's spouse; 39-week continuation of health coverage for spouse of person who is laid off or dies; preferential options under state's pension system; preferential benefits in state's medical program; access to veterans' spousal benefits and preferences; financial protections for spouses of certain state employees killed in performance of duty; equitable division of marital property on divorce; temporary and permanent alimony rights; right to separate support on separation that does not result in divorce; and right to bring claims for wrongful death and loss of consortium, and for funeral and burial expenses

Marriage also invokes significant federal benefits; according to a 2004 report released by the U.S. Government Accountability Office (GAO), there are at least 1,138 statutory provisions in which marital status factors in the determination of federal privileges, rights, and benefits.[25]

The scope and purpose of this paper do not warrant a detailed analysis of the rights and benefits that are available exclusively to married couples; suffice it to say that the consequences of the recognition or non-recognition of a particular relationship as a "marriage" has profound consequences, both legal and financial, for the parties to that relationship.

3. The rise of divergent state laws concerning marriage and marriage-like relationships.

The confluence of two events in 2003 dramatically affected the climate surrounding the debate over marriage or marriage-like rights for gay and lesbian couples. On June 26, the Supreme Court issued its opinion in *Lawrence v. Texas,* 539 U.S. 558 (2003). In a 6-3 opinion delivered by Justice Anthony M. Kennedy, the Court ruled that a Texas statute making it a crime for two persons of the same-sex to engage in certain intimate sexual conduct violated the Due Process Clause of the Fourteenth Amendment. Although the *Lawrence* opinion expressly stated that the Court was not ruling on the constitutional status of same-sex marriage, Justice Antonin Scalia disagreed, arguing in dissent that the majority's analysis inevitably leads to the conclusion that

and punitive damages resulting from tort actions. *Goodridge v. Department of Public Health,* 440 Mass. 309, 323-24, 798 N.E.2d 941, 955-56.

[25] Although Congress did not define "marriage" for purposes of federal law until 1996, the proliferation of federal statutes *affecting* the rights and privileges of married persons bears out one writer's observation that ". . . family law isn't the bastion of state sovereignty it's supposed to be. As some scholars have pointed out, [William Rehnquist]'s claim that family law is 'truly local' is wrong as a matter of history. Congress has meddled in this area for decades, through laws that address welfare, pensions, taxes, bankruptcy and immigration." Emily Bazelon, "Trading Places Over Gay Marriage," *The Washington Post*, November 23, 2003.

marriage must be available equally to homosexual and heterosexual couples. 539 U.S. at 604-05.

Then, on November 18, the Supreme Judicial Court of Massachusetts ruled that the state law barring same-sex marriage violated the equal protection clause of the state constitution and ordered the legislature to remedy the discrimination within six months. *Goodridge v. Department of Public Health,* 440 Mass. 309, 798 N.E.2d 941.

In her opinion for the majority in *Goodridge,* Chief Justice Margaret Marshall held that denying marriage benefits to same-sex couples violated the Massachusetts Constitution because it did not accomplish a legitimate government goal. Indeed, the court explained, the reasons the government offered for banning same-sex marriage - promoting procreation, ensuring a good child-rearing environment and preserving state financial resources - would not be promoted by prohibiting same-sex couples from marrying. Thus, according to the court, the only basis for the state's decision to exclude same-sex couples from the institution of marriage was a disapproval of their lifestyle. Because the court concluded that condemning a lifestyle is not a "constitutionally adequate reason" for denying marriage benefits, it held that the state must permit same-sex couples to marry.

In February 2004, the court ruled that offering same-sex couples civil unions instead of civil marriage would not pass constitutional muster under the standards enumerated in *Goodridge*. Since March, 2004, when same-sex marriage first became available, approximately 12,500 same-sex couples have married in Massachusetts.

The *Lawrence* and *Goodridge* decisions activated advocates on both sides of the legal and policy debate over same-sex marriage. On the one hand, they opened the door for courts in states other than Massachusetts to interpret the equal protection clauses of their state constitutions as mandates for same-sex marriage. At the same time, they roused opponents of gay marriage.

A. Same-Sex Marriage

Encouraged by the Massachusetts court's decision in *Goodridge,* advocates for gay marriage began filing suits and/or pushing for

legislative action in other states. Until 2008, however, only one of these cases was even partly successful. In that case, *Lewis v. Harris* (2006), the New Jersey Supreme Court ruled that the state constitution's equal protection clause required the state to grant same-sex couples the same rights and benefits of marriage enjoyed by opposite-sex couples. The *Lewis* decision was not as broad as the Massachusetts decision in *Goodridge* because the court permitted the state legislature to decide whether to grant these rights by marriage or civil union. Soon after the ruling, the New Jersey legislature passed a measure allowing gay and lesbian couples to enter into civil unions but not to marry.

Other than the New Jersey suit, the decisions by state supreme courts went against gay marriage advocates until 2008. In 2006 and 2007, the highest courts in New York, Washington and Maryland found that their state constitutions do not guarantee same-sex couples the right to marry. All three courts ruled that whether to permit or recognize same-sex marriage is a policy matter that rests with the legislative and executive branches. The suits grounded in state constitutions finally began to bear fruit in 2008, when the highest courts of California and Connecticut ruled in favor of gay marriage.

In California, same-sex marriage was legal for five and a half months during 2008. On May 15 the California Supreme Court ruled that limiting marriage to persons of the opposite sex violated the California Constitution. Over the next few months approximately 18,000 same-sex couples were married in California, but in November, after a spirited and expensive public campaign, California's voters amended the state constitution by approving "Proposition 8," which provides that "Only marriage between a man and a woman is valid or recognized in California."[26] Advocates for same-sex marriage challenged the validity of Proposition 8, but the California Supreme Court rejected their claim in May, 2009; consequently, same-sex couples may register as domestic partners in the state, but cannot marry. The court did uphold the validity of the same-sex marriages contracted before Proposition 8 took effect. The California Supreme Court's rulings did not end the battle over California's prohibition of same-sex marriage. In May, 2009 two gay couples filed suit in federal court challenging

[26] The California constitution has been amended more than 500 times through the proposition procedure since it was ratified in 1879.

Proposition 8 (and, by implication, all state laws that bar same-sex marriage) on grounds that such bans violate the equal protection guarantee of the Fourteenth Amendment to the United States Constitution.

In October 2008, the Connecticut Supreme Court ruled that the state's civil union law was discriminatory and unconstitutional, and that same-sex couples must be allowed to marry because "the segregation of heterosexual and homosexual couples into separate institutions constitutes a [constitutionally] cognizable harm."

In April 2009, Iowa and Vermont joined the ranks of states that grant full marriage equality to same-sex couples. In Iowa, the Supreme Court ruled unanimously that the state's law limiting marriage to opposite-sex couples was unconstitutional, whereas Vermont became the first state to enact marriage equality through legislative action when the state legislature overrode a governor's veto and legalized same-sex marriage in that state.

Maine's legislature passed a same-sex marriage bill in May, 2009. Governor John Baldacci, who previously had opposed same-sex marriage, signed it immediately upon its passage in the Senate. The governor said he had come to see same-sex marriage as a "question of fairness and of equal protection under the law," and to believe that "a civil union is not equal to civil marriage."

In June 2009, the New Hampshire legislature passed a same-sex marriage bill. Although Governor John Lynch personally opposes gay marriage, he signed the bill because it specifically provides that religious authorities are not required to officiate at same-sex ceremonies. "Today, we are standing up for the liberties of same-sex couples by making clear that they will receive the same rights, responsibilities – and respect – under New Hampshire law," Lynch said. The bill takes effect in January 2010.

B. Civil Unions

Until recently Connecticut, Vermont, New Hampshire, and New Jersey offered same-sex couples relationship recognition in the form of civil unions – the legal equivalent of marriage in those states. With the

advent of full marriage equality in September 2009, Vermont no longer offers the option of civil unions. New Hampshire will abolish them in January, 2010, when its same-sex marriage law takes effect.

In Connecticut and New Jersey, same-sex couples can enter into civil unions that provide the same rights and responsibilities as marriage, including:

- rights under family laws, such as annulment, divorce, child custody, child support, alimony, domestic violence, adoption, and property division
- rights to sue for wrongful death, loss of consortium, and under any other tort or law concerning spousal relationships
- medical rights, such as hospital visitation, notification, and durable power of attorney
- family leave benefits
- joint state tax filing, and
- property inheritance when one partner dies without a will.

C. Domestic Partnerships

"Domestic partnership" is another form of relationship recognition for same-sex couples, but what it means differs from state to state. In California, Nevada, Oregon, and Washington, domestic partnership is the legal equivalent of marriage; registered domestic partners have the same rights and obligations as legally married spouses under state law, including property rights and the right to receive support from one's partner after a separation. Although the District of Columbia does not explicitly grant domestic partners all of the same rights enjoyed by married couples, it is difficult to distinguish legally between the two types of domestic relationships.

New Jersey passed a domestic partner law in January of 2004 that offered limited rights to registered domestic partners. New domestic partnership registrations ended in January of 2008, when New Jersey began to offer civil unions that provide the same rights and responsibilities as marriage. However, couples who registered as

domestic partners before January 2008 maintain the same rights they had previously.

D. Reciprocal Beneficiaries

Reciprocal beneficiary laws in Colorado and Hawaii provide some marriage-like benefits. In Hawaii, any two state residents can register as reciprocal beneficiaries provided that they both are over 18 and are not permitted to marry. Couples who sign up gain some of the rights and benefits granted by the state to married couples, including hospital visitation rights, the ability to sue for wrongful death, and property and inheritance rights. In Colorado, reciprocal beneficiaries may own property jointly, inherit from a partner in the absence of a will, receive priority for appointment as a conservator, and receive a number of other rights similar to those of married couples.

4. State and federal "Defense of Marriage" Acts

As noted above, the recent divergence in state policies and laws respecting marriage and other domestic relationships – particularly the recognition by several states of same-sex marriage – led many states to adopt "Defense of Marriage" laws ("DOMAs") or constitutional amendments prohibiting the recognition of same-sex marriages, even if they were legally contracted in another jurisdiction. North Carolina's DOMA was passed in 1996 – seven years before Massachusetts became the first state to permit persons of the same gender to marry. That same year, Congress passed and President Clinton signed a federal DOMA defining "marriage" as "a legal union between one man and one woman as husband and wife" and declaring that the term "spouse" refers "only to a person of the opposite sex who is a husband or wife." The Act provides that these definitions apply "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation or interpretation of the various administrative bureaus and agencies of the United States." 1 U.S.C. §7. The federal DOMA also provides that

> 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. *28 U.S.C. § 1738(c).*

5. Legal and constitutional issues arising out of divergent state definitions of marriage and other domestic relationships.

By denying recognition to same-sex marriages, civil unions and domestic partnerships that were legal in the states where they were contracted, DOMAs – both state and federal – raise serious and thorny legal and constitutional issues. Assume, for example, that a lesbian couple who were legally married in Massachusetts moves to North Carolina and then part ways. Does North Carolina's DOMA preclude their obtaining a legal divorce here? Suppose they were married in Massachusetts and later divorced there, after which one of them moved to North Carolina. Does our state's DOMA deprive our courts of authority to enforce a custody order or property settlement on behalf of the North Carolina resident? And do state DOMAs in general violate the "full faith and credit" clause of the federal constitution?

The federal DOMA raises other constitutional issues, including whether it impinges on a "fundamental right" (to marry) and whether Congress violated the Tenth Amendment and state sovereignty by legislating with respect to matters traditionally reserved to the states.[27]

At first blush it would seem that both the state and federal DOMAs run afoul of Article IV, § 1 of the United States Constitution, which provides that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other state" and that "Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof." Read literally, the requirement that states accord "full faith and credit" to each other's laws clearly seems to mandate that North Carolina must grant persons who were legally married in another state, or who are

[27] The Tenth Amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

parties to a legal civil union or domestic partnership contracted in another state, all of the rights and privileges afforded them by that state.

As it happens, however, the courts have not read the "full faith and credit" clause as requiring one state to give absolute deference to another's laws. Rather, it has been construed to leave room for the application of traditional principles of conflicts of laws, including the concept that each state may decline to apply another state's law that conflicts with its own legitimate public policies. Therefore, the courts have rejected challenges to both state and federal DOMAs grounded in the "full faith and credit" clause. *Wilson v. Ake,* 354 F. Supp. 2d 1298, 1303-04 (2005).

The courts also have rejected due process and equal protection challenges to the federal DOMA grounded in the contention that the right to marry without regard to the gender of the parties is a "fundamental right of all persons." *Id.* at 1304-05 (citing *Baker v. Nelson,* 291 Minn. 310, 191 N.W.2d 185 (1971), *appeal dismissed,* 409 U.S. 810, 93 S. Ct. 37, 34 L.Ed.2d 65 (1972)).

For the foreseeable future, therefore, it appears that state laws and policies concerning marriage and marriage-like relationships will continue to vary widely, that same-sex couples who marry in one of the states that permit such unions will be denied concomitant federal rights available to heterosexual married couples, and that such couples who move across state lines also must be prepared to confront the effective loss of their marital status.

6. Marriage Laws and the Church

Under the "free exercise" clause of the First Amendment, state laws may (and do) limit, but may not mandate, who can be legally married in ceremonies presided over by members of the clergy. In North Carolina, a priest, rabbi or minister cannot solemnize a same-sex "marriage" no matter how enthusiastically his or her religious body approves; nor can Massachusetts or Connecticut require a member of the clergy to preside over a same-sex marriage. This does not necessarily mean, however, that Church leaders or clergy should be dismissive or obtuse about the upheaval in the legal landscape surrounding marriage.

For one thing, dramatic changes in the law generally mirror, to some degree, shifts in cultural and societal tectonic plates. For another, wedding ceremonies are the only occasions when members of the clergy act both as agents of the Church and of the State. Both of these points should be cause for reflection about the relationships between the Church and its members and between the Church and government.

The Supreme Judicial Court of Massachusetts did not decide that the state's constitution mandated same-sex marriage as the result of the Commonwealth's constitution having been amended, because it hadn't. Rather, the court rendered its decision because gays and lesbians decided (or dared) that the time had come to assert a claim to rights and privileges that traditionally had been denied to them – something that simply could not have occurred in a era when homosexuality was not just stigmatized, but criminalized. By like sign, neither the United States Congress nor the North Carolina General Assembly was moved to enact a "Defense of Marriage Act" until same-sex marriage suddenly shifted from being a cockamamie notion to a genuine "threat." The point is not whether the decisions made by the Massachusetts court and by our General Assembly perfectly reflect the attitudes of everyone in either state; manifestly, they don't. The point is that although the Church is not *of* Massachusetts or North Carolina (or any other state), it is *in* those states and thus not only must comply with their laws, but also must be aware of, and respond to, their societal and cultural underpinnings.

For a priest in Massachusetts the issue is likely to be how to explain to gay or lesbian parishioners why the Church cannot or will not agree to marry them, even though the state has no objection. For a priest in North Carolina and the majority of other states, the dilemma may involve explaining to gay parishioners why he or she continues to solemnize marriages on behalf of a state that denies them marriage rights and privileges that are accorded heterosexual couples.

Some clergy and commentators on both sides of the gay marriage issue argue that freedom of religion would be enhanced by the formal separation between legal marriage and religious ceremonies, either by voluntary action on the part of religious bodies, or by having state governments "remove one of the final vestiges of theocracy" by defining marriage as a purely civil matter and removing clergy from the

list of persons authorized to solemnize legal marriages. See, e.g., Jonathan Lindsey, "On Marriage, Time to Separate Civil from Ecclesiastical," Associated Baptist Press, 2009; Oliver Thomas, "Gay Marriage: A Way Out," USA Today, August 4, 2008; "Gay Episcopal bishop says civil and religious marriage should be separate," The Los Angeles Times, April 19, 2009.

The "Refuse to Sign" movement, which is spearheaded by John Tamilio and Tricia Gilbert of Pilgrim Congregational United Church of Christ in Cleveland, and which is supported by some Episcopal clergy, espouses the view that ministers should not sign marriage licenses issued in states that do not permit gays and lesbians to marry. [See http://refusetosign.org/]

At the other end of the spectrum are clergy who view *any* government involvement in marriage as theologically untenable, such as Pastor Matt Trewella of Mercy Seat Christian Church in Milwaukee, who has authored a pamphlet entitled "Five Reasons Why Christians Should *Not* Obtain a State Marriage License" wherein he professes to "marrying couples without marriage licenses for ten years."[28] [See http://www.mercyseat.net/.]

A complete decoupling of civil and religious marriage would mean, of course, that candidates for a traditional "church wedding" would first have to undergo a separate civil ceremony in order to legalize their marriage.

Although this "two-step" marriage process would reflect the *legal* reality that "marriage" is a civil contract that has nothing to do with religious beliefs or practices, it undoubtedly would be perceived by many

[28] Couples who "marry" in ceremonies that are performed without benefit of a marriage license (often called "covenant marriages") expose themselves to serious legal issues involving taxes, inheritance, property ownership, child custody and myriad other subjects. The participants in one such ceremony explained their views about marriage in an elaborate hand-out. See http://www.carolinaliberty.com/handouts/CovenantInfoBook2.pdf

Americans not only as an inconvenience,[29] but also as a wrenching and unwelcome change to a relationship that traditionally has been and continues to be seen as grounded in divine law. Many commentators worry that such bifurcation would cause many couples to view Holy Matrimony as a ritualistic optional "add-on" to marriage, rather than as a powerful spiritual experience that defines their relationship. [30] Although this certainly is a valid concern on the part of Christians and others who view "marriage" as something much more than a civil contract, it is not clear what, if anything, the Church can or should do to preserve the linkage between civil marriage and Holy Matrimony, given the powerful forces that are pulling them in opposite directions.

[29] Such dual ceremonies are commonplace in France, Germany and other countries where only civil marriages are recognized as creating legal rights and privileges.

[30] See, e.g., "Marriage: Its Relationship to Religion, Law and the State," by Charles J. Reid, Jr., published as Chapter 6 of *Same-Sex Marriage and Religious Liberty* (Laycock, Picarello and Wilson, ed. 2008). Professor Reid argues that the civil and religious attributes of marriage are so inextricably intertwined that any attempt to separate them completely would seriously devalue marriage as a cultural and social institution.