'Til Congress Do Us Part: A Prognosis for Same-Sex Marriage in the United States Based on International Developments

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I. INTRODUCTION

Few issues appear to be as controversial or politically charged as the issue of same-sex marriage. To date, only three countries have recognized marriages between persons of the same sex – the Netherlands, Belgium, and Canada. Developments in each of these countries have evidenced certain social, cultural, and legal factors unique to their legal system that have likely facilitated and hindered efforts toward same-sex marriage. The Netherlands and Belgium, while differing in certain aspects of their legal framework for same-sex unions, have developed in remarkably similar ways. For purposes of discussion, this developmental model shall be termed the "European approach." This is by no means an assertion that all European legal systems share a common development or structure relating to same-sex partnership rights; rather, it is merely a means of combining the common elements witnessed in both the Netherlands and Belgium for the sake of facilitating comparison. This paper shall examine the social, cultural, and legal factors contributing to the development of same-sex unions in the European and Canadian approaches and use these factors as a basis for formulating a prognosis for the development of same-sex marriage in the United States.

II. THE NETHERLANDS: THE EUROPEAN APPROACH

After five years of extensive debate, the Netherlands became the first country to legally recognize same-sex marriage when it "opened up" the institution to homosexual couples on April 1, 2001.[1] This landmark development placed the Netherlands in an unparalleled position and logically led to debate over why the Dutch had chosen such a unique stance on the nuptial

[1] *See Text of Dutch Act on the Opening Up of Marriage for Same-Sex Partners* (Kees Waaldijk trans.), *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INT'L LAW 437 (Robert Wintemute & Mads Andenaes eds., 2001), app. II, at 455-56.

rights of homosexual couples. An assessment of the various social, cultural, and legal factors contributing to the Dutch development could assist in analyzing the potential success of similar initiatives in other countries.

A. *Social and Cultural Considerations*

The widespread social recognition of homosexuals in the Netherlands is a factor that undoubtedly contributed to the success of the same-sex marriage statute. Overwhelming acceptance of homosexuality in Dutch society is recognized by outsiders and has earned the Netherlands the nickname "gay capital of the world."[2] A study conducted in 1991, ten years before marriage rights were extended to same-sex couples, reflected that ninety-five percent of the population believed that homosexuals should be left as free as possible to live their own lives and ninety-three percent of the public felt that homosexual couples should be allowed to inherit from each other just as any ordinary married couple.[3] Similarly, homosexual interest groups have a long history of integration within the Dutch cultural, economic, and political spheres. For instance, there are notable industry trade unions, distinct groups within political parties, professional physician associations, and even an organization of homosexual army members that is officially recognized by the Dutch military.[4] This widespread social inclusion of homosexuals has not only led to cultural tolerance but also preserved an active role for gays in the sociopolitical arena of the Netherlands.

In addition to being highly tolerant of homosexuality, the Netherlands is often noted for its population's general trend toward abstaining from religion. One Dutch author has noted of his own country that the Netherlands is known for being one of the most secular countries in the world and that it seems "no country in the world has a less religious population."[5] Considering that opponents of same-sex marriage often argue that marriage is more than a mere civil institution and is inextricably linked to deeply rooted religious beliefs, the highly secular nature of Dutch society was probably a substantial reason for the low threshold of resistance to same-sex marriage.

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[2] MARTIN MOERINGS, *The Netherlands*, *in* SOCIOLEGAL CONTROL OF HOMOSEXUALITY 299 (Donald J. West & Richard Green eds., 1997).

[3] *Id.* at 299-300.

[4] *Id.* at 301.

[5] Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN & INT'L LAW 439 (Robert Wintemute & Mads Andenaes eds., 2001).

B. *Legal Development of Same-Sex Marriage in the Netherlands*

1. Typical Development in European systems

a. The "Step-by-Step" Principle

Legal commentators have noted that the development of same-sex couple rights in European countries has tended to follow a remarkably similar trend. This development is often described as being comprised of small steps generally taken in standard sequences.[6] One jurist has labeled this trend the "step-by-step" principle.[7] According to the step-by-step principle, progress occurs incrementally in a defined sequence of steps; namely, (i) decriminalization of homosexual conduct,[8] (ii) passage of anti-discrimination legislation, and (iii) legislation recognizing same-sex partnership and/or parenting.[9] Advocates of this principle suggest that its implications are twofold. First, any development which evidences one of the "steps" outlined above will normally only occur after the previous step has been achieved.[10] In other words, under this principle, it is unlikely that anti-discrimination legislation would precede the decriminalization of homosexual activity, since preventing discrimination based on sexual orientation would likely seem illogical if homosexual acts were still illegal. Second, the achievement of one of the steps seems to be an impetus for the next step.[11] For instance, once a legal system ceases to criminalize homosexual sex, it seems logical for that system to consider protecting such conduct from interference.

b. The "Law of Small Change"

In addition to similar incremental steps in those European legal systems that have progressed toward the legal recognition of same-sex relationships, it may also be observed that within each step, a series of slight changes leads to the next step. One author has dubbed this phenomenon the "law of small change."[12] Under this "law," changes that are made within each of the three primary steps will only occur if either (i) they are perceived as small or (ii) if the change is also accompanied by a reinforced "condemnation of homosexuality."[13] For example, when a legal body, whether legislative, executive, or judicial, makes what appears to be a *sizable* change toward recognition of

[6] *See id.*; see also William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 McGEORGE L. REV. 641, 647-48 (2000).

[7] Eskridge, *supra* note 6, at 647.

[8] This is often accompanied by an equalization of the ages of consent for both homosexual and heterosexual intercourse. Waaldijk, *supra* note 5, at 440.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

homosexual liberties that body will likely accompany the change with an express or implied reassurance that it does not advocate change beyond the position it is promoting.

2. Adherence to the European Approach in the Netherlands

The Netherlands, in its development of same-sex couple rights, has adhered closely to the step-by-step principle. While numerous other European legal systems have followed a similar sequential approach, this discussion shall focus on the Dutch system as its developments have led to the full acceptance of same-sex marriage.[14] Further, as previously stated, the Dutch developments are particularly significant given that the Netherlands was the first country in the world to legally recognize same-sex marriage.

The Netherlands completed the first "step" of decriminalization very early. However, this early date of decriminalization is likely owing to factors other than its historical tolerance of homosexuality. Of those countries that have criminalized homosexual sexual conduct, France became the first country to decriminalize such acts in 1791. It later "exported" this decriminalization to other countries in the French empire through the Napoleonic Penal Code of 1810.[15] The Netherlands, as part of the French empire, received this legislation and decriminalized the conduct in 1811.[16] Thus, the Dutch decriminalization, which occurred quite early relative to the development of homosexual rights in other countries, was due largely to its position in the French empire, rather than its societal or cultural conditions. In addition to its early decriminalization of homosexual sex, the Netherlands, in 1971, equalized the ages of consent for homosexual and heterosexual conduct.[17]

Twelve years after equalizing the ages of consent, the country enacted its first anti-discrimination protection for homosexuals. Over ninety percent of the Dutch Chamber of Representatives requested the government "introduce a bill aimed against all types of discrimination on account of sex (including discrimination on account of homosexuality) and of discrimination on account of marital status" and initiated a committee to investigate

[14] It should be noted that Belgium has also legally recognized same-sex marriage. In 2003, Belgium "opened up" marriage through legislation similar to the Dutch Act. *See Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil* (Feb. 13, 2003), MONITEUR BELGE, Feb. 28, 2003, at 9880-82; *see also Belgium Votes to Recognize Gay Marriages*, CHI. TRIB., Jan. 31, 2003, at 6.

[15] Kees Waaldijk, *Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe*, 17 CAN. J. FAM. L. 62, 68 (2000).

[16] *Id.*

[17] YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 328, tbl. 4 (2002). It should be noted, however, that some European countries such as Turkey, Italy, and Poland have never had disparate treatment for ages of consent. Waaldijk, *supra* note 5, at 438.

prohibiting sexual orientation discrimination in the Netherlands.[18] The committee reported that "[t]he fundamental conclusion is, on the one hand, that the social oppression against homosexuality still occurs on a larger scale" and that a prohibition of discrimination based on homosexuality was socially necessary.[19] The Dutch Government and Parliament, who considered adding "sexual orientation" as a ground in the anti-discrimination provision of the 1983 Constitution, decided instead to include the phrase "on any other grounds whatsoever" in an attempt to also catch discrimination on grounds other than sexual orientation.[20] Although sexual orientation was not explicitly mentioned in the 1983 Constitution, it is clear from the legislative history that sexual orientation was one "other ground" referred to in the anti-discrimination legislation.[21] Notwithstanding the implicit protection against discrimination based on sexual orientation present in the 1983 Constitution, the Netherlands passed legislation explicitly outlawing discrimination based on sexual orientation in 1992 and 1994.[22] Therefore, although at first glance it may appear that the Netherlands first passed anti-discrimination legislation in 1992, it was implicitly in the Dutch legal framework as one "other ground" since 1983.

The widespread acceptance throughout Europe of legislation aimed at preventing discrimination on the grounds of sexual orientation, such as that passed in the Netherlands, has been further crystallized by actions at the European Union (EU) level. The European Union Council Directive of November 27, 2000 (Directive 2000/78/EC) established a general framework for equal protection of individuals in employment and occupation, specifically targeting anti-homosexual discrimination.[23] Directive 2000/78/EC contained a provision requiring implementation of the Directive in all fifteen Member States of the European Union by December 2, 2003.[24] Therefore, every EU Member State presumably now has anti-discrimination legislation that prohibits discrimination based on sexual orientation.

The final increment in the step-by-step principle requires legislation recognizing same-sex partnership and/or parenting. In 1989, Denmark became the first country to offer registered partnerships to same-sex couples.[25]

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[18] *See* Kees Waaldijk, *Constitutional Protection Against Discrimination of Homosexuals*, 13 J. HOMOSEXUALITY 57, 62 (1987) (quoting Motion of the Chamber of Representatives, *Kamerstukken II*, 1978-1979, 14496, nr. 22 (parliamentary papers)).

[19] *Id.* (citation omitted).

[20] *Id.* at 59-60.

[21] *Id.* at 62.

[22] Waaldijk, *supra* note 15, at 74.

[23] Council Directive 2000/78/EC of 27 Nov. 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L303) 16.

[24] *Id.*

[25] Waaldijk, *supra* note 5, at 438.

Following this enactment, Norway, Sweden, Greenland, and Iceland followed with similar legislation that granted the basic rights and responsibilities of marriage, just under a different name.[26] The Netherlands followed the lead of these Nordic countries in 1998, when it enacted partnership legislation.[27] However, this enactment gave same-sex couples neither the right to adopt nor the right to marry. On July 8, 1999, the Dutch government presented a bill to the Dutch Parliament calling for "opening up" marriage to same-sex couples.[28] The Dutch Parliament overwhelmingly passed the statute by a vote of 109-31.[29] Queen Beatrix signed the bill into law on December 21, 2000, and the new law took effect on April 1, 2001.[30] Therefore, it should be noted that although the Dutch system recognized same-sex partnerships in 1998, the rights to marry and adopt were not available until April 2001.

3. Jurisdictional Considerations: Judicial Deferral

Prior to the Dutch Parliament enacting the same-sex marriage legislation which took effect in 2001, early efforts aimed at achieving same-sex marriage targeted the judiciary. These cases, however, proved wholly unsuccessful. In a 1990 case, the Amsterdam District Court refused to rule on whether two gay men's human rights were violated by their inability to marry in the Netherlands. The court held that if any such remedy were available, it was within the powers of the Government or the Parliament, not the judiciary.[31] In a similar case, two women lost their case seeking same-sex marriage three times, ultimately before the Dutch Supreme Court on October 19, 1990.[32] This case, however, contained a strong *obiter dictum* cautioning that there may be insufficient justification for the fact that many of the rights and benefits of marriage are unavailable to same-sex couples – a message that has "since been interpreted as a clear signal towards the legislature" for change.[33]

These decisions deferring to the Dutch Parliament are consistent with Dutch courts' limited ability to exercise judicial review. The Dutch judiciary is allowed to review parliamentary law to ensure its compliance with

[26] *Id.* The dates of enactment in each of these countries are as follows: Norway (1993), Sweden (1995), Greenland (1996), and Iceland (1996). *Id.*; *see also Waaldijk*, *supra* note 15, at 80.

[27] Waaldijk, *supra* note 5, at 438.

[28] Merin, *supra* note 17, at 125, 126-27.

[29] Arjan Schippers, *From Idea to Reality*, RADIO NETHERLANDS WERELDOMROEP, *at* http://www.rnw.nl/society/html/struggle010815.html (Aug. 15, 2001).

[30] Waaldijk, *supra* note 5, at 437.

[31] *Id.* at 443.

[32] *Id.* Notably, these cases arose in the period when the Dutch system implicitly, but not explicitly, protected homosexuals from discrimination. *See* Waaldijk, *supra* note 18, at 62.

[33] Waaldijk, *supra* note 5, at 443.

international treaties and accords, but they are otherwise prevented from questioning the validity of laws passed by the Dutch Parliament.[34] Accordingly, the Dutch courts are usually limited to inquiry as to whether certain facts fall within the scope of certain provisions, as opposed to substantively evaluating the constitutional validity of specific statutes. In this light, it is not particularly surprising that the Dutch judiciary refused to find a bar on same-sex marriage to be unlawful and instead deferred to the Dutch Parliament to take any potential action on the matter.

III. CANADA

On June 10, 2003, Michael Leshner and Michael Stark, a same-sex couple of twenty-two years, wed just hours after an Ontario appellate court held that Canada's ban on same-sex marriage was unconstitutional.[35] This holding, which followed two similar holdings in other provinces,[36] effectively made Canada the third nation in the world to recognize same-sex marriages. The Canadian developments are particularly noteworthy as they significantly differ procedurally from those witnessed in the Netherlands – the first country to recognize same-sex marriages. The differences between the developments in the two countries are not, however, limited to procedural distinctions; rather, the social and political climate in Canada at the time of the decisions was markedly different from that in Dutch society. Accordingly, an analysis of these factors, as well as a comparison of the Dutch developments, is helpful in evaluating the likely success of similar initiatives in the United States legal system.

A. *Social and Cultural Considerations*

Unlike the Netherlands, where a large percentage of the population tends to favor extending marriage rights to same-sex couples, Canada evidences a significantly more divided population on the issue of homosexual marriages. Some recent studies of Canadians find that the general population is fairly evenly split on the issue, whereas other studies demonstrate that there is a marginally larger percentage of the population supporting same-sex

[34] *See* Peter J. Van Koppen, *The Dutch Supreme Court and Parliament: Political Decisionmaking Versus Nonpolitical Appointments*, 24 LAW & SOC'Y REV. 745, 753 (1990) (describing the judicial process); see also Waaldijk, *supra* note 18 at 57.

[35] *See* Cassandra Szklarski, *Court Backs Same-Sex Unions*, CNEWS, *at http://cnews.canoe.ca/CNEWS/Law/2003/04/22/70768-cp.html* (June 10, 2003).

[36] Courts in the provinces of British Columbia and Quebec found the exclusion of same-sex couples from marriage unconstitutional, but both courts gave the Federal Parliament a fixed time to correct the problem. Hendricks v. Québec, R.J.Q. 2506 (Que. Super. Ct. 2002); EGALE Canada Inc. v. Canada, 13 B.C.L.R.4th 1, paras. 157, 161 (C.A. 2003).

marriage, rather than opposing it.[37] The studies are consistent, however, in documenting that same-sex marriage is significantly more accepted by younger generations and those sectors of the population who do not regularly attend church services.[38] The strong correlation between consistent church attendance and opposition to gay marriage found in Canada lends support to the argument that religion serves as the likely source of many opponents' disapproval of same-sex marriage.

B. *Legal Development of Same-Sex Marriage in Canada*

In May 1999, the Canadian Supreme Court held in M. *v.* H. that federal legislation limiting spousal support after a breakup to opposite sex couples was unconstitutional.[39] While not explicitly concerning marriage, the ruling was nevertheless hailed as a victory for proponents of same-sex marriage since the Court found that the legislation's language, which limited "spouse" to opposite-sex couples, was unconstitutional under the Canadian Constitutional Act's Charter protections.[40]

Four years after the holding in M. *v.* H., the Ontario Court of Appeal, in *Halpern v. Canada*, found the exclusion of same-sex couples from marriage to be unconstitutional and ordered the Toronto City Clerk of Court to begin issuing marriage licenses to same-sex couples wishing to marry.[41] Specifically, the court in *Halpern* held that the traditional common law definition of marriage as between "one man and one woman" was inconsistent with constitutional *Charter* guarantees[42] and reformulated the definition as "the voluntary union for life of two persons to the exclusion of all others."[43] *Hal-*

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[37] A national study of Canadians, concluded in September 2003 by SES Canada Research Inc. and Sun Media Group, found that that forty-seven percent of Canadians favor same-sex marriage, while forty-four percent opposed it. Media Release, SES Canada Research Inc., Political Crossfire – Legalizing Same-sex Marriages: Generation and Faith Divide Canadians 1 (Sept. 7, 2003), *at* http://www.sesresearch.com/news/press_releases/PR%20September%207%202003.pdf (last visited June 15, 2004) [hereinafter SES Study]. A similar study conducted in August 2003 by the Centre for Research and Information on Canada (CRIC) found that forty-six percent of the Canadian population favored same-sex marriage and an equal forty-six percent were opposed. Andrew Parkin, A *Country Evenly Divided on Gay Marriage*, POLICY OPTIONS, Oct. 2003, at 39-40, *available at* http://www.irpp.org/po/archive/oct03/parkin.pdf (last visited June 15, 2004) [hereinafter CRIC Study].

[38] *See id.* The SES study found that sixty percent of Canadians under thirty years old favored same-sex marriage while only thirty-two percent of those over sixty years old favored such marriages. SES Study, *supra* note 37, at 1. Also, the SES Study found that fifty-eight percent of those who never attend church services favored homosexual marriage and only twenty-four percent of those who reported attending church weekly favored the unions. *Id.* The CRIC Study had similar findings. *See generally* CRIC Study, *supra* note 37, at 39-40.

[39] M. v. H., [1999] 2 S.C.R. 3 (Can.).

[40] *Id.*

[41] Halpern v. Canada, 65 O.R.3d 161, 200 (Ont. C.A. 2003).

[42] *Id.* para. 147.

[43] *Id.* para. 148.

pern was not a significant departure in holding that the exclusion of same-sex couples from marriage was unconstitutional, as courts in both British Columbia and Québec, in the *EGALE* and *Hendricks* cases respectively, had previously issued similar findings;[44] rather, the significance of the *Halpern* decision was that it became *immediately* possible for homosexual couples to begin marrying. *EGALE* and *Hendricks*, in contrast, allowed the government a window in which to implement same-sex marriage.[45]

Following the decision in *Halpern*, Jean Chrétien, Canada's Prime Minister at the time, issued a statement that the federal government would not challenge the court's finding.[46] Instead, the government presented draft legislation to the Supreme Court, which is now considering the constitutionality of the proposed measures.[47] After Ontario began issuing marriage licenses according to the *Halpern* decision and the government announced that it would not challenge the holding, the British Columbia Court of Appeal reconsidered the remedy granted in its *EGALE* ruling. Recognizing that suspending its remedy while Ontario was issuing same-sex marriage licenses would only "result in an unequal application of the law as between Ontario and British Columbia," the court lifted the suspension on remedy and allowed the province to immediately begin issuing same-sex marriage licenses.[48] Similarly, the Québec Court of Appeal, in considering an appeal of the *Hendricks* decision, unanimously affirmed the decision and lifted the ban which would have delayed same-sex marriage in the province until September 2004.[49] Although Parliament is delaying legislative action on same-sex marriage while awaiting a response from the Supreme Court, homosexual couples are free to marry in Ontario, British Columbia, and Québec under the rulings in *Halpern*, *EGALE*, and *Hendricks* respectively.

1. Adherence to the Step-by-Step Principle?

The developments in the field of same-sex marriage in Canada seem to be in line with the step-by-step principle highlighted among European legal

[44] *See* Hendricks v. Québec, R.J.Q. 2506 (Que. Super. Ct. 2002); EGALE Canada Inc. v. Canada, 13 B.C.L.R.4th 1, para. 157 (C.A. 2003).

[45] *Halpern*, 65 O.R.3d at 200; *Hendricks*, R.J.Q. 2506, para. 211; *EGALE*, 13 B.C.L.R.4th para. 161.

[46] Colin Nickerson, *Canada to Draft a Law Recognizing Gay Marriage*, THE BOSTON GLOBE, June 17, 2003, http://nl.newsbank.com/nl-search/we/Archives?p_action=doc&p_docid=0FBC19D9100F4058.

[47] *See Reference to the Supreme Court of Canada*, DEP'T OF JUSTICE CANADA, *at* http://canada.justice.gc.ca/en/news/nr/2003/doc_30946.html (last modified July 17, 2003); *see also* B.A. Robinson, *The Federal Government's "Reference" to the Supreme Court of Canada*, RELIGIOUS TOLERANCE.ORG, *at*http://www.religioustolerance.org/hom_marb26.htm (last modified May 28, 2004).

[48] *EGALE*, 13 B.C.L.R.4th para. 7.

[49] *Same-sex Marriage is Legal in Quebec! Court Confirms Rest of Canada Should Follow*, *available at* http://www.samesexmarriage.ca/legal/quebec_case/decision031904.htm.

systems. Specifically, Canada decriminalized same-sex intercourse by repealing its sodomy law in 1969.[50] However, while the ages of consent have been equalized to fourteen for both same-sex and opposite-sex intercourse, the age of consent for anal sex, for both opposite-sex and same-sex couples, is eighteen.[51] While on its surface, the black letter law here represents an equalization of the ages of consent between same-sex and opposite-sex couples, the "living law," or application of the statute, will likely give rise to disparities between same-sex (specifically male-male) couples and opposite sex couples. As homosexual male couples are physically incapable of engaging in traditional, non-anal intercourse, it is readily observable that homosexual male couples are significantly more likely to engage in anal sex, and therefore will be subjected to an age of consent that is higher than that of heterosexual couples engaging in traditional forms of intercourse. The decriminalization of homosexual intercourse would seem to satisfy the first step in the European model; however, the higher age of consent for anal sex, applied to both same-sex and opposite-sex couples, suggests a covert form of discrimination.

Regarding anti-discrimination legislation, Canada has enacted such protection at the federal level and in twelve of thirteen provinces.[52] In addition, since 1992, Canada has prevented discrimination in the military based on sexual orientation.[53] Further, Canada provides immigration rights to same-sex partners of Canadian citizens.[54] Thus, it appears that Canada has completed the second "step" in the European approach by offering a broad array of anti-discrimination legislation, both at the federal and provincial levels.

Prior to the Canadian judicial decisions holding the exclusion of same-sex couples from the institution of marriage unconstitutional, there was relatively little legislation protecting same-sex partnerships. However, the decision in *Hendricks*, as well as the judicial mandate in *Halpern* and *EGALE* that the Ontario and British Columbia governments begin issuing marriage licenses to same-sex couples, provides sound evidence that Canada has indeed completed the third step of the step-by-step principle. Notwithstanding that Parliament has yet to pass federal legislation allowing same-sex couples to marry, the practice is implemented, at least in Ontario and British Columbia, under the holdings in *Halpern* and *EGALE* respectively.

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[50] Merin, *supra* note 17, at 328, tbl. 4.

[51] *Id.*; *see also* GAY TIMES, LESBIAN AND GAY CANADA, *at* http://www.gaytimes.co.uk/gt/default.asp?topic=country&country=248 (last visited June 12, 2004).

[52] Merin, *supra* note 17, at 328, tbl. 4.

[53] *Id.*

[54] *Id.* at 328, tbl. 4, 331.

2. Applicability of the Law of Small Change

As at least one scholar has pointed out, development within each of the steps may take place in accordance with the "law of small change."[55] This "law" seems especially germane when evaluating the developments in Canada. For instance, when issuing its ruling in *M. v. H.*, Justice Cory of the Canadian Supreme Court pointed out that although the Court was holding limits on separation support to opposite-sex "spouses" unconstitutional, the matter "ha[d] nothing to do with marriage *per se*" and, in particular, that "there [was] no need to consider whether same-sex couples can marry."[56] This qualification on the Court's holding seems perfectly in line with the proviso of the "law of small change" which suggests any sizable change toward the recognition of homosexuality will only occur if the change is small or if the change is accompanied with a statement that "reinforces the condemnation of homosexuality." Further, the Canadian Parliament's action in equalizing the ages of consent for same-sex and opposite-sex couples, while leaving the age of consent for anal sex higher, would suggest a covert "condemnation of homosexuality" accompanying the change, as it seems to indirectly target same-sex couples (specifically male-male couples) to a greater degree than opposite-sex couples.

3. Judicial Review

Although the Canadian Parliament exclusively holds the power to determine who has the capacity to marry, the provincial courts nevertheless retain the power of judicial review – that is to say, the ability to question whether parliamentary statutes are constitutionally permitted by the Canadian Constitution. This power of substantive review is clearly evidenced in the same-sex marriage context by the provincial courts' holdings in *Hendricks*, *EGALE*, and *Halpern*. For instance, in *Hendricks* and *EGALE*, the courts ruled that the exclusion of same-sex couples from the institution of marriage ran afoul of the Canadian Constitution's Charter rights afforded to all Canadians; accordingly, the courts gave the federal Parliament a time frame in which to change the federal definition of marriage.[57] Similarly, in *Halpern*, the Ontario court held that the exclusion of homosexual couples from marriage violated constitutional rights.[58] However, as stated above, the court ordered the immediate issuance of marriage licenses to same-sex

[55] *See* Waaldijk, *supra* note 5, at 440.

[56] M. v. H., [1999] 2 S.C.R. paras. 52, 55 (Can.).

[57] *See* Hendricks v. Québec, R.J.Q. 2506 (Que. Super. Ct. 2002); EGALE Canada Inc. v. Canada, 13 B.C.L.R.4th 1, para. 161 (C.A. 2003).

[58] *See* Halpern v. Canada, 65 O.R.3d 161, 200 (Ont. C.A. 2003).

couples by the Toronto City Clerk of Court.[59] Therefore, it is clear that in the Canadian system the Federal Parliament has the right to determine capacity for marriage but such determinations are subject to review and rejection by the courts of the various provinces.

IV. THE UNITED STATES

A. *Social and Cultural Considerations*

In the United States, the percentage of the population self-identifying as religious is considerably higher than in other cultures that have recognized homosexual relationships.[60] In a 2001 study, 81% of the American adult population identified themselves with a religious group.[61] Furthermore, a majority of Americans consider marriage to be closely tied to religion. In one study, 53% reported that they believe marriage is largely a religious matter, and 71% of those individuals disapprove of same-sex marriage.[62] Conversely, only 33% of Americans view marriage as a legal matter, with 55% of those persons favoring same-sex marriage.[63] These statistics demonstrate that the American public largely self-identifies as religious and that religious Americans tend to disapprove of same-sex marriage.

Notwithstanding these empirical findings, the religious demographics appear to be changing within American society. For instance, the Episcopal Church USA recently consecrated openly gay Gene Robinson as its bishop of New Hampshire, despite national and global protests and threats of a schism to follow in the church.[64] Further, some churches seem to be opening their doors to same-sex blessings and holy union ceremonies. For example, some ministers in the United Methodist Church have begun blessing holy union ceremonies, and recently over 90 ministers of the church blessed a holy union ceremony of two lesbians.[65] In addition, although the US Catholic Church has traditionally aligned itself with strongly worded denouncements of homosexuality from the Vatican, there is recent evidence that this trend may be weakening. In an open letter released on December 19, 2003, nearly twenty-five Catholic priests stated they could no longer

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[59] *Id.*

[60] *See, e.g.*, Waaldijk, *supra* note 5.

[61] American Religious Identification Survey, The Graduate Center, The City University of New York, *at* http://www.gc.cuny.edu/studies/key_findings.htm (last visited June 15, 2004).

[62] *See also* Katharine Q. Seelye & Janet Elder, *Strong Support is Found for Ban on Gay Marriage*, N.Y. TIMES, Dec. 21, 2003, http://query.nytimes.com/gst/abstract.html?res=F30614FB395B0C728EDDAB0994DB404482.

[63] *Id.*

[64] *See* Laurie Goodstein, *Openly Gay Man is Made a Bishop*, N.Y. TIMES, Nov. 3, 2003, http://query.nytimes.com/gst/abstract.html?res=F30A12F63A540C708CDDA80994DB404482.

[65] Cynthia J. Sgalla McClure, *A Case for Same-Sex Marriage: A Look at Changes Around the Globe and in the United States, Including* Baker v. Vermont, 29 CAP. U. L. REV. 783, 808-09 (2002).

support the Vatican's "archaic" stance on gay issues and called the position "vile and toxic."[66] Therefore, despite a traditionally religious population that largely disapproves of same-sex marriage, changing societal and religious viewpoints may alter the traditional cultural viewpoint regarding same-sex unions.

B. *Developments Toward Same-Sex Marriage in the United States*

1. United States Supreme Court Decisions

While there are numerous United States Supreme Court decisions touching on homosexual issues, several key cases shall be discussed for purposes of assessing those issues related to the potential development of same-sex marriage within the United States. In 1986, the Supreme Court decided the landmark case of *Bowers v. Hardwick*.[67] In *Bowers*, the Court stated that "[t]he issue presented [was] whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."[68] The Court held that no such right existed and that criminalizing sodomy was not unconstitutional.[69]

However, in 2003, the Court reconsidered the issue. In *Lawrence v. Texas*, the Court overturned its decision in *Bowers* and held that "[t]he State cannot demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime."[70] It is noteworthy that, although the Court effectively decriminalized homosexual intercourse, it added the qualifier that it was not deciding the question of "whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[71] This proviso highlights the Court's desire not to have its holding construed as promoting same-sex marriages or other relationships, which is exactly the type of condemnation the law of small change suggests will accompany a step forward.

The Court also simultaneously addressed the issue of disparate ages of consent for homosexual and heterosexual conduct. In *State v. Limon*, an unpublished opinion, a Kansas court held that a criminal defendant could be given a longer sentence under a state statute that differentiated between

[66] *See Vatican's Homophobia Rejected by Catholic Clergy*, PLANETOUT, Dec. 22, 2003, *at* http://www.planetout.com/news/article.html?2003/12/22/4.

[67] Bowers v. Hardwick, 478 U.S. 186 (1986).

[68] *Id.* at 190.

[69] *Id.* at 196.

[70] Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003).

[71] *Id.* The dissent argued, however, that the majority's holding did provide a basis on which an argument for same-sex marriage could reasonably be mounted. *Id.* at 2497-98 (Scalia, J., dissenting).

homosexual and heterosexual activity for purposes of the requisite age of consent, as well as for sentencing guidelines for offenders.[72] The Supreme Court ordered the "case remanded to the Court of Appeals of Kansas for further consideration in light of Lawrence v. Texas. . . ."[73] On remand, the Kansas Court of Appeals affirmed the original sentencing.[74] It held that "[t]he legislature could have rationally determined that heterosexual sodomy between a child and an adult could be put in a class by itself and could be dealt with differently than homosexual sodomy between a child and an adult"[75] and that such a distinction was valid "because it is rationally related to the purpose of protecting and preserving the traditional sexual mores of society. . .."[76] Notwithstanding the Supreme Court's holding in *Lawrence*, it is apparent that certain jurisdictions, such as Kansas, continue to provide disparate ages of consent based on whether the conduct in question is homosexual or heterosexual.

2. Federal Legislative Developments

On May 7, 1996, the Defense of Marriage Act ("DOMA") was introduced into the United States Congress.[77] The House of Representative's Committee on the Judiciary stated that the DOMA was necessary to combat the "orchestrated legal assault being waged. . . by gay rights groups and their lawyers."[78] The Committee elucidated that the purposes of the DOMA are to "protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses."[79] The Committee further stated that the DOMA has two operative provisions:

> Section 2, entitled "Powers Reserved to the States," provides that no State shall be required to accord full faith and credit to a marriage license issued by another State if it relates to a relationship between persons of the same sex. And Section 3 defines the terms "marriage" and "spouse," for purposes of federal law only, to reaffirm that they refer exclusively to relationships between persons of the opposite sex.[80]

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[72] State v. Limon, 41 P.3d 303 (2002) (per curiam) (unpublished table decision), *available at* http://www.geocities.com/WestHollywood/4810/Queerlaw/Limon.html.

[73] Limon v. Kansas, 123 S. Ct. 2638, 2638 (2003).

[74] State v. Limon, 83 P.3d 229, 232 (Kan. Ct. App. 2004).

[75] *Id.* at 235.

[76] *Id.* at 237. *See generally* John Hanna, *Kansas Court Backs Harsher Sodomy Sentence*, WASHINGTON POST, Jan. 30, 2003, *available at* http://www.sodomylaws.org/usa/kansas/ksnews051.htm.

[77] H.R. REP. NO. 104-879, at 97 (1996); *see generally* H.R. 3396, 104th Cong. (1996) (enacted) (The Defense of Marriage Act) [hereinafter DOMA].

[78] H.R. REP. NO. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906.

[79] *Id.*

[80] *Id.*

Therefore, the DOMA can be interpreted as serving a dual purpose: (i) highlighting that each state is allowed to determine its own policies regarding marriage and same-sex unions and shall not be required to recognize homosexual marriages or unions from other states and (ii) explicitly stating that the terms "marriage" and "spouse," as used in federal law only, shall refer only to opposite-sex relationships.

3. State Judicial Decisions and Subsequent State Legislation

Similar to the developments which have occurred in Canada, the movement for same-sex marriage in the United States has largely targeted the judiciary at the sub-national level. In *Baehr v. Miike*, a Hawaii Circuit Court decision, a state judge found Hawaii's practice of denying same-sex couples marriage licenses and the right to marry was unconstitutional and ordered that homosexual couples immediately be given the right to wed.[81] However, following the decision, the Hawaiian legislature introduced a bill that would allow a public vote on a proposed amendment to the Hawaii Constitution that would grant the state legislature the power to restrict marriage to opposite-sex couples.[82] Before the state's appeal of the *Baehr* decision could reach the Hawaii Supreme Court, the bill passed, and approximately seventy percent of the Hawaii public voted in favor of the amendment, which effectively gave the legislature the power to exclude same-sex couples from the state's institution of marriage.[83]

Similar developments followed in Alaska. On February 27, 1998, in *Brause v. Bureau of Vital Statistics*, a state judge held that the right to choose one's life partner was a fundamental right and that the state's ban on same-sex marriages was unconstitutional.[84] Following the holding in *Brause*, legislative action similar to that in Hawaii was initiated. Less than a year later, the Alaskan Constitution was amended to provide "a marriage may exist only between one man and one woman" in order to be valid or recognized in the state.[85] Therefore, the judicial action was once again mooted by state legislative initiatives.

One year after *Brause*, a Vermont court would grapple with the same-sex marriage question as well. In *Baker v. State*, same-sex couples brought an

[81] Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

[82] *See Traditional Marriage Preservation: Overview, Hawaii's Same-Sex Saga*, HAWAII FAMILY FORUM, *at* http://www.hawaiifamilyforum.org/issues/traditionalmarriage.php (last visited Dec. 22, 2003).

[83] *Id.* The constitutional amendment reads "The legislature shall have the power to reserve marriage to opposite-sex couples." HAW. CONST. art. I, § 23.

[84] Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998).

[85] ALASKA. CONST. art. I, § 25.

action claiming the state's refusal to issue marriage licenses to same-sex couples was unconstitutional.[86] In *Baker*, the Vermont Supreme Court held that the state's refusal to grant same-sex couples the same benefits and protections afforded to married couples violated the Common Benefits Clause of the Vermont Constitution.[87] However, the court specifically pointed out that this would not foreclose the state legislature from creating a "civil union system" that would afford same-sex couples the rights and benefits that the state extended under marriage.[88] This was exactly the course taken by the legislature. The legislature passed Vermont's landmark civil union statute which allowed same-sex couples to "receive the benefits and protections and be subject to the responsibilities of spouses."[89] The statute did, however, explicitly reinforce that marriage "means the legally recognized union of one man and one woman."[90]

Most recently, Massachusetts, in *Goodridge v. Department of Public Health*, held that the state could not deprive couples of the rights and benefits of marriage merely because they seek to marry an individual of their own sex.[91] This case, decided on November 18, 2003, provided the state legislature a window until May 17, 2004 in which to reformulate the existing law so as to allow same-sex couples to enjoy the rights, benefits, and responsibilities of marriage.[92]

Following the Supreme Judicial Court's holding in *Goodridge*, the Massachusetts Senate queried the court as to whether a bill allowing civil unions, as opposed to civil marriage, would satisfy the ruling.[93] The court responded that civil unions were insufficient to satisfy its holding in *Goodridge* and stressed that the proposed civil union bill "maintains an unconstitutional, inferior, and discriminatory status for same-sex couples. . . ."[94] The advisory opinion suggests that nothing less than full civil marriage rights for same-sex couples will satisfy the *Goodridge* decision. Therefore, it appears that barring further developments, Massachusetts will in fact begin issuing same-sex marriage licenses on May 17, 2004.

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[86] Baker v. State, 744 A.2d 864, 867-68 (Vt. 1999).

[87] *Id.* at 867, 886. The Vermont Constitution's Common Benefits Clause, in pertinent part, reads: "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 particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community. . .." VT. CONST., ch. I, art. 7.

[88] *Baker*, 744 A.2d at 886.

[89] VT. STAT. ANN. tit. 15 § 1201(2) (1999).

[90] VT. STAT. ANN. tit. 15 § 1201(4) (1999)

[91] Goodridge v. Department of Public Health, 798 N.E.2d 941, 948 (Mass. 2003).

[92] *See id.* at 970.

[93] *See* Ann Rostow, *Mass. Senate Queries Court on Civil Unions*, PLANETOUT, Dec. 11, 2003, *at* http://www.planetout.com/news/article.html?2003/12/11/1.

[94] Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004).

To date, no state has recognized same-sex marriage in the United States and Vermont is the sole state to offer civil unions to homosexual couples. Despite this fact, several mayors began issuing marriage licenses to same-sex couples in various cities throughout the United States.[95] While the validity of these marriages is uncertain, New York Attorney General Eliot Spitzer issued an informal opinion stating that he believed state law would support the recognition of these marriages, notwithstanding the potential criminal liability of individuals performing the ceremonies without a proper license.[96]

V. APPLICABILITY OF INTERNATIONAL DEVELOPMENTS TO THE UNITED STATES DOMESTIC CONTEXT

A. *Social and Cultural Views of Homosexuality*

An analysis of the social and cultural factors present in the United States suggests that the Canadian approach is more likely than the Dutch approach to predict future developments within the United States. Religion appears to play a much larger role in Canada and the United States than it does in the Netherlands. A recent report by the U.S. Department of State notes that the Dutch "[s]ociety has become increasingly secular."[97] In fact, forty percent of the Dutch population consider themselves atheist or agnostic, claiming no religious affiliation.[98] By contrast, in the United States, only approximately ten percent of the population does not self-identify as belonging to a particular religious affiliation.[99] Similar to the United States, only sixteen percent of the Canadian population claim no religious affiliation.[100] Studies have suggested that much of the opposition to same-sex marriage is based on religious belief and concerns about its effects on religious marriage.[101] Similarly, even within the European context, it has been noted that the movement to give legal recognition to homosexual unions "is

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[95] *See* Tom Vanden Brook & Charisse Jones, *Oregon Gay Marriages Begin; New York Calls Vows Illegal*, USA TODAY, Mar. 3, 2004, http://www.usatoday.com/news/nation/2004-03-03-ny-gay-marriage_x.htm. As of March 3, 2004, such marriages had been conducted in California, New Mexico, New York, and Oregon. *Id.*

[96] *See* Ann Rostow, *New York May Recognize Out-of-State Nuptials*, PLANETOUT, Mar. 3, 2004, *at* http://www.planetout.com/news/article.html?date=2004/03/03/1. Spitzer stated that although persons solemnizing marriages without a license are likely violating state law, nothing in New York law "shall be construed to render void by reason of failure to procure a marriage license any marriage solemnized between persons of full age." *Id.*

[97] U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2003: NETHERLANDS (DEC. 18, 2003), *at* http://www.state.gov/g/drl/rls/irf/2003/24425.htm.

[98] *Id.*

[99] CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2004, UNITED STATES: PEOPLE, http://www.cia.gov/cia/publications/factbook/geos/us.html#People (last modified May 11, 2004).

[100] U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2003: CANADA (DEC. 18, 2003), *at* http://www.state.gov/g/drl/rls/irf/2003/24482.htm.

[101] *See supra* text accompanying notes 37-38.

rapidly gaining ground;" however, "[t]here are no such plans within the predominantly Catholic countries of Southern Europe."[102] These cultural and social factors support the findings that the Canadian approach is more applicable to the United States and that United States efforts will likely be met with opposition based on religious beliefs, as was seen in Canada. Thus, a prognosis for same-sex marriage within the United States should look to the Canadian developments to assess the potential success of initiatives to recognize same-sex relationships.

B. *Critique of the Step-by-Step Principle: is the United States "Out of Step"?*

Before addressing whether developments in the United States support the "step-by-step" principle, an analysis of the principle's utility is appropriate. One writer has noted that the principle, which he also terms the "necessary process," is both descriptive and normative.[103] He maintains that it is "descriptive" in that it reflects the process countries have undertaken to recognize same-sex partnerships.[104] Further, he argues that it is "normative" – that is to say, that it represents how legal systems engage the legitimacy of sexual orientation discrimination and same-sex relationships only once criminalizing same-sex intercourse is deemed improper.[105] These two factors, he argues, are causally linked, since only after a society recognizes the normative dimension of one of the "steps" may it progress to the next.[106]

It appears, however, that developments in the United States tend to cast some doubt on the validity and utility of the approach. At minimum, it appears that if the principle is indeed useful, the United States seems to be "out of step" with the process witnessed in the typical European legal systems. For instance, the writer who stressed the "descriptive and normative" features of the approach has emphasized the "causal connection between the prerequisites."[107] In other words, the normative value deduced from each step in the process serves as an impetus for the following steps. In the United States, however, developments have occurred that seem out of sequence in the "necessary process." For instance, while the United States is said to be significantly behind European countries as far as the recognition of same-sex partnerships is concerned, many states provide gay and lesbian parents more protection than European countries provide.[108] While many ju-

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[102] *See* Steven Sailer, *Gay Marriage Around the Globe*, UNITED PRESS INT'L, July 15, 2003, *at* http://www.upi.com/view.cfm?StoryID=20030714-073510-5671r.

[103] Merin, *supra* note 17, at 309.

[104] *Id.*

[105] *Id.*

[106] *See id.*

[107] *Id.* at 327.

[108] *Id.*

risdictions within the United States permit same-sex couples to enjoy adoption and other parenting rights, it is noteworthy that Belgium, which has recognized same-sex marriage, does not allow for adoption by same-sex couples. This fact has led the commentator to actually reformulate the order of the steps in applying the process in the United States context.[109]

The Supreme Court's decision in *Lawrence v. Texas* demonstrates that the United States has effectively decriminalized homosexual intercourse in all states. Although the Supreme Court remanded the *Limon* case based on its holding in *Lawrence*, the Kansas court upheld its earlier decision and reasoned that the state could legitimately maintain disparate ages of sexual consent based solely on sexual orientation. Therefore, since the first step of the step-by-step principle is characterized as the decriminalization of homosexual intercourse, it appears that the United States has progressed beyond this level. Curiously, however, United States developments, as evidenced by the *Limon* decision on remand, have not equalized the ages of consent for homosexual and heterosexual conduct – an occurrence often accompanying the decriminalization of same-sex intercourse in countries progressing toward gay marriage.

However, beyond this initial step, developments in the United States seem to contradict the mandatory sequence of events outlined in the principle. For instance, eleven states provide extensive protection from discrimination based on homosexuality, dating back as far as 1981.[110] Also, twenty-two states and the District of Columbia provide forms of protection from hate-crimes based on sexual orientation.[111] Despite this fairly developed system of anti-discrimination protection, the United States Supreme Court only recently decriminalized homosexual conduct.[112] One state, Massachusetts, continued to criminalize sodomy up until *Lawrence* for both homosexuals and heterosexuals while nevertheless providing protection from discrimination based on sexual orientation in "employment, public accommodations, housing, and education" since 1995.[113] Similarly, Minnesota outlawed discrimination on the basis of sexual orientation while continuing to maintain that homosexual acts were criminal. The state also had anti-discrimination measures for employment, housing, public accommodations,

[109] *Id.* "[W]hereas parental rights for same-sex couples in Europe may be classified as a fourth step, *following* recognition of gay partnerships, the recognition of homosexual parenthood in the United States. . . may be regarded as a third step in the process, following decriminalization and antidiscrimination and preceding a fourth step, *comprehensive* partnership recognition." *Id.* (emphasis in original) (internal citations omitted).

[110] *Id.* at 329, tbl. 4.

[111] *Id.*

[112] Until the Court's *Lawrence* decision in June 2003, homosexual conduct remained a criminal offense in 13 states. Lawrence v. Texas, 123 S. Ct. 2472, 2481 (2003).

[113] Merin, *supra* note 17, at 329, tbl. 4.

and education in place beginning in 1995, which predated the repeal of the state's sodomy law in 2001.[114]

Even if the sequence of the "step-by-step" principle seems dubious when set in the context of developments in the United States, its companion "law of small change" does nevertheless seem particularly applicable. For instance, in *Lawrence v. Texas*, the Supreme Court took a quite significant step "necessary" for the advancement toward same-sex unions when it decriminalized sodomy for both homosexuals and heterosexuals. This "significant change" was accompanied by explicit language from the Court that its holding did not address whether any state or government must give recognition to same-sex unions.[115] The use of the disclaimer, as well as the dissent's argument that the majority's language limiting the applicability of *Lawrence* is empty rhetoric, suggests that the Court did, in fact, reinforce "condemnation of homosexuality," in the words of the "law of small change," to seek to allay attacks that its holding goes too far.

However, such actions made by the Court, as well as extrinsic studies, seem to validate the hypothesis underlying the "law of small change" – that for change to be accepted, it must either be perceived as small or accompanied by continued condemnation of some aspect of homosexuality. For example, several polls conducted after the *Lawrence v. Texas* holding, which was hailed as landmark victory for homosexuals, showed that public support for same-sex relations actually *decreased* following the Court's "victory" holding.[116] Similarly, a poll conducted in Massachusetts following the Supreme Judicial Court's ruling in *Goodridge* found that opposition to same-sex marriage rose ten percent in the three months following the decision, documenting that a majority of Massachusetts residents opposed same-sex marriage where a majority had previously favored it.[117] Such findings seem to show an American "backlash" following a significant expansion of gay rights and support the "law's" proposition that change will not be accepted if perceived as being too large.

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[114] *Id.*; Waaldijk, *supra* note 5, at 440 n. 13. Minnesota's sodomy law was declared unconstitutional by a trial court in May 2001. Doe v. Ventura, 2001 WL 543734, (Minn. Dist. Ct. 2001).

[115] Justice Scalia argued in his dissent that the majority opinion nonetheless opened the door to recognition of same-sex marriage. Scalia said of the Court's disclaimer, "[d]o not believe it. . .. Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned." *Lawrence*, 123 S. Ct. at 2498 (dissenting opinion).

[116] *See* Seelye & Elder, *supra* note 62.

[117] Frank Phillips, *Poll: Majority of Mass. Residents Oppose Legalizing Gay Marriage*, THE BOSTON GLOBE, Feb. 21, 2004, http://www.boston.com/news/local/massachusetts/articles/2004/02/21/poll_majority_of_mass_residents_oppose_legalizing_gay_marriage/. Prior to the *Goodridge* holding, a poll had found a majority of Massachusetts residents favoring same-sex marriage. *See* Michael J. Meade, *Majority in Massachusetts Supports Gay Marriage, Poll Shows*, 365GAY.COM NEWSCENTER, Oct. 29, 2003, *at* http://www.365gay.com/newscontent/102903massMarriage.htm.

C. *Federalism*

Another element suggesting that the Canadian approach may be more salient for discussions of same-sex marriage within the United States is the importance of the federalist system in both the Canadian and United States legal frameworks.[118] Canada allows for an extensive system of federalism, allocating legal and political power at both the provincial and federal levels. For instance, legislative jurisdiction in Canada is often shared between the federal and provincial levels of government.[119] This federalist division is clearly observable in the field of marriage. The relevant case law relating to the regulation of marriage in Canada is especially complex. However, two points have generally been accepted in the relevant jurisprudence concerning marriage: (i) The Canadian Constitution clearly provides for overlapping jurisdiction between the federal and provincial levels of government and (ii) the Canadian Parliament retains exclusive jurisdiction in defining the "capacity to marry" – namely, which individuals can or cannot marry.[120]

Similarly, within the United States, there is a system predominantly defined by a division of power between the federal and state levels. In Canada, however, relevant jurisprudence has established that the federal Parliament has the authority to define the "capacity to marry," whereas provincial governments have the ability to regulate the "solemnization of marriage within their jurisdictions." By contrast, marriage in the United States is a matter of public policy that is left to each individual state. Although in the United States it is the states that have the power to regulate marriage, rather than the federal government as in Canada, the system of marriage in both countries has the potential to be highly fragmented. For instance, in the United States, thirty-eight states have taken legislative action, similar to that taken by the federal Congress in the DOMA, to restrict marriage to

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[118] For a discussion of the impact of American federalism on same-sex unions, see *Developments in the Law: II. Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2012 (2003).

[119] Depending on the matter, it is often stated that jurisdiction is either (i) exclusively within the scope of the federal Parliament, (ii) exclusively within the scope of the provincial legislatures, or (iii) shared concurrently between the two levels of government. *See, e.g.*, Donald G. Casswell, *Any Two Persons in Canada's Lotusland, British Columbia*, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW, 215, 216-17 (Robert Wintemute & Mads Andenaes eds. 2001).

[120] *Id.* at 217 (citing In re Marriage Legislation in Canada, [1912] A.C. 880 (Privy Council); Hellens v. Densmore, [1957] S.C.R. 768). Legal precedent suggests that the Federal Parliament has exclusive legislative jurisdiction concerning "marriage and divorce," while the provincial legislatures have exclusive jurisdiction relating to the "solemnization of marriage in the province" and "property and civil rights in the province." *Id.* (citing Constitution Act, 1867, 30 & 31 Victoria, ch. 3 (U.K.), as amended, §§ 91(26), 92(12) and 92(13)).

opposite sex couples within their states.[121] These statutes are often termed "mini-DOMAs" because of their similarity in wording to the federal DOMA.[122]

Unlike the system of federalism seen in both Canada and the United States, the Netherlands tends to remain a much more centralized system of government. As one commentator has noted, the Dutch system of government is a less populist system.[123] For instance, in the Netherlands, there are no referendums or elections held at the local level.[124] This leaves much of the "voice of the people" concentrated at the national level, as opposed to smaller, discrete systems of government at the local/regional level, such as in provinces or states in the Canadian and United States approaches.

Because the federalist system in Canada resembles the United States system, the development of same-sex partnership rights in the United States will likely parallel the Canadian approach rather than that of the Netherlands. There is already some evidence to this effect. In the United States, the recognition of same-sex unions has occurred exclusively at the state level – for instance, Vermont civil unions and the recent Massachusetts decision mandating same-sex marriage. Similarly, in Canada, challenges to the exclusion of same-sex couples from the institution of marriage were brought at the provincial, rather than federal level. In fact, there is currently a fragmented approach with Ontario and British Columbia allowing same-sex marriage, Québec holding such an exclusion unconstitutional but awaiting federal action, and the other provinces not including same-sex couples in marriage at all. Therefore, the regionalized approach taken in Canada due to its federalist system suggests that any action in the United States will occur at the state, rather than federal level.

D. *Judicial Review*

The instrument of judicial review further suggests that the Canadian approach may be more helpful in predicting the potential course of development for same-sex marriage within the United States domestic context. The notion of judicial review is altogether absent in the Dutch legal structure.[125] As is evidenced by the developments in the Netherlands, the courts do not

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[121] *See, e.g.*, *States With Laws Banning Same Sex Marriage* (Lambda Legal, New York, N.Y.), Feb. 12, 2004, *at* http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1427.

[122] The federal DOMA serves two limited purposes: it permits each state to refuse to recognize same-sex unions established in other states and it defines "marriage" and "spouse" for federal purposes. This is in no way belittles the restrictive impact of the federal DOMA. Because many matters, such as taxation, employment benefits and pension plans, are highly regulated under a federal framework, the potential impact of the DOMA on same-sex couples remains profound.

[123] Waaldijk, *supra* note 5, at 439.

[124] *Id.*

[125] *See* Van Koppen, supra note 34, at 753.

have the power to overturn Parliamentary legislative acts.[126] Rather, the courts are limited to such *obiter dictum* as was used in 1990 case of a lesbian couple seeking marriage, as discussed above, where the court "suggested" to the Dutch Parliament that homosexuals should be allowed the right to wed.

However, the Canadian system differs significantly from the Dutch approach and closely parallels the notion of judicial review present in the United States. As the *Hendricks*, *EGALE*, and *Halpern* cases suggest, the Canadian Parliament determines who has the capacity to marry, but its determination is not the final word; rather, the Canadian courts, even at the provincial level, are allowed the power to substantively review legislation for conformity with the Canadian Constitution. Courts in the United States have a similar ability. As was seen in *Brause*, *Baehr*, *Baker*, and *Goodridge*, the United States courts have the power to hold legislative enactments unconstitutional. Likewise, the United States federal courts have the power to review federal and state legislation for compliance with constitutional mandates – as the United States Supreme Court did in *Lawrence* and, implicitly, in its remand of *Limon*. In Canada, same-sex marriage rights developed almost exclusively because the judiciary exercised its power of judicial review over marriage legislation. Similarly, successful efforts in the United States have largely been limited to challenges brought before the judiciary. There is strong evidence that developments within the United States seem to be evolving from judicial challenges to legislation, just as in Canada. Thus, the future of United States based efforts may well parallel those witnessed in Canada.

E. *The Legislative "Veto"*

Recent developments within the United States suggest, however, that contrary to the Canadian history, the legislatures in the United States are unlikely to acquiesce to judicial determinations holding the exclusion of same-sex couples from marriage as unconstitutional. In Canada, following the courts' decisions, the Prime Minister of Canada conceded to the judicial rulings and stated that the Government would not challenge the courts' holdings.[127] Rather, the government began formulating same-sex marriage legislation to be presented to the Canadian Supreme Court and Parliament for consideration and enactment.

This approach is in stark contrast to the legislative reaction seen in the United States. For instance, following the decisions in both *Brause* and *Baehr*, the Hawaii and Alaska state legislatures both initiated constitutional amendments to "overrule" the courts' determinations that same-sex couples

[126] *Id.*

[127] *See supra* text accompanying note 46.

must be allowed to wed; both efforts were successful. Also, following the decision in *Baker*, the Vermont legislature took steps to prevent granting full marriage rights to same-sex couples – an outcome that seemed inevitable in light of the Vermont court's holding. Rather than allow full marriage rights, the legislature mitigated the potential reach and effect of the decision by passing civil union legislation, as opposed to marriage-enabling legislation. The recent Massachusetts holding in *Goodridge* evidences a similar action by the legislature. Following the ruling that same-sex couples must be extended the rights and benefits of marriage under the Massachusetts constitution, the state legislature questioned the Supreme Judicial Court as to whether civil unions would suffice in light of the court's holding;[128] the court responded that civil unions were an insufficient remedy in light of *Goodridge*.[129] Following the court's response to the civil union question, a joint-session of the Massachusetts legislature met to consider constitutional amendments that would legalize civil unions but not full marriage; amendment proposals to this effect were defeated during the session and the soonest any initiative for a constitutional amendment in Massachusetts could reach the state's voters would be November 2006.[130] In total, after witnessing the movement for same-sex marriage achieve initial successes within state judiciaries, thirty-eight states enacted legislation similar to the federal DOMA and defined marriage as only between one man and one woman.

Further, the developments by the United States courts, documented by the decisions above, led to increased motivation by some within the United States Congress to enact an amendment to the United States Constitution. The proposed Federal Marriage Amendment would define marriage as solely between one man and one woman, which would prevent any state from allowing same-sex marriage and potentially even bar civil unions at the state level.[131] This development, coupled with similar actions by the legislatures at the state level, supports the proposition that the legislative bodies within the United States are likely to mount opposition following judicial decisions which extend marriage rights to same-sex couples. Such action suggests that

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[128] *See* Dennis Cauchon, *Mass. About to Alter Gay Marriage Debate*, USA TODAY, Dec. 25, 2003, at 3A.

[129] *See* Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2004).

[130] *See* Jennifer Peter, *Massachusetts Fails in Attempt to Allow Civil Unions Instead of Marriage*, THE SEATTLE TIMES, Feb. 18, 2004, *at* http://seattletimes.nwsource.com/html/nationworld/2001856156_gays12.html.

[131] *See* Cauchon, *supra* note 128. Scholars, and even the proposed Amendment's drafters, disagree as to whether the proposed Federal Marriage Amendment would only prevent same-sex marriage or whether its provisions would effectively foreclose the option of civil unions as well. *See* Alan Cooperman, *Little Consensus on Marriage Amendment: Even Authors Disagree on the Meaning of Its Text*, WASHINGTON POST, Feb. 14, 2004, at A1, *available at* http://www.washingtonpost.com/wp-dyn/articles/A40866-2004Feb13.html.

American legislatures are willing to challenge and nullify judicial decisions promoting rights to same-sex unions. This would suggest that even where same-sex couples would otherwise be allowed to wed under the laws of their state, the federal legislature may prefer to foreclose any such options – a peculiarity that would leave same-sex couples otherwise allowed to marry under state law observing "'til Congress do us part."

VI. CONCLUSION

An analysis of same-sex marriage in the Netherlands and Canada suggests that certain social, cultural, and legal factors were essential in such development. These factors differ greatly between the two systems, however, based on differences in the social and cultural environment, as well as the legal and political structure of government. Considering that Canada more closely resembles the socio-cultural landscape and legal framework of the United States, it is probable that the Canadian developments and approaches are most likely to resemble any similar initiatives that develop within the United States domestic context. Specifically, the presence of judicial review, a system of federalism, and an overtly religious population generally disapproving of homosexuality tend to suggest that developments toward same-sex marriage in Canada and the United States will be strikingly similar. As the Netherlands does not recognize the concept of judicial review, has a largely secular society that is accepting of homosexuality, and has power concentrated at the national, rather than regional level, its applicability in the United States domestic context is limited. Consequently, future overtures toward same-sex marriage in the United States will likely proceed along the line of the Canadian approach. Such an approach has great significance for the future of same-sex unions in the United States.