

## IS SAME-SEX MARRIAGE A THREAT TO TRADITIONAL MARRIAGES?: HOW COURTS STRUGGLE WITH THE QUESTION

Legal recognition of same-sex marriages<sup>1</sup> has only recently become one of the leading issues in American politics,<sup>2</sup> but the history of related impact litigation goes back four decades.<sup>3</sup> Although the arguments raised

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1. “‘Homosexual’ and ‘same-sex’ marriages are not synonymous . . . . Parties to ‘a union between a man and a woman’ may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.” *Baehr v. Lewin*, 852 P.2d 44, 51 n.11 (Haw. 1993). Accordingly, this Note uses the term “same-sex marriage” rather than “gay marriage.” None of the American states directly regulate marriage based upon sexual orientation. Instead, most regulate marriage based upon the combination of genders of the parties involved. If a state were to issue marriage licenses based on sexual orientation, it might face a challenge under a state or federal due process constitutional provision. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (holding, in reference to due process provisions, that “our laws and tradition afford constitutional protection to personal decisions relating to marriage”); *Turner v. Safley*, 482 U.S. 78, 95 (1987) (“[T]he decision to marry is a fundamental right.”); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

2. State-level legal recognition of same-sex marriages has instigated the passage of broad-reaching federal laws, affected the outcome of a presidential election, and led to attempts to amend the state and federal constitutions. In 1996, the prospect that the Supreme Court of Hawaii might require that state to recognize same-sex marriages led to the enactment of the Federal Defense of Marriage Act, which prohibits the federal government from recognizing same-sex marriages for any purpose and provides that states cannot be required to recognize same-sex marriages performed in other jurisdictions. *See* H.R. REP. NO. 104-664, at 1–18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2905–23 (“[T]he state courts in Hawaii appear to be on the verge of requiring that State to issue marriage licenses to same-sex couples.” *Id.* at 2, *reprinted at* 2906. “[I]t is critical to understand the nature of the orchestrated assault being waged against traditional heterosexual marriage by gay rights groups and their lawyers.” *Id.* at 2–3, *reprinted at* 2906–07); *see* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)); *see also* *Andersen v. King County*, 138 P.3d 963, 1032 (Wash. 2006) (Bridge, J., dissenting) (arguing that the title “Defense of Marriage Act” reveals that the purpose of the law is to force a minority group to abide by the majority’s perception of tradition); *see, e.g.*, Craig Crawford, *Supporters Look to Bush to Back Gay Marriage Ban*, N.Y. TIMES, Nov. 5, 2004, <http://www.nytimes.com/cq/2004/11/05/news-1413230.html> (naming same-sex marriage recognition as “the issue that most helped re-elect President Bush” in the 2004 presidential election and describing the use of the issue in his campaign). There have been several attempts since *Baehr* and subsequent same-sex marriage cases to amend the Federal Constitution to preclude any recognition of same-sex marriages in all American jurisdictions. *See, e.g.*, H.R.J. Res. 93, 107th Cong. (2002); H.R.J. Res. 56 and S.J. Res. 26, 108th Cong. (2003); H.R.J. Res. 106 and S.J. Res. 30, 108th Cong. (2004); H.R.J. Res. 39 and S.J. Res. 1, 109th Cong. (2005); H.R.J. Res. 88, 109th Cong. (2006); H.R.J. Res. 22, H.R.J. Res. 74, and S.J. Res. 43, 110th Cong. (2007); H.R.J. Res. 89, 110th Cong. (2008); H.R.J. Res. 37 and H.R.J. Res. 50, 111th Cong. (2009); H.R.J. Res. 45, 112th Cong. (2011). *See infra* note 52 for a list of state constitutional amendments.

3. The first equal protection challenge to a same-sex marriage ban was heard by the Supreme Court of Minnesota forty years ago. *See Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). Although a New York court had dealt with the recognition of same-sex marriages two months before *Baker*, the New York case was a unique situation in which an adult male plaintiff underwent a marriage ceremony with the defendant, whom he believed to be a woman but who was in fact another man. *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Spec. Term 1971). The plaintiff accordingly sought a declaration of his marital status, but no equal protection arguments were raised. *Id.* The unusual circumstances behind that case would prevent the ruling from having broader precedential

in the litigation have developed over the years, one argument has persisted: that the State has an interest in preserving the traditional institution of marriage.<sup>4</sup>

Same-sex marriage litigation in the United States has generally proceeded as a challenge to a state's statutory ban of same-sex marriage recognition under the state constitution's equal protection provision.<sup>5</sup> States have consistently defended their bans on the grounds that there is a legitimate state interest in protecting or promoting the traditional institution of marriage, and that this interest is furthered by preventing the legal recognition of same-sex marriages.<sup>6</sup> Despite the ubiquity of this argument, the responses it has received in courts have varied widely. Some courts have accepted the argument and held that there is a legitimate state interest that is furthered by the same-sex marriage ban;<sup>7</sup> others have

effect. In contrast, the *Baker* case involved a challenge by two men under the Federal Equal Protection Clause to the state's decision to deny them a marriage license solely because they were of the same sex. 191 N.W.2d at 186. Thus, had the case been successful, it would have mandated legal recognition of same-sex marriages throughout the State of Minnesota, and it can fairly be characterized as impact litigation. See also *McConnell v. Nooner*, 547 F.2d 54 (8th Cir. 1976) and *McConnell v. United States*, 188 Fed. Appx. 540 (8th Cir. 2006), which together present the case of the same couple who, after receiving a (presumptively invalid) Minnesota marriage license despite the adverse ruling in *Baker*, attempted to compel the Veterans Administration and the Internal Revenue Service to treat them as married.

4. See *infra* notes 7–10 for cases dealing with the argument.

5. See *infra* notes 7–10. Minnesota's 1971 case *Baker v. Nelson*, 191 N.W.2d 185, as a failed Federal Equal Protection Clause challenge to a same-sex marriage ban raised in state court, is the exception to this rule. The subsequent dismissal of appeal by the Supreme Court of the United States in *Baker v. Nelson*, 409 U.S. 810 (1972) discouraged other plaintiffs from bringing challenges under the Federal Equal Protection Clause in the courts of other states. Several courts have held that the dismissal of an appeal constitutes a binding Supreme Court ruling on the merits of the case, although at least one federal court has found otherwise. See *infra* note 27 and accompanying text.

6. See *infra* notes 7–10. The rare exceptions to this rule were mostly decided before the Supreme Court of Hawaii decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), in which that court appeared to give serious thought to the possibility of mandating same-sex marriage recognition. See *infra* notes 29–36 and accompanying text. One of the numerous repercussions of this decision, see *supra* note 2, was to encourage defenders of the non-recognition of same-sex marriage to raise a more vigorous defense, such as arguing that same-sex marriage would threaten the traditional institution of marriage. The only state supreme court in those states that have had post-*Baehr* same-sex marriage recognition suits not to be confronted with the traditional institution argument in some form is the Supreme Court of New Jersey, in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006). See *infra* note 8.

7. See, e.g., *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) (holding that the traditional institution of marriage is sufficiently intertwined with society to prevent courts from holding that legislatures have no rational basis for preventing same-sex couples from accessing it); *Standhart v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003) (holding that although the State's denial of same-sex marriage recognition might result in some inequity, rational basis review did not require the State to show a perfect fit between the law and the interests it advanced, and thus deciding that the State's asserted interest in maintaining the traditional institution in order to channel procreation into heterosexual married couples was sufficient to satisfy rational basis review); *Morrison v. Sadler*, 821 N.E.2d 15, 23 (Ind. Ct. App. 2005) (holding that preserving the traditional institution of marriage would be presumed to be a legitimate state interest unless the plaintiffs could prove that legal

subjected it to critical analysis and have partially accepted it, finding an equal protection violation but allowing the legislature to remedy the violation by creating a parallel institution (often called a “civil union”) that is intended to have all the substantive benefits of civil marriage;<sup>8</sup> and some courts have rejected the argument as a red herring.<sup>9</sup> Several courts have found ways to avoid addressing the argument at all.<sup>10</sup>

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recognition of same-sex marriage would promote all of the state interests furthered by the recognition of traditional marriages); *Conaway v. Deane*, 932 A.2d 571, 630–33 (Md. 2007) (holding that although the State’s limitation of marriage to heterosexual couples might be both over-inclusive and under-inclusive as applied toward the goal of channeling procreation into heterosexual relationships, “[a] legislative enactment reviewed under a rational basis standard of constitutional review need not be drawn with mathematical exactitude”); *Hernandez v. Robles*, 855 N.E.2d 1, 21–22 (N.Y. 2006) (holding that the State’s asserted interest in maintaining the traditional institution of marriage in order to channel procreation into heterosexual married couples was by itself sufficient to satisfy rational basis review because rational basis review did not require a perfect fit). *But see id.* at 26, 33 (Kaye, C.J., dissenting) (arguing that the State’s interests in channeling procreation or in maintaining a traditional institution for tradition’s sake were not sufficient to satisfy rational basis review). Some federal courts give the argument summary acceptance. *See Adams v. Howerton*, 673 F.2d 1036, 1042–43 (9th Cir. 1982) (accepting with minimal analysis the argument as a legitimate state interest for the purposes of immigration laws); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 867–68 (8th Cir. 2006) (holding that it is beyond the competence of courts to decide that the traditional institution of marriage is not promoted by a same-sex marriage ban).

8. *See, e.g., Baker v. State*, 744 A.2d 864, 886–87 (Vt. 1999); *Lewis*, 908 A.2d at 224. *Lewis* appears to be unique among post-*Baehr* equal protection challenges to same-sex marriage bans in that the court was not faced with the argument that the ban furthered a legitimate state interest in promoting the traditional institution of marriage. *Id.* at 217. Despite this, the argument did receive some discussion in the dissenting opinion of Chief Justice Poritz. *Id.* at 228–30.

9. *See, e.g., Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (*see infra* notes 10, 48–50 and accompanying text); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (*see infra* notes 53, 55–56 and accompanying text); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (*see infra* notes 54, 57 and accompanying text); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (*see infra* notes 58–61 and accompanying text); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 389 (D. Mass. 2010) (“[T]his court cannot discern a means by which the federal government’s denial of benefits to same-sex spouses might encourage homosexual people to marry members of the opposite sex. And denying marriage-based benefits to same-sex spouses certainly bears no reasonable relation to any interest the government might have in making heterosexual marriages more secure.”); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 972 (N.D. Cal. 2010) (relying on statistical evidence to find that “[p]ermitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce, cohabit, have children outside of marriage or otherwise affect the stability of opposite-sex marriages”).

10. *See, e.g., Baker v. Nelson*, 191 N.W.2d at 186 (forestalling the issue by holding that marriage is an institution that predates the State, so the State does not engage in state action by defining marriage, but instead promotes the legitimate state interest of upholding tradition). *But see Goodridge*, 798 N.E.2d at 961–62 n.23 (“[I]t is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been.”). *See, e.g., Jones v. Hallahan*, 501 S.W.2d 588, 589–90 (Ky. 1973) (relying on a dictionary definition of the term “marriage” to find that the exclusion of same-sex couples from civil marriage resulted not from state action, but rather from a lack of capacity of two people of the same sex to marry, and thereby avoiding a finding of state action and thus any constitutional question which might invoke the argument); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (taking note of the argument but remanding the case to the trial court on procedural grounds, *see infra* note 32 and accompanying text, despite the concerns of a

German<sup>11</sup> courts began to examine the putative threat posed to marriage by the legal recognition of same-sex unions in 2001 after the German legislature introduced registered civil partnerships for same-sex couples.<sup>12</sup> The partnerships law was challenged on German constitutional

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dissenting justice that the court was in reality ruling on the merits of the argument, *see infra* notes 33–37 and accompanying text); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995) (in which a splintered court based its denial of same-sex marriage recognition on the reasoning that “same-sex ‘marriages’ are legally and factually—*i.e.*, definitionally—impossible,” *id.* at 361 (Terry, J., concurring), or that the argument need not be assessed until it was determined whether homosexuals constitute a suspect, quasi-suspect, or non-suspect class, *id.* at 333–34 (Ferren, J., concurring in part and dissenting in part)); *Brause v. Bureau of Vital Statistics*, 21 P.3d 357, 360 (Alaska 2001) (ignoring the trial court’s reasoning in the course of the trial that the traditional institution argument was judicially assessable, including that “[i]t is not enough to say that ‘marriage is marriage’ and accept without any scrutiny the law before the court,” 1998 WL 88743, at \*2 (Alaska Super. Ct. 1998), while finding that the case was not yet ripe for decision); *Li v. State*, 110 P.3d 91, 102 (Or. 2005) (striking down a challenge to Oregon’s same-sex marriage ban on procedural grounds and not addressing the form of the traditional institution argument that was raised in the trial court: “Intervenors-defendants argue that ‘traditional marriage—marriage between one man and one woman—would clearly be a historical exception to any reading of Article I, Section 20 that would invalidate the marriage statutes, then or now,’” 2004 WL 1258167, at \*7 (Or. Cir. 2004)); *Andersen v. King Cnty.*, 138 P.3d 963, 983 (Wash. 2006) (criticizing a concurring opinion’s reliance on the traditional institution argument as one of many “unassailable truths” and relying on prohibitions on judicial review of the merits of legislative action to avoid addressing the argument). In *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984), the Superior Court of Pennsylvania declined to rule on a state Equal Rights Amendment challenge to the State’s refusal to recognize same-sex common-law marriages, but it did so because the argument had not been raised in the lower courts. *Id.* at 956. Although it is an equal protection-type challenge to a state’s non-recognition of same-sex marriages, the *De Santo* holding is expressly restricted to common-law (non-statutory) marriages and thus is not relevant for comparison with the other cases. *Id.* at 953. *But see id.* at 954 (assuming that “marriage” retains its usual meaning even when referring to a common-law marriage). *See also Baehr*, 852 P.2d at 61 (holding that the restriction of the *De Santo* holding to common-law marriages rendered it irrelevant to the issue of whether Hawaii’s denial of same-sex marriage recognition was constitutional).

11. This Note cites and provides translations for several German legal texts. The English translations of the German Federal Constitutional Court [BVerfG] decisions reported at 105 BVERFGE 313 (decided on July 17, 2002) and 124 BVERFGE 199 (decided on July 7, 2009) are quoted (with Americanized spelling) from English translations available at the Court’s website, <http://www.bundesverfassungsgericht.de/en>. The same is true of the names of the German statutes cited in this Note. The translations of the other Federal Constitutional Court decisions, the German law journal articles, and the Act for the Revision of the Law of Civil Partnerships quoted in note 78 are the author’s own translations. Translation is an art, not a science, and there will inevitably be subtle changes in the meaning of a text when it is translated. The author has endeavored to provide a clear and accurate translation of the original German texts, and believes that the translations provided by the Federal Constitutional Court are both clear and accurate. Any errors in translation are, of course, the author’s own responsibility.

12. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 17, 2002, 105 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 313 (313) (describing the enactment of the *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften* [Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships], Feb. 16, 2001, BGBl. I at 266). As in Vermont (until the passage of the same-sex marriage recognition bill in 2009) and New Jersey, the German legislature established a parallel institution to marriage with a different name, rather than establishing legal recognition of same-sex marriages *per se*. *See* 2009 Vt. Adv. Legis. Serv. 3 (LexisNexis); 2006 N.J. Laws 103. However, the

grounds.<sup>13</sup> The German Constitution (entitled “Basic Law”) requires the government to affirmatively support the institution of marriage,<sup>14</sup> and the challenge to the partnerships law claimed that legal recognition of any form of cohabitation other than a marriage between one man and one woman would undermine the traditional institution of marriage.<sup>15</sup> The German Federal Constitutional Court, which is the court of final jurisdiction for constitutional questions,<sup>16</sup> considered the argument in detail and concluded that the legal recognition of same-sex unions did not undermine the traditional institution of marriage.<sup>17</sup> In a dissenting opinion, one judge argued that the constitutionally required guarantee of the institution of marriage required the State to privilege the institution of marriage above all other forms of cohabitation.<sup>18</sup> However, the Federal

traditional institution argument as raised in opposition to registered partnerships is identical to the argument as raised in opposition to same-sex marriages, so the judicial treatments of the argument permit a comparison. In many contexts, German life partnerships and German civil marriages are simply treated as if they were one institution. The word *Homoehe* [“gay marriage”] is used in Germany to describe life partnerships. See *Weitere Gleichstellung für Homosexuelle* [Greater Equality for Homosexuals], ONLINE FOCUS (Oct. 22, 2009), [http://www.focus.de/politik/weitere-meldungen/bundesverfassungsgericht-weitere-gleichstellung-fuer-homosexuelle\\_aid\\_447007.html](http://www.focus.de/politik/weitere-meldungen/bundesverfassungsgericht-weitere-gleichstellung-fuer-homosexuelle_aid_447007.html) (referring to registered partnerships as “sogenannte[] Homoehe” [“so-called gay marriage”]).

13. See *infra* note 15.

14. See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, art. 6.1 (Ger.) (“Ehe und Familie stehen unter dem besonderen Schutz der staatlichen Ordnung.” [“Marriage and family have the special protection of the state.”]). See also BVerfG, 105 BVERFGE 313 (342) (“[Das] neue[] Institut[] der eingetragenen Lebenspartnerschaft . . . verst[ößt] weder gegen die in Art. 6 Abs. 1 GG gewährleistete Eheschließungsfreiheit noch gegen die dort normierte Institutsgarantie.” [“The new institution . . . infringe[s] neither the freedom of marriage guaranteed in Article 6.1 of the Basic Law nor the institutional guarantee laid down there.”]).

15. 105 BVERFGE at 321. The challenge to the law claimed that “[i]nsbesondere stehe es mit dem nach Art. 6 Abs. 1 GG gebotenen Schutz von Ehe und Familie nicht in Einklang.” [“In particular, [the law] is not consistent with the protection of marriage and the family required by Article 6.1 of the Basic Law.”] The challenge to the law also included an allegation that the procedure by which the law was enacted violated the constitution. *Id.* at 318–19. That basis for the challenge was unanimously rejected by the court. See *infra* note 67.

16. GG art. 1.3. See also Bundesverfassungsgerichtsgesetz [Federal Constitutional Court Act], Mar. 12, 1951, BGBl. I at 244–245, §§ 13–14, repromulgated Aug. 11, 1993, BGBl. I at 1473, repro last amended by Gesetz, Dec. 22, 2010, BGBl. I at 2248, art. 11.

17. BVerfG, 105 BVERFGE 313 (343–57).

18. “Förderung bedeutet positive Zuwendung über das normale Maß hinaus, damit also Privilegierung der Ehe.” [“Promotion means positive consideration beyond the normal degree, and therefore giving marriage privileged treatment.”] (Richterin [Judge] Haas, dissenting). *Id.* at 361. The Federal Constitutional Court has continued to interpret this provision and, contrary to the arguments of Judge Haas, has limited the ability of the State to privilege marriages over domestic partnerships. “Geht jedoch die Förderung der Ehe mit einer Benachteiligung anderer Lebensformen einher, obgleich diese nach dem geregelten Lebenssachverhalt und den mit der Normierung verfolgten Zielen der Ehe vergleichbar sind, rechtfertigt die bloße Verweisung auf das Schutzgebot der Ehe eine solche Differenzierung nicht.” [“Although the support of marriage is associated with a disadvantage to other living arrangements, notwithstanding that they are comparable to marriage in the regulations they are subject to and in the ends that they are normally understood to serve, a mere referral to the

Constitutional Court has since rejected this argument<sup>19</sup> and mandated that all the substantive rights extended to married couples be extended equally to those in registered civil partnerships, except in situations where the government can show a justifiable reason to treat the institutions differently.<sup>20</sup>

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constitutional principle of protecting marriage does not justify such a different treatment [in reference to German inheritance tax law.]" BVerfG, 1 BvR 611/07, ¶ 91, July 21, 2010.

19. "Es ist verfassungsrechtlich nicht begründbar, aus dem besonderen Schutz der Ehe abzuleiten, dass andere Lebensgemeinschaften im Abstand zur Ehe auszugestalten und mit geringeren Rechten zu versehen sind." ["It cannot be constitutionally justified to derive from the special protection of marriage a rule that other partnerships are to be structured in a way different from marriage and to be given lesser rights."] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], July 7, 2009, 124 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 199 (226).

20. "Art. 3 Abs. 1 GG gebietet, dass hinsichtlich der Ungleichbehandlung an ein sachlich gerechtfertigtes Unterscheidungsmerkmal angeknüpft wird." ["Article 3.1 of the Basic Law requires that the unequal treatment must be linked to a factually justified distinguishing element."] *Id.* at 220. "Die Ungleichbehandlung von Ehe und eingetragener Lebenspartnerschaft ist gemessen an diesen Anforderungen nicht gerechtfertigt." ["The unequal treatment of marriage and registered civil partnerships is not justified, measured against these requirements."] *Id.* at 224. "Ein sachlicher Differenzierungsgrund ist auch objektiv nicht erkennbar." ["Nor is an objective reason for differentiation discernible."] *Id.*

Die Rechtfertigung der Privilegierung der Ehe, und zwar auch der kinderlosen Ehe, liegt, insbesondere wenn man sie getrennt vom Schutz der Familie betrachtet, in der auf Dauer übernommenen, auch rechtlich verbindlichen Verantwortung für den Partner. In diesem Punkt unterscheiden sich eingetragene Lebenspartnerschaft und Ehe aber nicht. Beide sind auf Dauer angelegt und begründen eine gegenseitige Einstandspflicht.

[The justification of the privileged treatment of marriage, even where it is childless, in particular when it is considered separately from the protection of the family, lies in the responsibility for the partner which is assumed in the long term and which is also legally binding. In this respect, however, there is no difference between registered civil partnerships and marriage. Both are of a permanent nature and create a mutual obligation of support.]

*Id.* at 225. Prior to the court's 2009 decision, at least one German legal commentator had insisted that although "marriage" had shifted in meaning over time, its constitutional definition retained essential attributes of opposite-sex spouses and indissolubility (immunity from institutional abolishment by the government, not immunity from dissolution by divorce), and that this justified a privileged status for opposite-sex marriage. Martin Burgi, *Schützt das Grundgesetz die Ehe von der Konkurrenz anderer Lebensgemeinschaften?* [Does the Basic Law Protect Marriage from Competition from Other Forms of Cohabitation?], 39 DER STAAT 487 (2000). "Die Ehe ist in der Realität nicht mehr das, was sie im Zeitpunkt des Inkrafttretens des Grundgesetzes gewesen ist . . ." ["The institution of marriage is in reality no longer the thing that it was at the time of the enactment of the Constitution . . ."] *Id.* at 488. "Unabdingbare inhaltliche Mindestvoraussetzungen einer Ehe im Sinne des Grundgesetzes sind mithin die Verschiedengeschlechtlichkeit und die grundsätzliche Unauflöslichkeit." ["Hence the presence of both sexes and constitutional indissolubility are indispensable minimum prerequisites of a marriage in the constitutional sense."] *Id.* at 491. "[A]n welche Form der Lebensgemeinschaft die berührten Gemeinwohlinteressen gebunden sind, nämlich an die Ehe. Sie entspricht einer Wertentscheidung des Grundgesetzes, das ihr den Vorrang gegenüber anderen Lebensgemeinschaften einräumt." ["[T]he form of cohabitation with which the common good is connected, which is marriage. This reflects a normative judgment of the Constitution that gives marriage priority over other forms of cohabitation."] *Id.* at 508. However, prior to the decision, other commentators had argued that the constitutionally mandated protection of marriage did *not* require other living arrangements to be given an inferior

While the issue may be more settled in Germany, the legal recognition of same-sex marriages (and other parallel institutions)<sup>21</sup> remains one of the hottest controversies in American politics,<sup>22</sup> and equal protection challenges to same-sex marriage bans continue to be raised in American courts.<sup>23</sup> The political nature of the controversy raises difficult questions about the appropriate scope of judicial intervention in the area, especially when courts are confronted with the politically charged claim that the traditional institution of marriage is threatened by the legal recognition of same-sex marriages. This Note will conduct a brief overview of the ways in which American courts have dealt with the traditional institution argument. It will then address in some detail the approach of the German

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status. “Eine Ausschließlichkeitsfunktion des Art.6 Abs.1 GG besteht im übrigen bereits faktisch nicht.” [“There is not in fact an exclusionary function of Article 6.1 of the Basic Law.”] Gerhard Robbers, *Eingetragene Lebenspartnerschaften: Verfassungsrechtliche Überlegungen* [Registered Civil Partnerships: Constitutional Considerations], 56 JURISTENZEITUNG 779, 782 (2001). “Solange der Gesetzgeber in den Kernbestand der die Ehe regelnden Normen nicht eingreift, steht die Institutsguarantie vielmehr selbst einem Rechtsinstitut nicht entgegen, das die eherechtlichen Vorschriften vollinhaltlich kopiert.” [“As long as the legislature does not interfere with the core of the legal norms that affect marriage, the institutional guarantee in itself is especially not a bar to another legal institution that fully copies the regulatory scheme of marriage.”] Johannes Wasmuth, *Zur Verfassungsmäßigkeit der eingetragenen Lebenspartnerschaft* [On the Constitutionality of Registered Civil Partnerships], 41 DER STAAT 47, 54 (2002).

21. For the controversies surrounding other legal recognition of same-sex couples, consider “marriage amendments” that ban not only recognition of same-sex marriages, but also sharply limit or entirely forbid lesser forms of legal recognition for same-sex couples. Such amendments have passed whenever brought to voters, except in the 2006 Arizona ballot. *See infra* note 52. Despite the successful passage of such amendments, polls from 2009–2011 suggest that significantly more Americans favor at least some legal recognition for same-sex couples than favor no recognition. *See* Stephanie Condon, *Poll: Support for Gay Marriage Dips*, CBS NEWS, June 17, 2009, <http://www.cbsnews.com/blogs/2009/06/17/politics/politicalhotsheet/entry5094597.shtml>; Jennifer Agiesta, *Post-ABC Poll: Views on Gay Marriage Steady, More Back Civil Unions*, WASH. POST, Feb. 12, 2010, [http://voices.washingtonpost.com/behind-the-numbers/2010/02/post-abc\\_poll\\_views\\_on\\_gay\\_mar.html?wprss=behind-the-numbers](http://voices.washingtonpost.com/behind-the-numbers/2010/02/post-abc_poll_views_on_gay_mar.html?wprss=behind-the-numbers); Gary Langer, *Support for Gay Marriage Reaches a Milestone*, ABC NEWS, Mar. 18, 2011, <http://abcnews.go.com/Politics/support-gay-marriage-reaches-milestone/story?id=13159608>.

22. For example, the 2008 voter referendum to amend California’s constitution to prevent recognition of same-sex marriage involved \$83 million total fundraising, making it “the most expensive ballot measure on a social issue in the nation’s history.” Lisa Leff, *Donors Pumped \$83M to Calif. Gay Marriage Campaign*, ASSOCIATED PRESS, Feb. 2, 2009, <http://www.foxnews.com/wires/2009Feb02/0.4670.GayMarriageMoney.00.html>; *see also infra* note 52.

23. The most prominent challenge was a Fourteenth Amendment challenge to California’s 2008 voter-enacted ban on same-sex marriage, commonly known as Proposition 8. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010). The federal complaint was filed after the Supreme Court of California upheld the ban under the California Constitution. *See Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). For other recently raised challenges to same-sex marriage bans under other provisions of the Federal Constitution, *see infra* note 103. As of this writing, *Perry* is on appeal to the Ninth Circuit, which has certified a question of standing under California state law to the Supreme Court of California. The Ninth Circuit is waiting to receive an answer from the California court. *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193–94 (9th Cir. 2011).

Federal Constitutional Court to the same argument. This Note concludes that the German judicial approach of providing a clearly explained, logical analysis of the traditional institution argument is an appropriate and desirable way for American courts to address the argument. However, this Note does not advocate a particular conclusion that courts should reach regarding the argument's merits.

#### I. APPROACHES BY AMERICAN COURTS TO THE TRADITIONAL INSTITUTION ARGUMENT

The first equal protection challenge to a same-sex marriage ban was heard by the Supreme Court of Minnesota in the 1971 case *Baker v. Nelson*.<sup>24</sup> The court did not directly address the traditional institution argument, but upheld the State's denial of a marriage license to the two petitioners against a challenge under the Federal Equal Protection Clause, although it was undisputed that the sole reason for the denial was that they were of the same sex.<sup>25</sup> The next year, the Supreme Court of the United States dismissed the petitioners' appeal "for want of a substantial federal question."<sup>26</sup> This dismissal "for want of a substantial federal question" has been recognized by several courts to constitute a binding Supreme Court ruling that the Federal Equal Protection Clause permits states to refuse to recognize same-sex marriages while recognizing opposite-sex marriages.<sup>27</sup>

24. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *see also supra* note 3.

25. *Baker*, 191 N.W.2d at 185; *see also supra* note 3.

26. *See Baker v. Nelson*, 409 U.S. 810 (1972).

27. *See, e.g.*, *Adams v. Howerton*, 486 F. Supp. 1119, 1124 (C.D. Cal. 1980); *McConnell v. Nooner*, 547 F.2d 54, 55–56 (8th Cir. 1976); *Lockyer v. City & Cnty. of S.F.*, 95 P.3d 459, 504–05 (Cal. 2004) (Kennard, J., dissenting); *Morrison v. Sadler*, 821 N.E.2d 15, 19–20 (Ind. Ct. App. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1304–05 (M.D. Fla. 2005); *Andersen v. King Cnty.*, 138 P.3d 963, 1000 (Wash. 2006) (Johnson, J., concurring); Def.'s Mot. to Dismiss at 29, *Smelt v. United States*, No. 09-00286, *dismissed* (C.D. Cal. Aug. 3, 2009), 2009 WL 1683906 ("The decision in *Baker* has precedential effect and is binding here. As the Supreme Court has explained, a dismissal for lack of a substantial federal question is a decision on the merits.") (internal citations omitted). *But see Hernandez v. Robles*, 855 N.E.2d 1, 9 (N.Y. 2006) (rejecting the argument that *Baker* prevented the court from considering a challenge under New York's Equal Protection Clause, although New York interprets its Equal Protection Clause as coextensive with the Federal Equal Protection Clause). Plaintiffs have occasionally argued that *Baker* should not apply because of subsequent social and legal developments affecting sexual orientation, such as *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating under the Federal Equal Protection Clause a state constitutional amendment that banned any legal protections for homosexuals or bisexuals as a class), or *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating the State's criminalization of consensual sexual conduct between adults of the same sex under the Federal Due Process Clause). However, at least one federal court has specifically rejected the argument that these subsequent developments affect *Baker*'s status as binding precedent. *Wilson*, 354 F. Supp. 2d at 1304–05. Despite these holdings, the United States District Court for the Northern District of California heard *Perry v. Schwarzenegger*, a case challenging that State's same-sex marriage ban under the Federal Equal Protection and Due Process Clauses. *See supra* note 23.



In the next two years, Kentucky and Washington state courts heard challenges to denials of same-sex marriage recognition under their state constitutions, and both courts upheld the denials.<sup>28</sup>

The next state court consideration of a challenge to the denial of same-sex marriage recognition took place in Hawaii in 1993.<sup>29</sup> In *Baehr v. Lewin*, the Supreme Court of Hawaii did not require the State to recognize same-sex marriages,<sup>30</sup> but it did find that the denial of marriage licenses to same-sex couples constituted sex discrimination,<sup>31</sup> and remanded to the lower courts for further proceedings.<sup>32</sup> This decision was significant because it was the first time that the highest court of any state treated the traditional institution argument as being within its competence to assess.

However, one dissenting justice did not agree that the argument was judicially assessable, arguing that there was “no question” that the maintenance of the traditional institution of marriage was a legitimate state

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Although the proponents of the ban argued that they were entitled to summary judgment against the plaintiffs because *Baker* was controlling precedent, Def.-Intervenors’ Mot. for Summ. J. at 13, *Perry v. Schwarzenegger*, 2010 WL 3170286 (Oct. 14, 2009) (“*Baker* is binding precedent and requires this Court to dismiss Plaintiffs’ claims as a matter of law.”), the court denied the motion for summary judgment on the grounds that *Baker* had been eroded by subsequent doctrinal developments and did not address the same issues that were raised by the plaintiffs’ challenge to Proposition 8. Tr. at 75–79, *Perry v. Schwarzenegger*, 2010 WL 3170286 (Oct. 14, 2009). See Vikram David Amar, *Should Summary Judgment Have Been Granted in the Federal Proposition 8 Suit? Part One*, FINDLAW, Oct. 23, 2009, <http://writ.news.findlaw.com/amar/20091023.html>; Vikram David Amar, *Should Summary Judgment Have Been Granted in the Federal Proposition 8 Suit? Part Two*, FINDLAW, Nov. 6, 2009, <http://writ.news.findlaw.com/amar/20091106.html> (arguing that it was appropriate for the court to deny summary judgment both because the Minnesota statute at issue in *Baker* and the California constitutional provision at issue in *Perry* are materially different and because part of the role of district courts is to develop records for the Supreme Court to use in deciding constitutional questions). The court did not address *Baker* in its opinion. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

28. *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974); see also *supra* note 5.

29. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

30. “Such a holding would . . . be premature at this time.” *Baehr*, 852 P.2d at 67. However, the decision was highly significant because it “raised the possibility, for the first time, that same-sex couples could begin to obtain state-sanctioned marriage licenses.” *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 377 (D. Mass. 2010).

31. *Baehr*, 852 P.2d at 59–60. In contrast, in its opinion upholding the German registered partnership law, the German Federal Constitutional Court expressly rejected the argument that the restrictions of marriage to opposite-sex couples and registered partnerships to same-sex couples constituted sex discrimination. It held instead that the restrictions were based on the gender combinations of the couple. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 17, 2002, 105 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 313 (351–52). The United States District Court for the Northern District of California, on the other hand, has held that denying recognition of same-sex marriages was sexual orientation discrimination that was “equivalent to . . . discrimination based on sex.” *Perry*, 704 F. Supp. 2d at 996.

32. *Baehr*, 852 P.2d at 68.

interest that would satisfy rational basis review.<sup>33</sup> That justice viewed the prospect of a judicial mandate of same-sex marriage recognition as equivalent to “rooting out the very essence of a legal marriage,”<sup>34</sup> and argued that “redress for [the] deprivations” of any statutory rights suffered by same-sex couples was “a matter for the legislature.”<sup>35</sup> The plurality’s response to these arguments was to point out that the court had not ruled on the constitutionality of the same-sex marriage ban, but had merely found that it was facially discriminatory.<sup>36</sup>

However, as no doubt concerned the dissenting justice, the court *had* held that the state’s interest in maintaining the traditional institution of marriage could be evaluated by courts, opening the possibility that a court might someday find the interest insufficient to support a same-sex marriage ban. The justice would have forestalled this possibility by relying on the reasoning of the Court of Appeals of Washington in *Singer v. Hara*,<sup>37</sup> which held that the State’s restriction of civil marriage to opposite-sex couples was not state action for the purposes of equal protection analysis.<sup>38</sup> The strong national reaction to the *Baehr* ruling spurred the passage of the Federal Defense of Marriage Act in 1996.<sup>39</sup> In 1998, Hawaiian voters amended their state’s constitution to preserve the legislature’s ability to confine civil marriage to opposite-sex couples.<sup>40</sup>

Legal challenges to same-sex marriage bans in various states and the District of Columbia continued after *Baehr*,<sup>41</sup> proceeding on equal protection or equal protection-type challenges.<sup>42</sup> None came close to

33. *Id.* at 72 (Heen, J., dissenting).

34. *Id.* at 74.

35. *Id.*

36. *Id.* at 67 (plurality opinion).

37. *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *see supra* note 7 and accompanying text.

38. “[A]ppellants are not being denied entry into the marriage relationship because of their sex; rather . . . because of the recognized definition of that relationship as one which may be entered into only by two persons . . . of the opposite sex.” *Baehr*, 852 P.2d at 71 (quoting *Singer v. Hara*, 522 P.2d at 1191–92). *But see* *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995).

39. *See supra* note 2.

40. “The legislature shall have the power to reserve marriage to opposite-sex couples.” HAW. CONST. art. I, § 23.

41. *See supra* notes 7–10.

42. The constitutions of Vermont and Oregon do not have equal protection clauses per se. They have, respectively, “common benefits” and “equality of privileges and immunities” constitutional provisions that perform the legal functions of equal protection clauses. *Baker v. State*, 744 A.2d 864, 869–70 (Vt. 1999); *Li v. Oregon*, 110 P.3d 91, 96 (Or. 2005) (clarifying that the challenge was brought under Art. I Section 20 of that state’s constitution); *see* VT. CONST. ch. 1, art. 7; OR. CONST. art. I, § 20.

success until the 1999 Vermont case *Baker v. State*.<sup>43</sup> In *Baker*, the Supreme Court of Vermont held that the legislature was constitutionally required to either include same-sex couples in the institution of civil marriage or find another way to provide them with identical substantive benefits.<sup>44</sup> In response, the legislature created a parallel institution of “civil unions” in 2000,<sup>45</sup> but in 2009, it granted full recognition to same-sex marriages instead.<sup>46</sup> Vermont thus became the first state to recognize same-sex marriages through legislative, rather than judicial, action.<sup>47</sup>

The first successful judicial challenge to a state’s same-sex marriage ban was the 2003 Supreme Judicial Court of Massachusetts ruling in *Goodridge v. Department of Public Health*.<sup>48</sup> In *Goodridge*, the court considered the argument that the legal recognition of same-sex marriages would threaten the traditional institution of marriage, but held that the argument contained “circular reasoning.”<sup>49</sup> As the court acknowledged in its opinion, the ruling was highly controversial.<sup>50</sup> In the five years following *Goodridge*, the number of states with constitutional amendments preventing courts (and, with the exception of Hawaii, legislatures)<sup>51</sup> from establishing same-sex marriage recognition jumped from four to thirty.<sup>52</sup>

43. 744 A.2d 864 (Vt. 1999).

44. *Id.* at 887.

45. 2000 Vt. Acts & Resolves 72.

46. *See supra* note 12.

47. Abby Goodnough, *Gay Rights Groups Celebrate Victories in Marriage Push*, N.Y. TIMES, Apr. 7, 2009, at A1, available at <http://www.nytimes.com/2009/04/08/us/08vermont.html>.

48. 798 N.E.2d 941 (Mass. 2003).

49. *Id.* at 961–62 n.23.

50. “Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral.” *Id.* at 948.

51. HAW. CONST. art. I, § 23. The Hawaii amendment is unique in that it simply reserves the power to determine whether to recognize same-sex marriage for the legislature. All the other marriage amendments prevent both courts and legislatures from establishing same-sex marriage recognition. *See infra* note 52.

52. Prior to *Goodridge*, four states had enacted marriage amendments: Alaska, Hawaii, Nebraska, and Nevada. Between 2004 and 2008, twenty-six additional states enacted marriage amendments: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin. *See* ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § IV ¶ 1; HAW. CONST. art. I, § 23; IDAHO CONST. art. III, § 28; KAN. CONST. art. 15, § 16; KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.D. CONST. art. XI, § 28; OH. CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18;

In 2008, the Supreme Courts of California<sup>53</sup> and Connecticut<sup>54</sup> held that their states' constitutions required the legal recognition of same-sex marriage. Both courts found that the traditional institution argument was not persuasive. In California, the proponents of the traditional institution argument relied on the works of the philosopher John Rawls, who "state[d] that one of the essential functions of the family 'is to establish the orderly production and reproduction of society and of its culture from one generation to the next.'"<sup>55</sup> The court, however, found that the quoted text actually suggested that same-sex marriage recognition would not undermine traditional marriage: "Rawls proceeds to observe that in his view, 'no particular form of the family (monogamous, heterosexual, or otherwise) is so far required by a political conception of justice so long as it is arranged to fulfill these tasks effectively and does not run afoul of other political values.'"<sup>56</sup> The Connecticut court relied on Justice Scalia's more blunt approach to the traditional institution argument: "Without sound justification for denying same sex [sic] couples the right to marry, it therefore may be true, as Justice Scalia has asserted, that 'preserving the traditional institution of marriage' is just a kinder way of describing the [s]tate's moral disapproval of same-sex couples."<sup>57</sup>

The California and Connecticut decisions were followed in 2009 by the Supreme Court of Iowa,<sup>58</sup> which likewise found that the traditional

TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; Wis. CONST. art. XIII, § 13. The first attempt to amend the Arizona Constitution failed in 2006. See ARIZONA SECRETARY OF STATE, STATE OF ARIZONA OFFICIAL CANVASS: 2006 GENERAL ELECTION 15 (2006), available at <http://www.azsos.gov/election/2006/General/Canvass2006GE.pdf> (voting results for Proposition 107 on marriage). The next election saw a successful attempt to amend the Arizona Constitution. See ARIZONA SECRETARY OF STATE, STATE OF ARIZONA OFFICIAL CANVASS: 2008 GENERAL ELECTION 15 (2008), available at <http://www.azsos.gov/election/2008/General/Canvass2008GE.pdf> (voting results for Proposition 102 on marriage).

53. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). This decision is also notable because the court held that, under the California Constitution, sexual orientation is a suspect classification that merits strict scrutiny for equal protection purposes. *Id.* at 442. It remains uncertain what precedential value the decision will have after the constitutional amendment redefining marriage in California solely as a union between one man and one woman. See *supra* notes 21–22.

54. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008). Unlike the Supreme Court of California, the Supreme Court of Connecticut applied intermediate scrutiny to the state's denial of same-sex marriage licenses after finding that sexual orientation is a quasi-suspect classification. *Id.* at 431–32, 472–73 n.74.

55. *In re Marriage Cases*, 183 P.3d at 433 n.51 (quoting JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 162 (2001)).

56. *Id.*

57. *Kerrigan*, 957 A.2d at 479 (quoting *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting)) (internal quotation marks omitted).

58. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). The Iowa Supreme Court held that, because the state's denial of same-sex marriage licenses did not survive intermediate scrutiny, it was not necessary to decide whether strict scrutiny should be applied to sexual orientation-based

institution argument was not persuasive. The Iowa court held that although the traditional institution argument “is straightforward and has superficial appeal,”<sup>59</sup> if courts were to accept the argument, “equal protection analysis [would be] transformed into the circular question of whether the classification accomplishes the governmental objective, which objective [sic] is to maintain the classification.”<sup>60</sup> The court continued with a dismissal of the argument on the merits:

The preservation of traditional marriage could only be a legitimate reason for the classification if expanding marriage to include others in its definition would undermine the traditional institution. The [appellant] has simply failed to explain how the traditional institution of *civil* marriage would suffer if same-sex civil marriage were allowed.<sup>61</sup>

Although the California decision was overturned later in 2008 by a voter-enacted state constitutional amendment,<sup>62</sup> the Connecticut and Iowa rulings remain in effect.

The decisions in Massachusetts, California, Connecticut, and Iowa all gave the traditional institution argument only cursory analysis before dismissing it. While the courts did give logical explanations for their dismissals of the argument, the explanations are so short that they have been reproduced almost fully in the text of this Note.

## II. THE GERMAN FEDERAL CONSTITUTIONAL COURT’S APPROACH TO THE TRADITIONAL INSTITUTION ARGUMENT

The traditional institution argument arose in a similar context in Germany in 2001. In that year, the German legislature created a system of registered civil partnerships (*eingetragene Lebenspartnerschaft*)<sup>63</sup> with

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classifications. *Id.* at 896; *cf.* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 387 (D. Mass. 2010) (holding that it was unnecessary to decide what tier of scrutiny ought to apply to sexual orientation-based discrimination because the federal government’s denial of same-sex marriage recognition under the Defense of Marriage Act did not survive rational basis review); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (holding that, although classifications based on sexual orientation are appropriately subject to strict scrutiny, the state’s denial of same-sex marriage recognition did not survive rational basis review).

59. *Varnum*, 763 N.W.2d at 898.

60. *Id.*

61. *Id.* at 899 n.25 (emphasis in original).

62. *See supra* notes 21–22, 52 and accompanying text.

63. *Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften* [Act on the Termination of the Discrimination of Same-Sex Couples: Civil Partnerships], Feb. 16, 2001, BGBL. I at 266.

many of the substantive benefits and responsibilities of civil marriage.<sup>64</sup> The registered civil partnerships law was challenged on the grounds that it violated Germany's constitutionally mandated state protection of the institution of marriage, as well as on the grounds that the procedure by which the law was enacted was unconstitutional.<sup>65</sup> The Federal Constitutional Court, which has final jurisdiction for constitutional questions,<sup>66</sup> considered both challenges<sup>67</sup> and held that neither was a constitutional bar to the civil partnerships.<sup>68</sup>

In the years after the court's ruling, the German legislature expanded the rights of the partnerships further to more closely match those of civil marriages.<sup>69</sup> The court ruled in 2009 that the government is constitutionally required to extend the same rights to couples in registered partnerships as are granted to married couples, except in situations where the government can justify different treatment.<sup>70</sup> The court noted that the German Constitution's requirement of equal treatment by the government precludes extending benefits to different groups of people unequally.<sup>71</sup> The court held that the privileged status of marriage must be extended to civil partnerships because the justification for the privileged status of marriage—the legally enforceable duty of care that spouses owe to each other—is equally applicable to members of civil partnerships.<sup>72</sup>

64. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], July 17, 2002, 105 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 313 (314–15).

65. *See supra* note 15.

66. *See supra* note 16.

67. For the court's treatment of the procedural challenge, see BVerfG, 105 BVERFGE at 318–42. The majority's holding—that the procedure by which the partnership law was enacted was constitutional—was not disputed by either of the two dissenting judges. *See id.* at 357–65 (Richter [Judge] Papier, dissenting and Richterin [Judge] Haas, dissenting). For the court's treatment of the argument that the legal recognition of partnerships was a threat to the traditional institution of marriage, see *id.* at 342–57.

68. *Id.* at 357.

69. *See Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts* [Act for the Revision of the Law of Civil Partnerships], Dec. 15, 2004, BGBL. I at 3396.

70. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], July 7, 2009, 124 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 199 (226). This decision is only retroactive to January 1, 2005. BVerfG, 1 BvR 170/06, ¶ 17, June 11, 2010.

71. “Der allgemeine Gleichheitssatz (Art. 3 Abs. 1 GG) gebietet, alle Menschen vor dem Gesetz gleich zu behandeln. Verboten ist auch ein gleichheitswidriger Begünstigungsausschluss, bei dem eine Begünstigung einem Personenkreis gewährt, einem anderen Personenkreis aber vorenthalten wird.” [“The general principle of equality (Article 3.1 of the Basic Law) demands that all persons be treated equally before the law. It also prohibits the exclusion of favorable treatment that violates the principle of equality in which favorable treatment is granted to one group of persons while it is denied to another group of persons.”] BVerfG, 124 BVERFGE 199 (218).

72. *Id.* at 225; *see supra* note 20.

When the court considered the traditional institution argument in 2001, it began by observing that the civil partnerships law did not burden the constitutional right of every citizen to freely choose a marital partner,<sup>73</sup> which is an essential attribute of the protection of marriage.<sup>74</sup> The court continued by reasoning that because the civil partnerships were not available to opposite-sex couples, opposite-sex couples would not be materially influenced by the existence of partnerships in deciding whether to get married.<sup>75</sup> The court then acknowledged a potential problem with the civil partnerships law: the law did not say whether it would permit an individual to be both married and in a separate civil partnership simultaneously.<sup>76</sup> The court interpreted the law to mean that it was not possible to be in both a marriage and a partnership. The constitutionally mandated protection of marriage required the recognition of marriage's "personal exclusivity," the court explained, which would preclude being in a civil partnership with one person while married to another.<sup>77</sup> The court did not determine what would happen if a person in a partnership attempted to legally marry, and left the question for the legislature to resolve.<sup>78</sup>

The court then addressed the argument that the constitutionally mandated protection of marriage precluded the legislature from creating any parallel institution.<sup>79</sup> The court held that marriage was not undermined by the recognition of a parallel institution with some or all of the

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73. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], July 17, 2002, 105 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 313 (342, 344).

74. *Id.* at 342–43.

75. *Id.*; *see also id.* at 347 (holding that an institution for people who cannot legally marry does not denigrate the institution of marriage and that rights are not a zero-sum game: granting rights to another institution does not take away rights from marriage); *id.* at 350 (holding that because different groups of people are eligible for the two institutions, it would be constitutionally permissible to grant equal rights to the two groups).

76. *Id.* at 343.

77. *Id.*

78. *Id.* at 344. The court did, however, mention equitable concerns about interpreting the statute to mean that one party's subsequent marriage would dissolve an existing registered partnership because the other party in the partnership could be adversely affected without the benefit of statutory dissolution proceedings. *Id.* Accordingly, the court held that it would be permissible for the legislature to preclude people in registered partnerships from marrying. *Id.* at 343. The legislature later amended the law to clarify that a person in a registered partnership could not legally marry another person: "Eine Ehe darf nicht geschlossen werden, wenn zwischen einer der Personen, die die Ehe miteinander eingehen wollen, und einer dritten Person eine Ehe oder eine Lebenspartnerschaft besteht." ["A marriage may not be entered into when there exists a marriage or registered partnership between one of the two people who want to marry each other and a third person."] Gesetz zur Überarbeitung des Lebenspartnerschaftsrechts [Act for the Revision of the Law of Civil Partnerships], Dec. 15, 2004, BGBl. I at 3396, art. 2, para. 2.

79. 105 BVERFGE at 346.

substantive rights of marriage, even if the parallel institution was clearly modeled on marriage.<sup>80</sup> The court noted that a violation of the constitutionally mandated protection of marriage could arise if the legislature were to treat marriage as inferior to other forms of cohabitation.<sup>81</sup> The court also acknowledged that the civil partnerships law was restricted to couples who could not legally marry, suggesting that it might find a constitutional violation<sup>82</sup> if there were a parallel institution to marriage that was an alternative for those who could legally marry.<sup>83</sup>

The court limited another avenue of attack under the marriage protection provision by holding that if certain other German laws treated married couples as inferior to couples in partnerships, then those laws, but not the partnership law, could be invalidated under the marriage protection provision.<sup>84</sup> The court concluded its opinion by rejecting the argument that, because unmarried opposite-sex couples were not eligible for partnerships, the partnerships constituted illegal gender discrimination.<sup>85</sup> The rejection was based on the finding that opposite-sex couples and same-sex couples were not similarly situated in the context of legal recognition of their unions because the opposite-sex couples had the option of a legally recognized marriage.<sup>86</sup> The rejection of the discrimination challenge is a logical complement to the court's decision to uphold the partnerships against the marriage protection clause. As the court noted, there might be a violation of the clause if marriages and civil partnerships were interchangeable options for couples who were eligible to marry.<sup>87</sup>

80. *Id.* at 346–47.

81. *Id.* at 346; *see also id.* at 349–50 (stating that the legislative history of the constitutional provision does not suggest that marriage protection requires that rights be denied to all other parallel institutions). *But see supra* note 18 and accompanying text; *infra* notes 91–94 and accompanying text (regarding the dissenting opinion of Richterlin [Judge] Haas).

82. 105 BVERFGE at 350–51.

83. The court may be referring to the French *Pacte Civil de Solidarité*, a civil unions system enacted in 1999. Unlike in the German system, French unions are open to both same-sex and opposite-sex couples, while opposite-sex couples also have the option of civil marriage. Loi 99-994 du 15 novembre 1999 de relative au pacte civil de solidarité [Law 99-994 of November 15, 1999 on the Civil Pact of Solidarity], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 16, 1999, p. 16959. Since 1999, France has experienced a decline in the rate of civil marriages and an increase in civil unions. *See* 2004 Demographic Report—Summary, NAT'L INST. STATS. & ECON. STUD., [http://www.insee.fr/en/themes/document.asp?reg\\_id=0&id=1358](http://www.insee.fr/en/themes/document.asp?reg_id=0&id=1358) (last visited Apr. 12, 2011).

84. 105 BVERFGE at 347.

85. *Id.* at 351–52. This point was disputed in the second dissenting opinion. *Compare id.* at 362–63 (Richterlin [Judge] Haas, dissenting), *with* Baehr v. Lewin, 852 P.2d 44, 59–60 (Haw. 1993), and *supra* note 31 and accompanying text.

86. 105 BVERFGE at 352.

87. *See supra* note 75 and accompanying text.



Two judges filed dissenting opinions.<sup>88</sup> The President of the Court<sup>89</sup> argued that the constitutional provision meant that marriage was protected from state interference and could not be redefined to reflect popular trends.<sup>90</sup> In his opinion, the civil partnerships were simply marriage by another name, and thus, for constitutional purposes, were a redefinition of marriage.<sup>91</sup> Both this opinion and the second dissenting opinion disagreed

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88. 105 BVERFGE at 357, 359.

89. The President (*Präsident*) presides over the First Senate (*Erster Senat*) of the Federal Constitutional Court. Bundesverfassungsgerichtsgesetz [Federal Constitutional Court Act], Mar. 12, 1951, BGBl. I at 245, §§ 14–15, repromulgated Aug. 11, 1993, BGBl. I at 1473, last amended by Gesetz, Dec. 2, 2010, BGBl. I at 2248, art. 11. The First Senate has jurisdiction over claims that a government action violates basic rights. Bundesverfassungsgerichtsgesetz § 14. The President's position as a judge is thus analogous to that of the Chief Justice of the Supreme Court of the United States.

90. BVERFGE at 357–58. The judge developed this point further in a 2002 law journal article in the context of an expansive criticism of German tax policies and their effects on married couples. The judge argued that it was inconceivable that the German Constitution prevented any change in the institutions of marriage and the family, because marriage as it existed at the time of the 1949 constitutional enactment was incompatible with the mandate of gender equality. Hans-Jürgen Papier, *Ehe und Familie in der neueren Rechtsprechung des BVerfG* [Marriage and the Family in the Modern Jurisprudence of the Federal Constitutional Court], 55 NEUE JURISTISCHE WOCHENSCHRIFT 2129 (2002).

Auf der anderen Seite kann dem Staat nicht jede Reform des Eherechts verwehrt sein, denn das hieße, dessen Stand von 1949 in den Rang von Verfassungsrecht zu heben und damit zu zementieren. Dies konnte schon deshalb vom Grundgesetz nicht gewollt sein, weil es die Unvereinbarkeit des damaligen Eherechts mit dem Grundgesetz hinsichtlich der Gleichberechtigung zwischen Mann und Frau sehr wohl erkannt hatte.

[On the other hand it cannot be that it is forbidden for the state to make any reform to marriage laws, because that would elevate the 1949 status to a constitutional provision and thus cement it in place. This cannot have been the goal of the Basic Law, because the incompatibility of the then-existing marriage laws with the equal treatment of men and women was fully recognized.]

*Id.* For other German law articles discussing how the institution of marriage has evolved as far as the German Constitution is concerned, see *infra* notes 91, 96.

91. 105 BVERFGE at 357–59. This point has been echoed and developed further by commentators who have argued that registered civil partnerships encroach on the exclusivity of marriage and that the protection of marriage requires the government to reserve the material core (“*materielle Kerngehalt*”) of marriage for unions of one man and one woman. Rupert Scholz & Arnd Uhle, „*Eingetragene Lebenspartnerschaft*“ und Grundgesetz [“Registered Civil Partnerships” and the Basic Law], 54 NEUE JURISTISCHE WOCHENSCHRIFT 393, 396–97 (2001). These commentators also argued that it is essential to privilege marriage over other living arrangements in order to encourage young people to marry—otherwise, a majority of young people might decide against marrying and raising families, the birthrate would fall, and the state would be destroyed by its support for individual freedoms. *Id.* at 393. However, this argument has been sharply criticized as a baseless “dam-break phobia” (“*Dammbruchphobie*”) that equal treatment of same-sex couples will encourage heterosexual people to engage in homosexual relationships. Manfred Bruns, *Art. 6 I GG und gesetzliche Regelungen für gleichgeschlechtliche Lebensgemeinschaften* [Article 6.1 of the Basic Law and Legal Regulatory Schemes for Same-Sex Cohabitation], 29 ZEITSCHRIFT FÜR RECHTSPOLITIK 6, 7 (1996).

with the majority's conclusion that the marriage protection provision simply required the State to preserve the institution from harm.<sup>92</sup>

The second dissenting opinion began by noting that the constitution did not prevent the legislature from providing some legal recognition for same-sex couples.<sup>93</sup> However, like the President of the Court, the judge argued that the marriage protection provision sheltered the institution of marriage from all state interference, not just freedom from institutional harm.<sup>94</sup> She claimed that because the purpose of marriage was to protect family stability, the protection of marriage required that the government privilege marriage above all other living arrangements,<sup>95</sup> and she

92. 105 BVERFGE at 359–62.

93. *Id.* at 359–60. However, the dissenting judge appeared to limit what she held to be constitutionally permissible recognition of same-sex unions to something that is not a parallel institution to marriage:

Ich stimme mit der Senatsmehrheit darin überein, dass von Verfassungen wegen nichts grundsätzlich gegen die Einführung einer Rechtsform der eingetragenen Lebenspartnerschaft für gleichgeschlechtliche Paare zu erinnern ist. Damit kann jederman (mit einigen gesetzlich geregelten Ausnahmen) seine Gemeinschaft mit einem Partner gleichen Geschlechts registrieren lassen, ohne dass zwischen diesen eine homosexuelle Beziehung besteht oder beabsichtigt wäre.

[I agree with the majority . . . that there are fundamentally no constitutional objections to introducing a legal form of registered civil partnership for same-sex couples. In this way, everyone (with some exceptions governed by statute) may have his or her partnership with a partner of the same sex registered without a homosexual relationship existing or being intended between these two persons.]

*Id.*

94. *Id.* at 361.

95. *Id.* at 360–61. This constitutional concern has been echoed by commentators. *See, e.g.,* Rudolf Gerhard & Martin Kriele, *Die „eingetragene Lebenspartnerschaft“ für gleichgeschlechtliche Paare: Der Gesetzgeber zwischen Schutzabstandsgebot und Gleichheitssatz* [The “Registered Civil Partnership” for Same-Sex Couples: The Legislature Between Protective Distinguishment and the Equality Provision], 33 ZEITSCHRIFT FÜR RECHTSPOLITIK 409 (2000). “Wenn der besondere Schutz der Ehe und seine Ausformung als Schutzabstandsgebot einen Sinn haben soll, so muss eine Differenz der Ehe zu der Intensität der rechtlichen Ausgestaltung einer gleichgeschlechtlichen Partnerschaft erkennbar sein.” [“If the special protection of marriage and its manifestation as protective distinguishment are to have meaning, there must be a cognizable difference in the intensity of the legal rights structures of marriage and registered partnerships.”] *Id.* at 413. The majority in the court rejected this argument on the grounds that because registered partnerships were not open to opposite-sex couples who were eligible to marry, it was constitutionally permissible to extend equal rights to the partnerships because couples who could marry would not be discouraged from marrying by the availability of partnerships. *See supra* notes 75, 81–83 and accompanying text. This method of dealing with the argument that protecting marriage requires that it be given a legally privileged status does not immediately extend to disputes over same-sex marriage recognition because it assumes the existence of two parallel institutions where couples are only eligible for one institution or the other. However, the approach is instructive in that it focuses on the lack of influence of extending privileged status to committed same-sex couples on the decisions of opposite-sex couples whether to enter into a civil marriage. Perhaps, in American equal protection challenges to same-sex marriage bans, it would be appropriate for courts to respond to the argument that protecting marriage requires associating it with greater privileges by asking the state to show how extending identical privileges to same-sex couples

emphasized that the court was wrong to dismiss a fundamental connection between “marriage” and “family.”<sup>96</sup>

### III. THE APPROACH OF THE GERMAN COURT TO THE TRADITIONAL INSTITUTION ARGUMENT IS A USEFUL MODEL FOR AMERICAN COURTS TO ADOPT

The German court approached the traditional institution argument by critically analyzing the argument on its merits and by articulating in detail its reasoning. This approach is appropriate and desirable for American courts dealing with the argument. The intensity of the political battles over same-sex marriage,<sup>97</sup> including over the idea that the legal recognition of same-sex unions will threaten the institution of marriage, makes it especially important for courts that address the argument to give clear justifications in their decisions regarding the argument’s merits. A decision on the constitutionality of same-sex marriage bans will spark significant disagreement regardless of a court’s holding.<sup>98</sup> Because of the inevitability of widespread disagreement, courts should take care to provide well-articulated justifications for their decisions.

One response to this is to argue that courts should stay out of the issue entirely, as under the political question doctrine. In the landmark gay rights case *Romer v. Evans*,<sup>99</sup> Justice Scalia made this argument, claiming that the Supreme Court had “mistaken a Kulturkampf for a fit of spite.”<sup>100</sup> However, it may be difficult for courts in many jurisdictions to justify

would act to discourage opposite-sex couples from marrying. See *supra* note 91 and accompanying text.

96. 105 BVERFGGE at 361–62. On the same pages of the opinion, the judge argued that the institutional guarantee of marriage only made sense when considered in context of the relationship between marriage and the family. Indeed, the same constitutional provision that requires the state to protect marriage also requires the state to protect the family. See *supra* note 14. However, one commentator has argued that the constitutional language of “marriage and family” is not a tautology and does not establish a close, causal connection between the two—instead, the provision is appropriately interpreted as protecting two separate institutions in light of a decoupling through history of “marriage” and “family.” “Zudem haben sich beide Begriffe auch inhaltlich im Laufe der Zeit stetig voneinander ‚entkoppelt‘.” [“The two concepts have also gradually ‘decoupled’ themselves in their natures with the passage of time.”] Volker Beck, *Die verfassungsrechtliche Begründung der Eingetragenen Lebenspartnerschaft* [The Constitutional Foundation of Registered Civil Partnerships], 54 NEUE JURISTISCHE WOCHENSCHRIFT 1894, 1897 (2001). The Federal Constitutional Court appeared to implicitly adopt this position in 2009. See *supra* note 20.

97. See *supra* note 2.

98. For public opinion polls showing that no one position on same-sex marriage recognition can avoid rejection by a significant portion of the population, see *supra* note 21.

99. *Romer v. Evans*, 517 U.S. 620 (1996).

100. *Id.* at 636 (Scalia, J., dissenting).

abstention, because cases involving the legal recognition of same-sex marriages uniformly involve claims that constitutional rights have been violated. Many courts have an established tradition of reviewing government action under constitutional challenges despite political controversy surrounding the issue, such as in racial discrimination cases. Courts choosing to abstain must draw a principled distinction between past political controversies and the present political controversy surrounding same-sex marriage.

The controversial aspect of same-sex marriage decisions demonstrates a basic problem of judicial legitimacy. In jurisdictions with appointed judiciaries, a controversial judicial decision may raise complaints of judicial activism and a lack of judicial accountability. And jurisdictions with elected judiciaries, though less vulnerable to criticisms of judicial unaccountability, may still have to face questions of judicial legitimacy if they are perceived as bowing to popular pressure. Because decisions affecting same-sex marriage recognition are likely to be strongly supported and opposed by a deeply divided public, each decision has the potential to inspire claims of either improper majoritarian control or undemocratic minority influence on the judiciary.<sup>101</sup>

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101. It is difficult to draw a conclusion on how the prospect of re-election may have affected how courts deal with the traditional institution argument, because few courts with life tenure have had occasion to deal with the issue. Federal Article III courts, with the exceptions of the United States District Courts for the Northern District of California and Massachusetts (*e.g.*, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) and *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), have held that the issue is precluded by the Supreme Court's dismissal of appeal in *Baker v. Nelson*, 409 U.S. 810 (1972). *See supra* note 3. The Supreme Judicial Court of Massachusetts, on which justices enjoy life tenure until age seventy, MASS. CONST. part II, ch. 3, art. 1, dismissed the argument, *see supra* note 10. In the Supreme Court of New Jersey, justices must be reappointed after an initial seven-year term, but thereafter enjoy life tenure until age seventy. N.J. CONST. art. VI, § 6(3). At the time of that court's decision in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), none of the four justices who avoided addressing the traditional institution argument (Justices Albin, LaVecchia, Wallace, and Rivera-Soto) had life tenure. Of the three justices who were willing to address the argument (Justices Long and Zazzali and Chief Justice Poritz), one had life tenure, one was granted life tenure between oral arguments (Feb. 15, 2006) and the announcement of the court's decision (Oct. 25, 2006), and, in the same time period, the third justice was nominated and confirmed as the next chief justice. However, it is entirely possible that the majority simply declined to address the argument because the State had not raised it before the trial court. 908 A.2d at 217. For the confirmation dates of Justices Albin, LaVecchia, Long, Rivera-Soto, and Wallace, see *Supreme Court of New Jersey*, NEW JERSEY COURTS, <http://www.judiciary.state.nj.us/supreme/index.htm> (last visited Apr. 12, 2011). For the confirmation date of Chief Justice Poritz, see *Chief Justice Deborah T. Poritz Retires Departs from a Strong and More Efficient Judiciary*, NEW JERSEY COURTS, Oct. 25, 2006, <http://www.judiciary.state.nj.us/pressrel/2006/pr061025b.htm>. For the confirmation date of then-Justice Zazzali, see 2007–2008 N.J. CTS. ANN. REP., at 3, available at <http://www.judiciary.state.nj.us/pressrel/ARNJCourts08.pdf>.

Among courts without life tenure that have dealt with the traditional institution argument, those in jurisdictions where judges face retention elections were more likely to accept the argument than courts

Courts would thus be well served by including clearly articulated logical explanations of their decisions in same-sex marriage cases, especially with assessments of the politically charged argument that same-sex marriage recognition threatens the traditional institution of marriage. By including in their opinions detailed analyses of the merits and failings of the traditional institution argument, courts may demonstrate to those who disagree with their rulings the legitimate reasons behind the decisions. The German Federal Constitutional Court exemplified this approach by systematically addressing the facets and nuances of the traditional institution argument in detail and providing clear explanations for its reasoning. In an examination of the Federal Constitutional Court's tradition of originalist constitutional interpretation, Professor Mary Ann Glendon has written that this is not unique to the cases dealing with the recognition of same-sex unions: "The *Bundesverfassungsgericht* [Federal Constitutional Court] displays impressive skill in . . . explaining the outcomes of particular cases in ways that can make sense even to the losers and others who disagree."<sup>102</sup>

Importantly, by providing clearly explained analyses in their rulings, American courts may defend against or even avoid attacks on their legitimacy. Those questioning the legitimacy of courts would have the additional obstacle of justifying why the reasons given by the courts for

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in states where judges face legislative reappointment. Of the ten states with retention elections (Alaska, Arizona, California, Indiana, Iowa, Kentucky, Maryland, Minnesota, Oregon, and Washington), four accepted the argument. *See Standhart v. Superior Court*, 77 P.3d 451 (Ariz. Ct. App. 2003); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) (in a later case, *Andersen v. King Cnty.*, 138 P.3d 963 (Wash. 2006), the Washington Supreme Court would avoid the argument). However, of the six jurisdictions with legislative reappointment (Connecticut, Washington, D.C., Hawaii, New Jersey, New York, and Vermont), only New York accepted the argument. *See Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006). For the laws governing judicial appointment or election schemes, see ALASKA CONST. art. IV, § 6; ARIZ. REV. STAT. § 12-101 (LexisNexis 2009); CAL. CONST. art. VI, § 16; CONN. CONST. art. V, § 2; D.C. CODE § 1-204.31, 33 (LexisNexis 2009); HAW. CONST. art. VI, § 3; IND. CONST. art. VII, § 11; IOWA CONST. art. V, § 17; KY. CONST. arts. 117–19; MD. CONST. art. IV, § 5A(f); MASS. CONST. part II, ch. 3; MINN. STAT. ANN. ch. 114, § 12 (West 1976) (reflecting the Minnesota Constitution as it was in force at the time of the *Baker v. Nelson* decision); MINN. CONST. art. VI, § 8 (current); N.J. CONST. art. VI, § 6, ¶ 3; N.Y. CONST. art. VI, § 2; VT. STAT. ANN. tit. 4, §§ 3–5 (2009); WASH. REV. CODE § 2.06.070 (2009). The possibility of majoritarian influence on election judiciaries deciding same-sex marriage cases is real. After the Supreme Court of Iowa's unanimous decision in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009), which required that state to recognize same-sex marriages, the three justices who were subject to retention elections the next year were removed from office. *See* IOWA SECRETARY OF STATE'S OFFICE, OFFICIAL RESULTS REPORT: 2010 GENERAL ELECTION 1–15, available at <http://www.sos.state.ia.us/pdfs/elections/2010/judicialorr.pdf> (describing the results of the 2010 retention elections of Justices Baker and Streit and Chief Justice Ternus).

102. Mary Ann Glendon, *Comment, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 95, 110 (Amy Gutmann ed., 1997).

their decisions are not legitimate. This in turn may help courts preserve their autonomy, because courts that are perceived to be legitimate are less likely to be subject to attempts to undermine their autonomy. Of course, the justifications that courts provide in their opinions may not be read by most members of the public. Still, they may enter the political debate all the same through commentators, political figures, and anyone else inclined to discuss judicial decisions.

#### IV. CONCLUSION

With the ongoing controversy surrounding same-sex marriage recognition, it is likely that the traditional institution argument will continue to be used in social, political, and legal battles. This will provide opportunities for courts to decide how they will assess the traditional institution argument. Since 2010 there have been several lawsuits in federal courts involving the legal recognition of same-sex marriages, and at least two of those cases have invoked the traditional institution argument.<sup>103</sup> And future legal battles may not be restricted to federal courts. Cases challenging state denials of same-sex marriage recognition have even been heard in the courts of states with constitutional amendments that are intended to resolve the issue.<sup>104</sup> Courts hearing these

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103. See, e.g., Def.'s Mot. to Dismiss, *Smelt v. United States*, No. 09-00286 (C.D. Cal. Aug. 3, 2009), 2009 WL 1683906 (see *supra* note 27 and accompanying text); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (see *supra* note 23 and accompanying text for a discussion of the ongoing appeal of *Perry*). Although *Smelt* has been dismissed, the dismissal was without prejudice because it was solely on procedural grounds. See Order Granting Def.'s Mot. to Dismiss *passim*, *Smelt v. United States*, No. 09-00286 (C.D. Cal. Aug. 24, 2009).

104. Texas, like many states, has a "marriage amendment" preventing the state or any subdivision thereof from recognizing same-sex marriages. TEX. CONST. art. I, § 32(a). In 2009, well after the amendment had gone into effect, a man who had married another man in Massachusetts filed for divorce in a Texas state trial court. *In re Marriage of J.B. & H.B.*, 326 S.W.3d 654, 659 (Tex. App. 2010). The State intervened and argued that the court did not have subject matter jurisdiction because of the marriage amendment. *Id.* The trial judge disagreed, holding that the Texas laws violated the Federal Constitution, and refused to dismiss the divorce proceedings. *Id.* at 659–60. The State appealed this issue and prevailed before the appellate court, which engaged in a detailed analysis of the Equal Protection Clause as it applied to the legal recognition of same-sex marriages. See *id.* at 670–81. A few months later, though, the State lost a similar appeal involving a divorce of two women. See *State v. Naylor*, 330 S.W.3d 434 (Tex. App. 2011). The women, who had been married in Massachusetts, were granted a divorce by a Texas trial court. *Id.* at 436–37. The State then attempted to intervene, arguing that the divorce violated Texas law. *Id.* at 437–38. The trial court ignored the motion as untimely. *Id.* at 438. The State appealed, arguing that it had standing to defend its statutes from constitutional attacks, and that the divorce could not have been granted without an implicit finding that the Texas prohibition of legal recognition of same-sex marriage was unconstitutional. *Id.* at 439–41. The appellate court declined to find an implied constitutional challenge to the State's

cases should approach the traditional institution argument with a more overtly analytical response to help solidify the legitimacy of their decisions.

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prohibition on legal recognition of same-sex marriages, and found that the State did not have standing to appeal. *Id.* at 441–42, 444.

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