

Same Sex Marriage and Civil Unions
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Same Sex Marriage and Civil Unions: What Is the Difference?

- Civil unions, also sometimes called domestic partnerships, take a variety of forms.¹ All involve some sort of registration or contract that demarcates a same sex couple as legally bound and entitled to certain legal rights and responsibilities.
- Some, such as those in California and Vermont, offer all (or nearly all) of the same rights and responsibilities offered by the state to heterosexual married couples, with the exception of any tax or other laws governed at the federal level.
- Others, such as Hawaii's, offer a certain number of relationship rights and responsibilities, such as custody, hospital visitation, etc., but not all of the rights associated with marriage in that state. Domestic partnerships are also sometimes offered by certain cities or counties within a state.
- Civil unions and domestic partnerships are generally only valid and recognized in the state or municipality in which they were granted. Marriage, on the other hand, generally transcends state lines in terms of recognition.
- Civil unions and domestic partnerships are not subject to the 1,138 federal rights and responsibilities connected with civil marriage (that is, those conferred by the federal government and not by individual states).²
- Some argue that, aside from the specific rights and responsibilities attached to it, marriage carries cultural and spiritual meaning in relationships that civil unions do not.

Laws Governing Same Sex Marriage and Civil Unions in the United States

- 4 states in the U.S. currently offer some form of civil union or registered domestic partnership³:
 - Vermont⁴
 - California⁵
 - Hawaii⁶

¹ Legal distinctions are sometimes made between these terms—"civil union" most often refers to those in Vermont, which are analogous to marriage in nearly every way at the state level, except cross-state recognition, while "domestic partnership" is used in most other states to refer to a variety of forms of relationship recognition. For the purposes of this fact sheet, these terms will be used interchangeably to refer to relationship recognition other than marriage. In all cases, however, it should be clear that these refer to state-conferred statuses that only deal with state-based rights, not federal rights or responsibilities (which to date do not exist in any way for same sex couples)

² See <http://www.marriageequalityca.org>

³ In addition, eight other states, as well as the District of Columbia, offer domestic partnership benefits to state employees: Connecticut, Illinois, Iowa, New Mexico, New York, Oregon, Rhode Island, and Washington (For up-to-date information on legal changes in these states and others, see <http://www.thetaskforce.org>).

⁴ In 1999 and 2000 the Vermont Supreme Court and legislature created the first ever civil unions for same sex couples in the United States, carrying all the privileges and responsibilities of marriage at the state level, though without the label of marriage. See *Baker v Vermont*, 744 A.2d 964 (Vt. 1999); 15 V.S.A. § 1201

⁵ Domestic partnership laws were enacted in California, first in part in 1999 (AB25, providing 15 rights to same sex couples) and in full in 2003 (AB 205, providing rights analogous to marriage, with the exception of taxation), and went into effect in January 2005. See Cal Fam Code § 297 et seq.

⁶ Hawaii's "reciprocal beneficiaries" law went into effect in 1997 after the state constitutional amendment banning same sex marriage passed, and includes 50 of the over 200 rights afforded to married couples in that state.

- New Jersey⁷
- Maine⁸
- Currently, Massachusetts is the only state that offers same sex marriage in the U.S. This is the result of the Massachusetts Supreme Judicial Court’s 2003 ruling in the case of *Goodridge v Massachusetts Department of Public Health*, which stated that marriage laws excluding same sex couples were discriminatory, according to the Massachusetts State Constitution.⁹
- In February and March of 2004, the city of San Francisco issued marriage licenses to same sex couples for the first time in any jurisdiction in the United States; however, these 4037 marriage licenses were voided by the California Supreme Court in August of 2004¹⁰, on the grounds that they mayor and county clerk of San Francisco did not have the authority to issue them.
- Trial courts in both New York (*Hernandez v. Robles*, 2005) and California (*Woo v Lockyer, et al.*, 2005) have ruled that the state must offer marriage rights to same sex couples, based on equal protection arguments; however both of these decisions are pending further review and neither has yet gone into effect.
- 38 states have either statutes or constitutional amendments barring same sex marriage; 15 of these states bar civil unions as well.
- The Defense of Marriage Act (DOMA), passed by the federal government in 1996, requires that no state be forced to recognize any marriage other than that between a man and a woman.¹¹ This stands in contrast to the laws governing heterosexual marriage, which say that states must recognize marriages licensed in other states according to the U.S. Constitution’s “full faith and credit” clause. It also defines marriage, under federal law, as a union between one man and one woman.

International Laws Regarding Same Sex Marriage and Civil Unions

- Currently, 3 countries in the world have legal same sex marriage in all or most of the country: Belgium, Netherlands, and Canada. In addition, the President of Spain has indicated that he intends to modify Spanish law to legalize same-sex marriage there as well.
- The Netherlands was the first country in the world to legalize same sex marriage, and went so far as to change the dictionary to eliminate any reference to gender in the definition of marriage.
- 10 other countries have some form of registered domestic partnership; these include Germany, France, Hungary, Iceland, Israel, Norway, Portugal, South Africa, Denmark, and Sweden.

⁷ New Jersey’s domestic partnership law went into effect in July 2004, and includes the right to make medical or legal decisions for an incapacitated domestic partner, the right to consent for an autopsy, the right to authorize donation of the deceased partner’s organs, the right to be exempt from New Jersey inheritance tax on the same grounds as a spouse, the right to be eligible for dependent benefits under the state-administered retirement system, and the right to domestic partner health benefits for state employees. See Senate Bill 796.

⁸ Maine’s domestic partnership law into effect in April 2004. The law provides a handful of rights to domestic partners, including the right to interstate succession, the right to make funeral and burial arrangements, and preferential status to be named as guardian and/or conservator in the event of the death of a domestic partner. See *A. 3743, Approved P.L.2003, c.246*.

⁹ See *Goodridge v Massachusetts Department of Public Health*, 440 Mass. 309

¹⁰ See *Lockyer v San Francisco*, 2004.

¹¹ See 28 USCS § 1738C

The Debate over Same Sex Marriage

Below are summaries of the legal, practical, and moral arguments for and against same sex marriage, which have been advanced on either side and are most commonly heard in public debate and media:

Arguments against:

- The purpose of marriage is procreation, and same sex couples cannot “naturally” procreate. And, since domestic partnerships and private contracts provide the legal benefits sought by same sex couples, they have no purpose in marrying.¹²
- The United States’ tradition of Judeo-Christian values enshrined in marriage law is threatened by the legalization of same sex marriage. Religious and government officials who do not condone homosexuality should not be forced to perform and validate same sex marriage.
- Children need both a male and a female parental role model, and do best when they are raised by a heterosexual married couple. Studies indicate that children not raised in such an environment are more prone to depression and juvenile delinquency.¹³
- Studies in the Netherlands indicate that, since that country legalized same sex marriage, the institution of marriage more generally has suffered.¹⁴
- The majority of U.S. citizens are opposed to same sex marriage, and the public’s desires need to be reflected in law in a democratic system.¹⁵
- Some in the LGBT community argue that marriage is an oppressive, exclusive, and patriarchal institution; same sex couples should not spend time and energy fighting to enter such a flawed institution.

Arguments in favor:

- Same sex couples can and do have children using adoption and donor insemination (while many heterosexual couples are infertile or choose not to have children- thus, the separation between marriage and procreation is already evident). Moreover, children of same sex couples are hurt by their parents’ inability to marry. They may not be covered by a parent’s health insurance policy, be deprived visitation access to both parents upon dissolution of the relationship, and suffer financial hardship as a result.
- Barring same sex couples from marrying deprives them of the 1,138 federal rights as well as hundreds of state-conferred legal rights and responsibilities associated with marriage. These include the right to hospital visitation, end-of-life decision-making, child custody and visitation, tax benefits, immigration and residency, transfer of property, inheritance, wrongful death claims, domestic violence protection, employer family benefits, joint insurance policies, and many others. Denying access to these rights amounts to a violation of equal protection, and of the Supreme Court’s precedent protecting the right to choose one’s marriage partner in *Loving v Virginia* (1965).¹⁶
- Allowing same sex couples to marry in no way diminishes or changes the marriages of heterosexual couples. Evidence of this is observable in those jurisdictions where same sex

¹² See “The Truth about Same-Sex Marriage”, Alliance Defense Fund: www.alliancedefensefund.org/userdocs/SameSexMarriage.pdf

¹³ See “The Potential Impact of Homosexual Parenting on Children,” by Lynn Wardle, *University of Illinois Law Review*, 1997.

¹⁴ See “The End of Marriage in Scandinavia” by Stanley Kurtz, *The Weekly Standard*, February 2004.

¹⁵ See <http://www.marriageequalityca.org/politics/polling/index.php>

¹⁶ See *Loving v Virginia*, 388 U.S. 1

marriage is now legal, and where no adverse effects have been observed.¹⁷ If anything, it simply strengthens the institution by allowing more people to enter it.

- Separation of church and state requires that concerns for religious definitions of marriage as between a man and a woman be separated from the legal entity of civil marriage, and cannot be used to justify a ban on same-sex marriage.

Activist and Community Organizations/Web-based Information Sources

- National Freedom to Marry Coalition: <http://www.freedomtomarry.org/>
- Human Rights Campaign: <http://www.hrc.org/>
- Partners Task Force for Gay and Lesbian Couples: <http://www.buddybuddy.com/>
- Lambda Legal Defense and Education Fund: <http://www.lambdalegal.org/>
- Marriage Equality California: <http://www.marriageequalityca.org/home.php>
- National Center for Lesbian Rights: <http://www.nclrights.org/>
- Gay and Lesbian Defenders and Advocates: <http://www.glad.org/>
- Empire State Pride Agenda: <http://www.prideagenda.org/>
- National Gay and Lesbian Task Force: <http://www.thetaskforce.org/>
- Queer Resources Directory: <http://www.qrd.org/qrd/family/marriage>

Print Resources of Further Information, Teaching, and Suggested Reading

- Bourassa, Kevin and Joe Varnell (2002) *Just Married: Gay Marriage and the Expansion of Human Rights*. Madison: The University of Wisconsin Press.
- Cahill, Sean (2004) *Same Sex Marriage in the United States: Focus on the Facts*. Lanham, Maryland: Lexington Books.
- Eskridge, William (2002) *Equality Practice: Civil Unions and the Future of Gay Rights*. New York: Routledge.
- Gerstmann, Evan (2004) *Same Sex-Marriage and the Constitution*. Cambridge: Cambridge University Press.
- Goldberg-Hiller, Jonathan (2002) *The Limits to Union: Same-Sex Marriage and the Politics of Civil Rights*. Ann Arbor: The University of Michigan Press.
- Lehmann, Jennifer M. (2001) *The Gay and Lesbian Marriage and Family Reader: Analyses of Problems and Prospects for the Twenty-First Century*. Lincoln: Richard Altschuler & Associates, Inc.; distributed by University of Nebraska Press.
- Mello, Michael (2004) *Legalizing Gay Marriage*. Philadelphia: Temple University Press.
- Merin, Yuval (2002) *Equality for Same-Sex Couples: The Legal Recognition of Gay Partnerships in Europe and the United States*. Chicago: University of Chicago Press.
- Strasser, Mark (1998) *Legally Wed: Same-Sex Marriage and the Constitution*. Ithaca: Cornell University Press.
- Sullivan, Andrew (1997) *Same Sex Marriage: Pro and Con, A Reader*. New York: Vintage Books.

Video/Audio Teaching Resources

- Video Showing the Importance of Equal Marriage Rights for Same-Sex Couples (available online through Lambda Legal): <http://www.lambdalegal.org/media/marriage-SM.wmv>
- Because This is About Love (1992, available from Filmmakers Library)
- Domestic Bliss (1984, by Joy Chamberlain, and Gillian Slovo)

¹⁷ See “Will Providing Marriage Rights to Same-Sex Couples Undermine Heterosexual Marriage? Evidence from Scandinavia and the Netherlands” by M.V. Lee Badgett, *Sexuality Research and Social Policy*, July 2004.

- Freedom to Marry: A Green Mountain View (1996, by the Vermont Freedom to Marry Task Force)
- Freedom to Marry (a different video, filmed in San Francisco in 2004)
- Flowers from the Heartland (2004)
- In Praise of Gay Marriage (1990, by Thomas F. Krahn)
- The Right to Marry: A documentary about a basic human freedom (1993, by Demian)