Chapter 2
The Recognition of Same-Sex Couples' Rights in the US Between Counter-Majoritarian Principle and Ideological Approaches: A State Level Perspective

Graziella Romeo

Abstract The chapter analyzes the issue of same sex couples' right to marry from a State level perspective. Before describing different models of recognizing same sex couples' rights, the essay deals with the argumentative structure of State Courts decisions in an attempt to demonstrate that the continued interaction among legal formants fosters the recognition of rights. The State Supreme Courts indeed seem to develop a counter-majoritarian attitude that encourages a theory of constitutional interpretation that conceives constitutions as evolving documents.

2.1 The Recognition of Rights Between Counter-Majoritarian Dilemma and Ideological Approaches

Studies on same-sex couples in the United States usually take for granted the distinction between Red and Blue States, emphasizing two opposing models of society behind the recognition or the denial of homosexual relationships, which in turn express conflicting views of basic values and deep ideological beliefs that define political inclinations.[1]

There are at least two reasons why this approach is arguable. Firstly, this methodology, although generally capable of explaining some data, tends to underestimate the process through which a claim, originally supported by a specific faction or group,[2] achieves an ideologically enfranchised position in public (and

[1] See McClain (2008–2009), p. 415.

[2] Earlier analyses of homosexuals' rights had a primarily militant motive: see T. Stoddard and P. Ettelbrick's debate in *Out/Look Magazine* during the 1980s, now retraced in Hull (2006), p. 77. Stoddard believed that allowing same-sex marriage was the best way to end discrimination for political reasons and a part from practical reasons such as tax regulation. By contrast, Ettelbrick

G. Romeo (✉)
Department of Law, Bocconi University, Milan, Italy
e-mail: graziella.romeo@unibocconi.it

D. Gallo et al. (eds.), *Same-Sex Couples before National, Supranational and International Jurisdictions*, DOI 10.1007/978-3-642-35434-2_2,

political) debate. The State of Washington could serve as an illustration of this: it recently moved from being cited as an example of a State with quite a conservative attitude towards same-sex couples' rights[3] to a State that advocated the complete recognition of same-sex marriages[4] without significant changes in political scenario. Virtually every State seems to adopt an incremental approach to gay rights that usually develops from a statutory ban on homosexual intimate relationships to a statutory guarantee of (at least) some spousal rights. These developments do not appear to depend directly upon changing political attitudes. In almost every case the evolving vicissitudes of rights recognition involve struggles among courts, legislatures and civil society—as the preferred terrain of the liberty/authority dialectic—rather than the mere transformation of political preferences.[5]

Secondly, the ideological dichotomy between Red and Blue States represents a structural division that is for instance insensitive to specific or temporary changes in voters' attitudes. Progresses in the affirmation of civil rights reflect cultural shifts in people's beliefs[6] towards specific issues without necessarily encompassing a broader change in political inclination.

In other words, the recognition of a previously denied right owes more to the dynamic interaction among judges, legislatures and civil society initiatives than to the predominance of a political party. There will undoubtedly be instances in which the full recognition of rights is combined with the State's progressive political attitude, but this does not mean that the division between Red and Blue States can be interpreted as self-explanatory. Therefore, the analysis of same-sex couple's rights needs to be placed within the democratic process understood in wider terms, as a communicative process in which multiple actors, even the non-political ones, play significant roles.[7]

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maintained that marriage would not have had the effect of liberating gays and lesbians, rather it would have forced them into the mainstream, undermining "some of the most cherished goals of gay liberation, including the recognition of and the respect for a diversity of family forms and intimate relationships" (Hull 2006, p. 80). Along the same lines, the modern feminist critique of the marriage model extends to same-sex marriages as they tend to 'map-on' the traditional prototype of marriage. See Barker (2012), p. 198: "there have been some strong arguments made for same-sex marriage, from the necessity of accessing legal protections and the symbolism of legal recognition to feminist claims that same-sex marriage would transform the institution and suggestions that marriage could be queered". In other words, the struggle for homosexuals' rights missed the chance to move beyond marriage and conjugality.

[3] See the decision of *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

[4] Same sex marriages came into effect on December 6th, 2012 (see note 62).

[5] On the contrary, J. Toobin seems to support the view according to which there is an immediate correlation between the outcome of Presidential elections and the outcome of cases before the Supreme Court: "[. . .] So in time of great polarization between the parties, Democratic and Republican judicial appointees see the world, and the law, in very different ways". See Toobin (2013), p. 20.

[6] See Tribe and Matz (2011–2012), p. 471.

[7] This idea, of course, owes a debt to the theory of communicative democracy, better known as discourse ethics, formulated by Habermas (1990).

Neither the exclusive reference to the history of legislative proposals (or popular initiatives) nor the sole mentioning of Courts' decisions are capable of explaining the *status* of same-sex couples' rights protection in the United States. It is the continued interaction among legal formants[8] on the one hand and public debate on the other that marks progress or regression in this field. Courts cannot ignore commonly held opinions as always happens when the recognition of controversial rights is concerned. Judges indeed face the counter-majoritarian difficulty[9] each time they are required to deliver decisions that affect society's fundamental choices. Nevertheless, the issue of the rights of same-sex couples appears to be a typical area of the law in which the counter-majoritarian approach encourages theories of constitutional interpretation that conceive constitutions as evolving documents,[10] capable of leading to results that are not entirely predictable.

In order to be consistent with the general premise, this chapter disregards the ideological division between conservative and progressive States and addresses same-sex couples' rights from a dual perspective: the competing arguments within the public debate and the Courts, and the models of same-sex couples' relationships, shaped as result of the competition among possible solutions.

Before considering the issue of same-sex couples' rights from an argumentative standpoint, Sect. 2.2 focuses on the implications of the federalist system for the regulation of marriage, while Sect. 2.3 deals with the competing solutions to the same-sex couples' issue supported by courts, legislators and public opinion. In an attempt to summarize the contents of public discourse, in which each legal formant plays its role, Sect. 2.4 describes and analyzes the contending views with a particular focus on judicial argumentation. Section 2.5 explores four models of recognition of homosexual couples' rights in order to systematize legislative and judicial instruments that influence the current scenario. Eventually, Sect. 2.6 offers some concluding remarks on counter-majoritarian approach and its role in fostering evolving standards of protection of rights.

[8] "Legal formant" is here used to denote legislators, Courts' decisions and scholars' opinions "who are never in complete harmony" as has been taught by Sacco (1991), p. 343.

[9] See the well-known analysis of Bickel (1986).

[10] Consider the Connecticut Supreme Court decision of *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407 (CT 2008) which holds that the State ban on same-sex marriage violates the Constitution. The ruling clearly states: "we are mindful that State "[c]onstitutional provisions must be interpreted within the context of the times ... The Connecticut Constitution is an instrument of progress, it is intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens". See also Conkle (2006), p. 121 discussing *Lawrence v. Texas*, 539 U.S. 601(2003) as an example of a decision based on interpretative flexibility and dynamic theory of those national values that guide constitutional interpretation (see note 44).

2.2 Marriage Federalism and Its Implications

Marriage as a legally recognized social relation involves both the State's power to regulate internal affairs (and the internal order)[11] and the guarantee of a personal right. This dual nature of marriage, a subject matter of police power and an individual right,[12] implies that it is incorrect from a methodological perspective, when discussing the rights of same-sex couples, to disregard issues like State interest in pursuing public goals connected with marriage (such as procreation, childrearing, preservation of traditional family) or federal interactions with State level regulation.

As far as State interests in marriage are concerned, the case law offers a variegated map of reasons that governments supported to justify the regulation of marital (and non-marital) relationships. Although the promotion of procreation is the most cited interest in State's litigation, it does not represent the only concern of courts and legislatures. Childrearing and protection of the traditional model of family[13] are often alleged to be the justifications of public regulation. Those interests, of course, are interconnected: procreation and childrearing need a stable and committed relationship that usually takes the form of marriage. States that refuse to recognize same-sex relationships maintain that their interests in marriage justify the prohibition. Sometimes even other reasons peer out from the case law and are claimed to be supportive of the banning of same-sex relationships. The preservation of State finances, threatened by the extension of social or tax benefits recipients, can be cited as an example of asserted interest.[14]

The issue of same-sex couples, however, is not a purely State's problem. It necessarily involves also federal law because, as always happens in American constitutionalism, recognition of rights has consequences for federalism.[15] Indeed when a right is guaranteed by both State and federal law, minimal interferences or overlaps occur between the two levels of government.[16] When the dynamics of federalism allow or imply differentiation in matter of rights, however, tensions may appear insofar as State law or judicial interpretation attempt to find a constitutional foothold at federal level.[17] Indeed within American constitutionalism there is in any case no general need to pursue homogeneous grounds of protection across the

[11] The reference is to state police power as described by Dubber (2005), *passim*. The Author underlines the prevailing purpose of the exercise of police power, essentially aimed at guaranteeing the ordered and safe existence of civil society.

[12] See *ex multis Loving v. Virginia* 388 U.S. 3 (1967).

[13] *Baker v. Vermont*, 744 A.2d 864, 884 (Vt. 1999).

[14] *Baehr v. Miike*, No. 20371, 1999 HI LEXIS 391 (HI December 9, 1999). See Sects. 2.4 and 2.4.1.

[15] See Abraham and Perry (2003), p. 38. See also Powell (1996–1997), pp. 81–82 and Collins (1992), p. 78. who argues that American federalism has seldom been interpreted "in the sense in which [Justice] Black had newly christened it – as a way of referring to our concerns for harmonious state-federal relations, and with more than a hint of special solicitude for states' rights".

[16] See Marks Jr and Cooper (2003), pp. 35–38.

[17] The issue is clearly addressed by Sandalow (1965), p. 187. The Supreme Court of the United States seems to be jealous of its mandate to interpret the provisions of the Constitution and the Bill of Rights.

whole federation.[18] Nevertheless, a State guarantee that does not have a federal counterpart may raise issues such as a specific supra-state interest to regulate the matter or inconsistent interpretations of the Bill of Rights between federal and State Courts; in the same way there may be instances in which the recognition of a right relies upon State provisions (with or without constitutional standing) and, at the same time, no federal interest can be identified. Consequently only State constitution and statutory law occupy the scene.

This seemed to be the case for same-sex couples rights up to the 1990s. In *Baker v. Vermont*,[19] Vermont Supreme Court held that the banning of homosexual marriage amounted to a violation of rights secured by the state Constitution. The Massachusetts Supreme Court ruled that the right to marry the person of one's choice is granted under the state Constitution in the celebrated decision of *Goodridge v. Department of Public Health*.[20] Conversely, in *Baehr v. Miike*,[21] Hawaii Supreme Court found that the interpretation of statutory provisions in a way that allows same-sex marriage to be performed was inconsistent with the State Constitution. In all cases, judicial interpretation rested upon State constitutional grounds, excluding federal law from the issue.

In the second half of the 1990s, federal law came to the fore in the field of same-sex couples' rights. In 1996, Congress passed the Defense of Marriage Act (DOMA),[22] defining marriage as the union between a man and a woman and denying the recognition of same-sex marriages, performed in State jurisdictions, for federal law purposes such as social security benefits or tax benefits. This piece of legislation was specifically designed to preserve "marriage federalism"[23] without forcing the Nation to share choices made by a few States.

DOMA served somehow as an example for State jurisdictions. Seven States passed similar statutes,[24] and the vast majority of them approved constitutional amendments to define marriage as a relationship between a man and a woman.[25]

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[18] Federal constitutional and statutory laws establish a minimum national standard for the exercise of individual rights but do not prevent State governments from affording higher levels of protection for the same rights: see *State v. Morales*, 232 Conn. 707, 716, 657 A.2d 585 (1995), quoting *State v. Barton*, 219 Conn. 529, 546, 594 A.2d 917 (1991).

[19] See note 13.

[20] 798 N.E.2d 941, 948 (MA 2003).

[21] See note 14.

[22] Pub.L. 104–199, 110 Stat. 2419, enacted Sept. 21, 1996, 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

[23] See Knauer (2008), p. 421.

[24] Delaware (DE Code, Title 13, Ch. 1, §101); Hawaii (HI Code, Title 31, Ch. 572, § 1); Indiana (IN Code, Title 31, Ch. 1, sect. 1); Illinois (750 IL Code 5/212); Minnesota (MN Code, Ch. 517, sect. 03); Pennsylvania (PA Code, Title 23, Ch. 11, § 1102), West Virginia (WV Code, Ch. 48); Wyoming (WY Code, Title 20, Ch. 1, Art. 1).

[25] See para 5. Scholars refer to Super-DOMAs to describe those laws that prohibit any kind of recognition of same-sex relationships, including civil union and domestic partnership. Nebraska, Ohio and Virginia passed statutes expressly not permitting even those forms of domestic relationships. See Cahill (2004), p. 9.

As a result, the recognition of marriages performed in jurisdictions issuing licenses for homosexual couples is left to the discretion of each State. In a limited number of cases, States refusing such a right recognize marriages from other jurisdictions such as civil unions or domestic partnerships so as not to contradict their own position on same-sex relationships.[26]

This composite framework did not come to an end after the Supreme Court reached the decisions in *United States v. Windsor*[27] and *Hollingsworth v. Perry*.[28] The former involved Sect. 3 of DOMA, which expressly circumscribes marriage to the union of a man and a woman. The latter concerned the State of California Proposition 8, which bans same sex marriages. The judgments called into question not only homosexuals' rights, but also State prerogatives and even, in broader terms, the way in which federalism is supposed to be framed.[29] An essential point behind these cases was the extent to which State interests in regulating marriage prevent the 'constitutionalization' of same-sex couples' rights and in parallel the extent to which the federal government is allowed to ignore States' decision to dignify homosexual relationships. The Supreme Court seems to have chosen to preserve marriage federalism by declaring on the one hand that Sect. 3 of DOMA is unconstitutional under the Fifth Amendment due process clause and, on the other hand, by deciding not to address the constitutionality of Proposition 8, hiding itself behind a procedural issue.[30] The concrete outcome of the two cases is that States may regulate same-sex couples' right to marry without incurring in denial of homosexuals' marriage under federal law. At the same time, States are not compelled to recognize marriage equality.

Against this background, exploring the issue of homosexuals' rights at State level should imply focusing on the competing arguments that have influenced scholarly as well as public debate around this topic. They are indeed the most powerful forces that can challenge (and even survive) the constitutional decisions.

Before reaching the core of competing opinions, the analysis should address the mutual influences among legal formants that continuously reshape models of recognition of homosexuals' rights.

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[26] See Illinois Religious Freedom Protection and Civil Union Act of 2011 (codified as 750 IL Code 75/60). By contrast, the West Virginia Code expressly refuses recognition of same-sex marriages performed in another State (WV Code, Ch. 48, sect. 2–603).

[27] 570 U.S. ___ 2013 (Docket No. 12-307).

[28] 570 U.S. ___ 2013 (Docket No. 12-144).

[29] From this standpoint, it is worthwhile mentioning those studies that analyze the coefficient of successful gay rights litigations in federal and state courts. See Cross (2004–2005), p. 1196 who underlines: "states courts decided in favor of gay rights more than twice as often as did federal courts, at both intermediate and supreme courts level". Similarly, claims brought under state constitutions were resolved more favorably than federal constitutional cases.

[30] In *Hollingsworth v. Perry* the Court failed to reach the merit because it affirmed that the petitioners, who were the sponsors of ballot initiative, lacked standing to sue under federal law.

2.3 Courts, Legislature and Public Debate

In recent American legal thought it is not unusual to find authors supporting the thesis of the limited impact of judicial decision in advancing gay rights protection.[31] There are even arguments clearly asserting that judicial activism resulted in severe backlashes for the cause of same-sex couples' equality.[32]

Undoubtedly homosexuals' rights litigation was not always capable of achieving enduring results. There are at least three cases in which the outcome of judicial decisions provoked legislative or popular retorts. In 1993, Hawaii Supreme Court held that the denial to recognize same-sex marriage violates the State equal protection clause. On April 29, 1997, both Houses of the legislative branch passed a bill proposing an amendment to the Hawaii Constitution defining marriage as being limited to the union of a man and a woman. Similarly, the California Supreme Court ruling declaring the ban on same-sex marriage to be unconstitutional was overruled in a referendum. Indeed, in 2008 voters approved an amendment designed to define marriage as the relationship between two persons of the opposite sex (the so-called Proposition 8). After the above-mentioned decision *Goodridge v. Department of State*, a wave of legislative and popular initiatives sought to insulate marriage laws from the judicial process.[33]

According to some scholars, had the Courts decided to leave the choice to legislators and their constituencies, there would not have been such sweeping backlashes.[34] In other words, instead of establishing a fruitful dialogue with the judiciary, lawmakers tried to put the issue of same-sex couples beyond the reach of judges resulting in a substantial impairment of homosexuals' rights at least in the long term.

The recognition of rights is not something that develops at an even pace. It is rather a history of struggles in which Courts act as watchdogs of the legislative branch and sometimes succeed in developing a 'civilization' of fundamental rights. One cannot trace a perfect harmony among legal formants: it is indeed the communication among them that marks the upholding of (formerly denied) rights.

Thus it is not surprising that same-sex marriages are legalized following fluctuating vicissitudes. The Maine Legislature approved "An Act To End Discrimination in Civil Marriage and Affirm Religious Freedom".[35] The voters firstly invalidated the law by referendum, and then changed their opinion supporting same-sex marriage in a ballot held in 2012.

In some instances, Courts have engaged in a virtuous dialogue with legislators. Though urging lawmakers to adopt statutes on marriage equality, judges left them free to choose any form of legally recognized relationship that was capable of guaranteeing spousal rights on an egalitarian basis. The Vermont Supreme Court

[31] See Toobin, in note 5.

[32] See Klarman (2013).

[33] At least 25 States had enacted constitutional amendments that define marriage as the union between a man and a woman after the Supreme Court of Massachusetts decision: see Cole (2013).

[34] See Klarman (2013), p. 35.

[35] ME Rev. Stat. Ann. tit. 19-A, § 650.

for instance left the legislature with the ultimate decision on how to secure gay couples' rights without compelling the State to provide them with the institution of marriage.[36]

In virtually every case one can trace a strong connection between political process and litigation in the field of gay rights. It does not necessarily require that there should also be a complete syncretism. Arguments discussed in the courtroom become the subject of public debate and public debate, in turn, influences law-makers and, indirectly, judges. The Hawaii Supreme Court declared the ban on same-sex marriage to be in violation of the State equal protection clause but was then compelled to recognize that a constitutional amendment and a statutory provision had been approved. Consequently, the ruling could not withstand a change that was of a political nature.[37]

These kinds of changes are, however, not irreversible; indeed they are constantly subjected to challenges as the cases of Maine and Washington show. In both circumstances, political shifts are incapable of *per se* explaining why public opinion moved from anti-gay to pro-gay positions.

In modern democracies *consensus* around shared values is built in a process where opinions compete in a public arena. However, even in an open and democratic debate constitutional arguments are compelling. It is therefore unavoidable to turn to strictly legal argumentation in order to understand the way in which same-sex couples' rights receive protection.

2.4 The Choice Over the Scheme of Argumentation in State Litigation

Arguments used to oppose same-sex marriages in States' litigations seem to be of a circular kind: that is they often assume what they are attempting to prove. The circular logic has been shown both by State governments' lawyers that have tried to resist the right to same-sex marriage in court and by legal scholars, to such an extent that the debate has been virtually built around one single issue: the biological basis

[36] See *Baker v. Vermont*, in note 13. Chief Justice Amestoy wrote: "in the faith that a case beyond the imagining of the framers of our Constitution may, nevertheless, be safely anchored in the values that infused it, we find a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples. It remains only to determine the appropriate means and scope of relief compelled by this constitutional mandate". It must be mentioned that civil unions or domestic partnerships are not a "consolation prize" (Tribe and Matz 2011–2012, p. 481): there are views, even within the gay community, that do not share the need to have homosexual relationships recognized in the form of marriage as part of a broader critique to the marriage institution itself: see note 2.

[37] See note 24.

(i.e. the *natural* foundation) of the human bond that generates a family and requires a legal/formal structure called marriage.[38]

Even leaving out the most radical rhetoric based on the laws of nature[39] and taking a closer look at recent academic debate and judicial rationale, the 'basic biology' (or 'basic understanding' of biology), i.e. the need for a man and a woman to give birth to a child, is at the same time the starting point of the theory that justifies the different treatment of straight and homosexual couples and the reason why same-sex marriage could not be conceived in a ordered society.[40] In other words, marriage is an institution that is designed to protect the essential nucleus of our society (the family), possibly completed by children. The argument could be essentially synthesized as follows: biological differences create the family *because* the family derives from biological differences. From this perspective, only heterosexual couples are able to establish a family and thus need the institution of marriage. It has been far too simple to respond that same-sex partners have and raise children and that they need a secure and committed relationship as much as heterosexual couples do.[41]

Considering the argument from the point of view of the interests of the State[42] in regulating marriage leads to the same conclusion. If state regulation of conjugal relationships is essentially designed to secure a stable and healthy environment for childrearing, it is unreasonable to deny protection to those who happen to have parents with homosexual orientation. To some authors[43] the doctrine of State interest seems to afford another reason to support same-sex couples' rights and at the same times reveals that the real interest served by State legislations is basically the protection of the heterosexual conception of marriage (and thus a traditional way of conceiving family).[44]

Hence, the first difficulty encountered by States' Supreme Courts is the choice of the scheme of argumentation. Judges' opinions always need to be perceived as acceptable from the perspective of the common starting points in legal contexts.[45] This means, *inter alia*, that judicial reasoning should put to one side extra-legal/traditional/cultural arguments so as not to transform the rationale into a sort of political argumentation.

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[38] It is worthwhile recalling that in a number of U.S. Supreme Court decisions marriage is expressly defined as heterosexual and as "the foundation of the family and society without which there would be neither civilization nor progress": *Reynolds v. United States*, 98 U.S. 145, 165 (1879); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1988). See also Gallagher (2003), p. 17.

[39] For a comprehensive explanation of a natural law approach see George (1993).

[40] See for example arguments presented in decisions such as *Anderson v. King County*, 138 P. 3d 963, 982–983 (WA 2006); *Conaway v. Deane*, 932 A.2d 571 (MD 2007); *Morrison v. Sadler*, 821 N.E. 2d 15 (IN Ct. App. 2005).

[41] See Sect. 2.4.1. See also Strasser (2003), p. 36.

[42] See Wardle (2001), p. 771.

[43] See Strasser (2003), p. 36.

[44] "Traditional family" is used to denote the idea of family that has its origins in a specific socio-cultural context. See for instance George (2003), p. 116. See also the classical study on marriage and family written by Witte Jr. (1997).

[45] See Feteris (2009), pp. 91–92.

Even Justice Scalia, who cannot be described as an advocate of homosexuals' rights, appears to believe that some traditional conceptual tools are weak or completely inadequate to face the challenging arguments supporting gay equality.[46] Procreation is maybe the clearest example: it is constantly brought up in State litigation[47]; nonetheless it can be held as a general opinion that marriage has assumed "profound expressive, personal, and financial significance in modern society".[48] This new understanding of marital relationships, whether or not embracing an alternative model of family, overlooks the procreation-oriented prototype of marriage.[49]

Therefore, the competition between opposing views should be dealt with on a strictly legal basis where the quality of conflicting opinions can be measured with positive law and theories of constitutional interpretation.

2.4.1 Equal Protection v. Due Process

Within the cultural debate among gay rights supporters, some authors recall the rhetoric of the civil rights movement[50] and favor a political and cultural crusade based on the inspiring principle of equality. In terms of judicial litigation though, equality can be less effective than it is frequently perceived to be, at least in those fields in which the law is persistently influenced by cultural heritage and traditional understandings of human relationships. Even the litigation on civil rights has shown the limited meaning that judicial interpretation can give to equality when it comes to deciding "hard cases".[51]

Nevertheless claims supporting gay rights tend to be based on grounds of equal protection both at the Federal and State level. From a legal standpoint, this trend could easily be justified because the scheme of equal protection reasoning is perfectly suitable for arguments affirming same-sex couples' rights. Both the technique of

[46] See *Lawrence v. Texas*, in note 10, Scalia J. dissenting: "preserving the traditional institution of marriage is just a kinder way of describing the state's moral disapproval of same-sex couples". The point is also well illustrated by Walfson (2004), pp. 79–80.

[47] *Ibidem*, at 75.

[48] See Tribe and Matz (2011–2012), p. 481.

[49] Witte Jr. (1997), p. 75.

[50] Walfson (2004), p. 23 and Cole (2013). Novak (2010), p. 711 criticizes this approach stressing that there is a difference between pre-political institution like marriage and political (and strictly legal) institutions like the ones involved in civil rights litigation, citing as an example public education.

[51] See Ball (2011–2012), p. 1. Examples can also be derived from the controversial "separate but equal doctrine", elaborated within the equal protection clause jurisprudence before the upheaval of *Brown v. Board of Education*, 47 U.S. 483 (1954). An interesting case is *Pace v. Alabama*, 106 U.S. 583 (1883), cited by the Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967). In that case, the Court upheld an Alabama statute forbidding adultery or fornication between a white person and a Negro and imposing a greater penalty than that of a statute proscribing similar conduct by members of the same race. The Court maintained that the statute could not be conceived as a discriminative measure against Negroes because the punishment was the same for each participant in the offense.

suspect or quasi-suspect classifications and the corresponding model of scrutiny fit the structure of the argumentation presented to support marriage equality.

Although the equality principle does not ensure a successful litigation, there are at least four cases in which constitutional or statutory bans on same-sex marriages have been struck down on equal protection grounds[52]; by contrast, a different legal basis seems to have been successfully invoked only in two cases.

In *Kerrigan v. Commissioner of Public Health*,[53] the Connecticut Supreme Court ruled the ban on homosexual marriages to be unconstitutional and rejected the government argument according to which same-sex and straight couples are not similarly placed as far as the desire to develop a conjugal relationship is concerned. In other words, the Court refused to adopt a sort of socio-cultural approach that characterizes homosexual couples as being basically indifferent to the aspiration of forming a family and adopted the equal protection analysis on a rigorous basis.

Comparably, the equality principle was influential in judges going against traditional beliefs and opinions in *Varnum v. Brien*.[54] The Supreme Court of Iowa cited the *Kerrigan* case and justified the application of the heightened level of scrutiny over classifications based on sexual orientation such as the one contained in a statute that excludes same-sex marriages. Neither the State interest in preserving traditional marriage, nor the interest connected to the promotion of the optimal environment for childrearing can withstand the intermediate scrutiny because the Court found that neither interest was supported by clear evidences justifying the classification operated by the statute. Even the promotion of procreation is conceived as a 'too tenuous' argument to overcome the heightened test of constitutionality.

The equal protection clause can be a powerful weapon in litigation concerning the rights of same-sex couples, but it can be used to justify discrimination as well. In a number of cases the principle of equality is invoked to reach opposing conclusions, essentially based upon the fact that gay and heterosexual couples are not similarly situated as far as the right to marry is concerned.[55] In *Standhardt v. Superior Court*,[56] the Arizona Appeals Court applied the same rationale to conclude that there is a reasonable link between opposite-sex marriage, procreation and childrearing.

The due process clause, on the contrary, has hardly been used at all to decide gay rights cases even if it generally demands a more intrusive standard of review. Massachusetts Supreme Court resorted to both due process and equal protection in the famous decision of *Goodridge v. Department of Public Health*.[57] Due process has been applied according to the rational basis test. It has been construed as requiring that the statute "bear[s] ... a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare".

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[52] For a complete list of examples see Ball (2011–2012), p. 41.

[53] See note 10.

[54] 763 NW 2d 862 (IA 2009).

[55] See *Morrison v. Sadler*, in note 38, or *Hernandez v. Robles*, 855 N.E. 2d 1, 21 (N.Y. 2006).

[56] 77 P. 3d 451 (AZ Ct. App. 2003).

[57] See note 20.

The equal protection standard required that:

> an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.

The Court systematically rejected the justifications of the ban on same-sex marriages offered by the Government, including procreation, childrearing and preserving the institution of traditional marriage, and found that the statutory ban could not withstand even the rationale basis test.

The majority opinion is heavily influenced by Supreme Court decision in *Lawrence v. Texas*[58] and develops a rationale that is a sort of matching of the classical due process and equal protection analysis.

The approach adopted by the California Supreme Court is somehow bolder. In *Re Marriage Cases*[59] is indeed entirely construed as a due process claim. The State judges appear to believe that the issue cannot be confined to the equal protection clause. Accordingly they perform a liberty analysis that recognizes the fundamental right to marry as being applicable to same-sex couples because marriage is not to be grounded in procreation and childrearing, but more broadly viewed as a stable commitment that gives formal recognition to an intimate relationship.

Some scholars argue that it is not by chance that due process has been applied to reach such a strong position on same-sex marriage as a fundamental right.[60] In other words, the liberty review should be held as the most effective standard in gay rights litigation.

This position supports the rediscovery of the due process clause[61] and ultimately transfers the key point of the debate around same-sex couples from equal treatment, that could mean fairly comparable treatment, to complete recognition of rights enjoyed by straight couples.[62]

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[58] Crane (2003–2004), p. 465. *Lawrence v. Texas*, in note 10, dealt with sodomy law, an area of legislation where it may be generally difficult to apply equal protection because law criminalizing sodomy may be facially neutral. The Texas statute however was not facially neutral, but expressly targeting homosexual intimate relationships. See Ball (2011–2012), p. 40.

[59] 183 P. 3d 384 (CA 2008).

[60] See Ball (2011–2012), p. 38.

[61] Supreme Court Justices developed an interesting debate around the rediscovery of the due process clause and its substantive dimension. The discussion arose from Justice Kennedy concurring opinion and Scalia response in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S.Ct. 2592, 2613 (2010). The debate is retraced by Stone et al. (2010), pp. 98–99. I have discussed this issue elsewhere: Romeo (2011), pp. 4063–4064. In general see Musgrove (2008), p. 137.

[62] Nussbaum (2010), pp. 669ff. seems to stress that the debate around same-sex couples must address primarily this issue when she argues that: "The public debate … is … about marriage's expressive aspects. It is here that the difference between civil unions and marriage resides, and it is this aspect that is at issue when same-sex couples reject the compromise offer of civil unions, demanding nothing less than marriage. It is because marriage is taken to confer some kind of dignity or public approval on the parties and their union that the exclusion of gays and lesbians from marriage is seen … as stigmatizing and degrading".

In most cases, the outcomes of the litigation that was centered on equality review were indeed partial solutions (or victories) such as the recognition of non-marital relationships, labeled as domestic partnership or civil unions, or of a particular package of rights.

2.5 Models of Recognizing Same-Sex Couples' Rights: A Kaleidoscopic Framework

From a purely theoretical standpoint, possible approaches to same-sex couples' rights are essentially limited to the dialectic between traditional and modern conceptions of marriage and family relations. By contrast, positive law offers nuanced solutions, sometimes even combined with each other and not entirely congruent from a strictly legal perspective. In this regard, it happens that civil unions, with the recognition of the whole set of spousal rights, characterize States in which legislatures have simultaneously passed a statutory ban on same-sex marriages.[63] In other words, homosexual couples enjoy the same rights and almost the same status as married couples but without being allowed to marry.

The overview of State level solutions should distinguish among different ways of recognizing couples' rights. Following an ideal rights-declining approach but without claiming to be complete, it is possible to classify at least four prototypes: the first covers those States where same-sex marriages are allowed.[64] The second designates States which recognize only civil unions (and possibly domestic partnerships).[65] The third labels States which expressly do not allow homosexuals marriage and introduce domestic partnerships.[66] Finally, the fourth covers States which prohibit same-sex marriages by means of constitutional[67] or

[63] This is the case for Hawaii, Delaware and Illinois (see Sect. 2.2 and note 24).

[64] Connecticut (An Act Implementing the Guarantee of Equal Protection Under the Constitution of the State for Same Sex Couples, Public Act No. 09-13); Iowa (by judicial decision); Maine (Title 19, Domestic Relations, Ch. 1, § 34); Maryland (Civil Marriage Protection Act 2012); Massachusetts (by judicial decision); New Hampshire (Title XLIII, Domestic Relations, Ch. 457, § 457:1-a); New York (The Marriage Equality Act, 2011); Vermont (An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, 2009); Washington (Civil Marriage and Domestic Partnership law, 2012); District of Columbia (Jury and Marriage Amendment Act of 2009).

[65] Delaware; Hawaii; Illinois (see note 24); New Jersey (NJ Code, Ch. 103, P.L. 2006); Rhode Island (RI General Laws, Title, 15, Ch. 3.1-1).

[66] California (CA Family Code, sections 297–297.5); Nevada (NV Code, Ch. 122A); Oregon (OR Code, Title 11, Ch. 106).

[67] Alabama (Am. 774(d)); Alaska (Art. 1, sect. 25); Arizona (Art. XXX); Colorado (Art. II, sect. 31); Florida (Art. I, sect. 27); Georgia (Art. I, sect. IV); Idaho (Art. III, sect. 28); South Carolina (Art. XVII, sect. 15); South Dakota (Art. XXI, sect. 9); Kansas (Art. XV, sect. 16); Kentucky (sect. 233 A); Louisiana (Art. XII, sect. 15); Michigan (Art. I, sect. 25); Mississippi (Art. XIV, sect. 263A); Missouri (Art. I, sect. 33); Montana (Art. XIII, sect. 7); Nebraska (Art. 1, sect. 29); North Carolina (Art. XIV, sect. 6); North Dakota (Art. XI, sect. 28); Ohio (Art. XV, sect. 11); Oklahoma

statutory provisions,[68] without providing homosexual couples with alternative forms of union.

Within the first two models, same-sex marriages and civil unions are often presented as an alternative. That is to say, recognizing the former implies denying the latter. The solution could be perceived to be surprising, but it is probably coherent with the incremental approach followed by those States in which civil unions were the first step towards the full recognition of marriage equality between homosexual and straight partners.[69] Therefore, marriage licences for homosexual couples tend to replace previously enacted civil unions.[70] On the other hand, civil unions are sometimes introduced as a compromise solution specifically designed to avoid the recognition of same-sex marriage. Massachusetts's Legislature engaged in a form of struggle with the judiciary after the Supreme Court delivered a decision in the case of *Goodridge v. Department of Public Health*. The State Senate played its part and introduced a bill on civil unions in order to provide same-sex couples with an institution that is *de facto* equivalent to marriage,[71] without being compelled to allow homosexuals to marry.

Allowing same-sex marriages does not, however, rule out domestic partnerships that survive as alternative form of recognized union,[72] clearly distinguishable from marriage due to the explicit purpose they are designed to serve and thus the specific nature of the rights they grant to individuals. Domestic partnerships are aimed at protecting property rights, usually granted to married couples, within a stable relationship in which it is undeniable that one partner contributes to the other partner's property and economic situation.[73] The recognition of such a union does not imply that the law supports same-sex relationships, since domestic partnerships are available for straight as well as for homosexual couples.

Some States, in which a constitutional or statutory provision defines marriage as being between a man and a woman, often choose to recognize domestic partnerships as a substitute option for expressing a stable and legally recognizable commitment. As a result, States afford some spousal rights but tend to exclude most of

(Art. II, sect. 35); Tennessee (Art. XI, sect. 18); Texas (Art. I, sect. 32); Utah (Art. I, sect. 29); Virginia (Art. I, sect. 5-A). It must be mentioned that the State of Ohio instead of simply amending the Constitution, passed a far-reaching statute on defence of marriage that does not recognize civil unions and State employee domestic partner benefits.

[68] Indiana; Minnesota; Pennsylvania; West Virginia; Wyoming (see note 24).

[69] This was certainly the case at least for New Hampshire, Vermont and Connecticut: see Sect. 2.3.

[70] The State of Vermont passed the Marriage Equality Act in May 2009. As of September 1, 2009, civil unions are no longer available; however civil unions entered into prior to September 1, 2009 remain valid.

[71] See Crane (2003–2004), pp. 477ff.

[72] See Maine (ME P.L. 2003, c. 672); District of Columbia (Jury and Marriage Amendment Act of 2009; Health Care Benefits Expansion Act of 1992 and Domestic Partnership Registration Rule); Washington (WA Rev. Code Title 26, Ch. 26.60).

[73] Anyway, the right to enter a domestic partnership never implies that unmarried couples also enjoy those federal guarantees that married couples are normally provided with, one example being the social security survivors' benefits, financed by federal programs.

social security rights.[74] Within States which refuse same-sex marriage licenses this model is of a 'recessive' kind: out of 28 States in which legislatures have passed constitutional provisions to prohibit same-sex marriages, only three[75] have extended the right to homosexual couples to enter into a domestic partnership. Reasons can be found in the intensely ideological debate that led to the approval of constitutional amendments, often cited as examples of backlashes of judicial hyperactivism in affirming marriage equality.[76] As has been mentioned before, constitutional amendment proposals are often designed to prevent judicial decisions, which recognize the fundamental right of every couple to marry. The hesitancy of legislatures to guarantee spousal rights to unmarried homosexual couples seems to derive from a defensive attitude towards those controversial claims catching judicial attention.

Besides their strong legal foundation, these models do not describe a static layout, they rather express a dynamic situation in which the recognition of same-sex couples' rights seems to undergo phases of progress and of backlash, sometimes even in rapid succession. Virtually every State in America has experienced two or three of the models. This statement does not imply that there is such a thing as an inescapable and progressive path towards the full recognition of marriage equality. The general framework rather suggests that the recognition of rights depends on unpredictable interactions between legal formants and the public debate. Indeed each model results from (that is, it is shaped by) a string of 'dialogues' among judges, legislatures, scholarship and public opinion.

2.6 Final Remarks

This chapter focuses upon the recognition of same-sex couples' rights in the United States of America from a rigorous State level perspective. However, same-sex couples' rights are not only a State concern. As was mentioned above,[77] the Supreme Court will rule on this issue during the present term. The future of 'marriage federalism' is thus directly related to the outcomes of the pending cases.[78]

Within US scholarships, opposing views of what the Justices will decide coexist.[79] Without becoming involved in prophetic hypothesis, it is important to stress that the brief history traced here reveals that the recognition of rights proceeds with

[74] See for example the case of Oregon (OR Family Fairness Act, P.L. 2007-99) and Wisconsin (WI P.L. 2009-28, Assembly Bill 75, sect. 774).

[75] Nevada and Oregon (see note 64); Wisconsin (WI Code, Ch. 770).

[76] See Sect. 2.3.

[77] See Sect. 2.2.

[78] See the chapter by D'Aloia in this volume.

[79] Tribe and Matz (2011–2012), p. 478. See also Eskridge (2012), p. 97.

phases of progress and phases of inaction, both having the effect of stimulating debate and sometimes even bringing about cultural shifts in public opinion.

Courts, however, seem to be aware of their mandate: that is to act as the watchdog of legislative power when the choices of legislatures conflict with constitutional principles. This counter-majoritarian vocation is upheld even where a legislative action coincides with a viewpoint which is broadly accepted in terms of public debate. The Iowa Supreme Court made clear this approach in *Varnum v. Brien*,[80] stating that:

> Our responsibility ... is to protect constitutional rights of individuals from legislative enactments that have denied those rights, even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time.

The same can be held for the other State Supreme Courts facing same-sex couples' rights issue.

Judges, scholars and legislatures normally deal with the counter-majoritarian difficulty, recognizing its role in a mature democracy.[81] When it comes to issues that involve basic social values though the risk of a backlash in the protection of rights can hardly be ignored. However, the mere fact that there is a strong link between the democratic process and recognition of rights should not restraint Courts from addressing controversial issues and coming to a decision in a way that is inconsistent with the majoritarian choice as long as the judgment can be founded upon constitutional principles.

Principles, though, are subject to interpretation more than norms. The above-mentioned approach represents an emerging trend that reveals how, especially in times of values polarization, the counter-majoritarian attitude encourages a theory of constitutional interpretation that conceives constitutions as evolving documents. The rulings based on the application of State equal protection clause can confirm this assumption.[82]

Such an emerging trend is far from being completely persuasive to the federal Supreme Court. In American constitutionalism, the recognition of new rights or of 'new' areas of protection of existing rights seems to be founded upon an evaluation of the existing needs of the society. At the same time, the character of 'fundamentality' of the right pertains to the legal position as it is rooted in the history and culture of the United States of America. In other words, the expectation

[80] See note 52. The Iowa Supreme Court proceeds citing *Lawrence v. Texas* and *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999): "Our Constitution is not merely tied to tradition, but recognizes the changing nature of society."

[81] See Redish (1989–1990), p. 1346.

[82] *Kerrigan v. Commissioner of Public Health*, part II, stating: "The Connecticut Constitution is an instrument of progress, it is intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all of our citizens". *Goodridge v. Department of Public Health*, part B, citing Loving. Virginia: "As it did in Perez and Loving, history must yield to a more fully developed understanding of the invidious quality of the discrimination". *Varnum v. Brien* in notes 52 and 77.

of a constitutional protection is necessarily related to the appreciation of a change already (neither *in fieri*, nor merely possible) occurred in the society. This is the way in which Justices appear to find a link between "past values" and "future demands".[83]

State Courts that developed an activist approach on same-sex couples' rights may exert a modest influence towards the Supreme Court or, with the help of *Lawrence v. Texas* and its due process basis, may force Justices to take a sharp position on one of the most delicate issue in contemporary political agenda.[84]

In any case, judicial rationale becomes part of the public debate and shapes the discussion of such a divisive problem. Solutions or equilibrium reached in 'hard cases' are rarely long lasting[85]; they are rather a moment in the complex history of individuals' rights. For all these reasons, it is only within the dialectical confrontation among arguments that rights can, in the end, be affirmed.

References

Abraham HJ, Perry B (2003) Freedom and the courts: civil rights and liberties in United States. Kansas University Press, Lawrence

Ball CA (2011–2012) Why liberty judicial review is as legitimate as equality review: the case of gay rights jurisprudence. Univ Pa J Const Law 41:1–76

Barker N (2012) Not the marrying kind. Palgrave, MacMillan, London

Bickel A (1986) The least dangerous branch. The Supreme Court at the bar of politics. Yale University Press, New Haven

Cahill S (2004) Same-sex marriage in the United States. Focus on the facts. Lexington Books, Lanham

Cole D (2013) Getting nearer and nearer. The New York Review of Books, New York, January 10th, 2013. http://www.nybooks.com/articles/archives/2013/jan/10/getting-nearer-and-nearer

Collins MJ (1992) Whose federalism? Const Commentaries 9:75–86

Conkle D (2006) Three theories of substantive due process. N C Law Rev 85:63–148

Crane JMA (2003–2004) Legislative and constitutional responses to *Goodridge v. Department of Public Health*. N Y Univ J Legis Public Policy 7:465–485

Cross FB (2004–2005) Gay politics and precedents. Mich Law Rev 103:1186–1212

Dubber MD (2005) The police power. Patriarchy and the Foundation of American government. Columbia University Press, New York

Eskridge WN Jr (2012) The Ninth circuit's Perry decision and the constitutional politics of marriage equality. Stanford Law Rev Online 64:93–100, http://www.stanfordlawreview.org/online/perry-marriage-equality

Feteris ET (2009) Strategic manoeuvring in the justification of judicial decision. In: van Eemeren FH (ed) Examining argumentation in context. John Benjamins Publishing Company, Amsterdam/Philadelphia, pp 91–114

[83] In general see Thomson (1981–1982), p. 601 discussing theories of constitutional interpretation.

[84] See Toobin (2013), p. 19.

[85] Considering for instance the New Hampshire Republicans initiatives to revoke same-sex marriages briefly mentioned by Tribe and Matz (2011–2012), pp. 471–472, note 4.

Gallagher M (2003) Normal marriage: two views. In: Wardle LD, Strasser M, Duncan WC, Orgon Coolidge D (eds) Marriage and same sex unions. A debate. Praeger, Westport, pp 13–24
George RP (1993) Making men moral: civil liberties and public morality. Clarendon, Oxford
George RP (2003) Neutrality, equality and "Same Sex Marriage". In: Wardle LD, Strasser M, Duncan WC, Orgon Coolidge D (eds) Marriage and same sex unions. A debate. Praeger, Westport, pp 119–132
Habermas J (1990) Moral consciousness and communicative action. Massachusetts Institute of Technologies, Cambridge
Hull KE (2006) Same sex marriage. The cultural politics of love and law. Cambridge University Press, Cambridge
Klarman MJ (2013) From the closet to the altar: courts, backlash, and the struggle for same-sex marriage. Oxford University Press, Oxford
Knauer NJ (2008) Same-sex marriage and federalism. Temple J Polit Civ Rights 17:421–442
Marks Jr C, Cooper JF (2003) State constitutional law. West, St. Paul, Thomson West
McClain LC (2008–2009) Red versus blue (and purple) states and the same sex marriage debate: from values polarization to common ground? UMKC Law Rev 77:415–455
Musgrove W (2008) Substantive due process: a history of liberty in the due process clause. Univ St Thomas J Legis Public Policy 2:125–140
Novak D (2010) Response to Martha Nussbaum's a right to marry. Calif Law Rev 98:706–720
Nussbaum M (2010) A right to marry? Calif Law Rev 98:667–696
Powell KJ (1996–1997) The other double standard: communitarism, federalism, and American constitutional law. Seton Hall Const Law J 7:69–102
Redish MH (1989–1990) Political consensus, constitutional formulae, and the rationale for judicial review. Mich Law Rev 88:1340–1365
Romeo G (2011) La giurisprudenza della corte suprema degli stati uniti nei *terms* 2009/2010 e 2010/2011. Giurisprudenza Costituzionale 5:4039–4072
Sacco R (1991) Legal formants: a dynamic approach to comparative law. Am J Comp Law 39:343–401
Sandalow T (1965) Henry v. Mississippi and adequate state ground: proposals for a revised doctrine. Supreme Court Rev 1965:187–240
Stone GR, Seidman LM, Sunstein CR, Tushnet MV, Karlan PS (2010) Constitutional law, 4th edn. Wolters Kluwer, New York
Strasser M (2003) The state interest in recognizing same sex marriage. In: Wardle LD, Strasser M, Duncan WC, Orgon Coolidge D (eds) Marriage and same sex unions. A debate. Praeger, Westport, pp 33–42
Thomson JA (1981–1982) Principles and theories of constitutional interpretation and adjudication: some preliminary notes. Melb Univ Law Rev 13:597–616
Toobin J (2013) The people's choice. The New Yorker, New York, pp 19–20
Tribe LH, Matz J (2011–2012) The constitutional inevitability of same sex marriage. Md Law Rev 71:471–489
Walfson E (2004) Why marriage matters. America, equality, and gay people's right to marry. Simon and Schuster, New York
Wardle LD (2001) "Multiply and Replenish": considering same sex marriage in light of state interest in marital procreation. Harv J Legis Public Policy 24:771–814
Witte J Jr (1997) From sacrament to contract. Marriage, religion and law in the western tradition. Westminster John Knox Press, Louisville