

Nova Law Review

Volume 32, Issue 2

2008

Article 4

A Comparative Perspective on Immigration Law for Same-Sex Couples: How the United States Compares to Other Industrialized Democracies

James D. Wilets*

*

Copyright ©2008 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

A COMPARATIVE PERSPECTIVE ON IMMIGRATION LAW FOR SAME-SEX COUPLES: HOW THE UNITED STATES COMPARES TO OTHER INDUSTRIALIZED DEMOCRACIES

JAMES D. WILETS*

I.	INTRODUCTION.....	327
II.	SAME-SEX COUPLE IMMIGRATION IN COUNTRIES THAT DO NOT CURRENTLY RECOGNIZE FULL MARRIAGE RIGHTS	329
	A. <i>The Case of Australia</i>	330
	B. <i>The Case of Brazil</i>	331
	C. <i>The Case of France</i>	333
	D. <i>The Case of Germany</i>	335
	E. <i>The Case of Israel</i>	337
	F. <i>The Case of Switzerland</i>	338
III.	COUNTRIES THAT DO RECOGNIZE FULL MARITAL RIGHTS FOR SAME-SEX PARTNERS	339
	A. <i>The Case of Belgium</i>	339
	B. <i>The Case of Canada</i>	340
	C. <i>The Case of the United Kingdom</i>	342
	D. <i>The Case of Denmark</i>	343
	E. <i>The Case of Finland</i>	344
	F. <i>The Case of Iceland</i>	345
	G. <i>The Case of the Netherlands</i>	345
	H. <i>The Case of New Zealand</i>	347
	I. <i>The Case of Norway</i>	348
	J. <i>The Case of Sweden</i>	348
	K. <i>The Case of South Africa</i>	349
IV.	SAME-SEX IMMIGRATION IN A “FEDERAL” CONTEXT: THE CASE OF THE EUROPEAN UNION	351
V.	CONCLUSION.....	352

I. INTRODUCTION

In May 2007, Senator Patrick Leahy (D-VT) and Congressman Jerrold Nadler (D-NY) reintroduced the Uniting American Families Act (UAFSA); a bill seeking to recognize the rights of foreign same-sex partners of United

States citizens to immigrate to the United States on a similar or equal basis as foreign heterosexual spouses of United States citizens.¹ This bill has been reintroduced in Congress in every session since 2000.² The issue of same-sex partner immigration even became an issue in the 2000 presidential debates between Vice-President Al Gore and Governor George Bush wherein Vice President Gore noted the federal government's refusal to provide similar immigration rights to bi-national same-sex couples as provided by other industrialized democracies, some of which, like the United States, also do not recognize the right of same-sex partners to legally marry.³ It is interesting to note that Gore raised this issue at the same time that he indicated he was against federal recognition of same-sex marriage.⁴

The conceptual de-coupling of the issues of same-sex unions and same-sex partner immigration raises the possibility of providing the same relief to same-sex partners of United States citizens presently available to heterosexual spouses of American citizens, without resolving the larger issue of otherwise recognizing same-sex unions.

This article will explore the markedly different approaches of the United States from other industrialized democracies with respect to same-sex partner immigration, and provide some explanations for this divergent approach. The principal benefit of comparative legal analysis lies in identifying legal approaches in other societies that may have similar applicability in our own legal system. Comparative analysis thus requires an identification of the variables that account for the different approaches to a particular issue, and a determination of whether those variables preclude or support the adoption of those alternative approaches by our own legal system.

The comparative analysis provided in this article suggests that a de-coupling of the issues of same-sex unions and same-sex partner immigration is not a particularly dramatic step, and in fact, is a policy that has been adopted by the great majority of industrialized democracies—including those that have not yet granted full marriage rights. The country case studies ex-

* Professor of Law at Nova Southeastern University and Chair of the Inter-American Center for Human Rights. M.A., Yale University; J.D., Columbia Law School; B.A. University of Washington. I would like to thank Ethan Rodan for his research assistance and the entire staff at the *Nova Law Review* for their assistance in seeing this article to completion.

1. See generally S. 1328, 110th Cong. (2007); H.R. 2221, 110th Cong. (2007).

2. See SCOTT LONG ET AL., HUMAN RIGHTS WATCH, FAMILY, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW 145 (2006), available at <http://www.hrw.org/reports/2006/us0506/FamilyUnvalued.pdf>.

3. Al Gore, Presidential Debate at Wake Forest University at Winston-Salem (Oct. 11, 2000), available at <http://www.debates.org/pages/trans2000b.html>. See also 28 U.S.C. § 1738C (2000).

4. Al Gore, *supra* note 4.

amined in this article suggest that most industrialized democracies have viewed the recognition of same-sex couple immigration rights as a logical requisite of application of non-discrimination and equal protection principles, even if some of those countries are unwilling to extend those principles to full legal recognition of same-sex unions.

Since the United States also recognizes those legal principles in theory, and the great majority of the American body politic supports basic non-discrimination rights for lesbian, gay, bisexual, and transgender/transsexual people in general,⁵ it would appear that there are the basic legal and political prerequisites for this modest change in the current federal refusal to recognize any same-sex couple rights under the Defense of Marriage Act.

The great majority of the world's industrialized democracies recognize the right of same-sex couple immigration. In addition to all of the countries that grant marriage, or the equivalent thereof, to same-sex couples, such as Belgium, Canada, Spain, South Africa, the Netherlands, Denmark, Finland, Iceland, New Zealand, Norway, Sweden, and the United Kingdom, other countries grant the more limited right of immigration to same-sex couples, in addition to other rights associated with marriage.⁶ Those countries include Australia, Brazil, France, Germany, Israel, Portugal, and Switzerland.⁷

In furtherance of this analysis, it is helpful to discuss the means by which other countries that do not recognize full marital rights nevertheless provide immigration to same-sex partners, and the political and societal context in which those legal policies were adopted. It is also useful to consider how countries that currently recognize same-sex marital rights approached the issue of same-sex partner immigration prior to their recognition of same-sex unions. Finally, it is very useful to explore how a federal union, such as the European Union, with the same rights of freedom of movement for its citizens as the United States, addresses the issue of same-sex partner immigration. Like the United States, the European Union has member states that recognize same-sex marriage or civil unions, while other states do not.

II. SAME-SEX COUPLE IMMIGRATION IN COUNTRIES THAT DO NOT CURRENTLY RECOGNIZE FULL MARRIAGE RIGHTS

This article provides country case studies and examples of countries that provide same-sex couple immigration rights, but do not otherwise legally

5. Kimberly D. Richman, *(When) Are Rights Wrong? Rights Discourses and Indeterminacy in Gay and Lesbian Parents' Custody Cases*, 30 *LAW & SOC. INQUIRY* 137, 142 (2005).

6. LONG ET AL., *supra* note 3, app. B at 150–72.

7. *Id.*

recognize full marriage rights. The case studies include Australia, Brazil, France, Germany, Israel, and Switzerland.

A discussion of these countries provides insight into how countries that have not recognized full marriage rights nevertheless have extended the principal of equal protection and non-discrimination to same-sex couples, at least in this area of the law.

A. *The Case of Australia*

Australia provides a particularly analogous case study of a country that shares many socio-political and legal attributes of the United States, including a federal structure. Thus, identifying the variables that the United States shares with Australia, as well as identifying the differences, assists in determining whether the Australian approach to this issue has relevance for the United States.

Until recently, Australia, like the United States, has had a conservative government for over eleven years, which has been resolutely and vocally opposed to same-sex unions. It nevertheless has recognized same-sex partner immigration rights.⁸ It also has a relatively “macho” social culture,⁹ with a historical and ongoing national identification with a frontier culture.¹⁰ It has a strong suburban and largely middle class socio-economic structure, which closely mirrors the United States,¹¹ and a body politic that is somewhat skeptical towards immigration in general.¹² It also has an active Christian fundamentalist movement that is nevertheless less powerful a force in Australian politics than anti-gay religious movements in the United States.¹³

Australia shares this last factor—the less potent political impact of anti-gay religious sentiment—with almost all other industrialized democracies. This difference may at least partially account for this differing legal approach to same-sex partner immigration, even among otherwise conservative politi-

8. Sara A. Shubert, *Immigration Rights for Same-Sex Partners Under the Permanent Partners Immigration Act*, 74 TEMP. L. REV. 541, 555 (2001).

9. Uma D. Jogulu & Glenice J. Wood, *A Comparison of Peer Evaluations of the Effectiveness of Women's Leadership Styles in Malaysia and Australia* 13 (U. of Ballarat Sch. of Bus., Working Paper No. 2007/04, 2007) (Austl.), available at http://www.ballarat.edu.au/ard/business/research/resources/working_papers/wp2007-04.pdf.

10. *See id.*

11. *See* Joshua Drucker, *American and Australian Urban Forms: A Comparison of Structure, Determinants, and Consequences* 3 (April 2000) (unpublished masters project, University of North Carolina at Chapel Hill), <http://www.unc.edu/~jdruck/Merged%20Final.pdf>.

12. *See id.* at 7.

13. Jill Rowbotham, *Piety Not Much of a Vote-Winner*, AUSTRALIAN, June 17, 2006, available at <http://www.theaustralian.news.com.au/story/0,20867,19488944-28737,00.html>.

cal parties. This generally less anti-gay conservative political and social culture is also reflected in far-reaching federal and state anti-discrimination laws that protect gays and lesbians from discrimination in a number of areas outside of immigration.¹⁴

On April 15, 1991, the Australian federal government introduced a new visa and permit category for interdependent relationships which covers common law and same-sex couples and may be used by same-sex couples to achieve residency.¹⁵ It is interesting to note how long ago this immigration category was introduced—only five years after the United States Supreme Court decision in *Bowers v. Hardwick*.¹⁶

The regulation provides for a six-month residency before an application for conditional residency can be made.¹⁷ In order to qualify for this status, the applicant must, inter alia: 1) prove a genuine and continuing relationship of interdependency that involves residing together and “a continuing commitment to mutual emotional and financial support;” 2) demonstrate that the relationship “has existed for at least 6 months” before the application; and 3) satisfy normal health and public interest requirements.¹⁸

A successful applicant will be granted a temporary interdependency visa, which permits the applicant to work.¹⁹ Permanent residency will be granted after two years, provided that the relationship has continued during that period.²⁰ Significantly, if the Australian partner dies during the two-year waiting period, the foreign partner is granted permanent residency.²¹

B. *The Case of Brazil*

Brazil is an important case study for at least six reasons and represents a study in contrasts, which adds to its value as a comparative case study. First, despite its relatively progressive recent legislation with respect to same-sex

14. See generally Parliament of Australia, S. Legal & Const. Aff. Comm., Inquiry into Sexual Discrimination ch. 4 (1997), http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/1996-99/citizens/report/c04.htm.

15. Margaret Young, Library of Parliament, Immigration of Same Sex Couples (Jan. 8, 1992) (Can.), <http://www.qrd.org/qrd/world/americas/canada/immigration.of.same.sex.couples>. See generally Migration Regulations (Amendment), 1991, No. 60 (Austl.), available at http://www.austlii.edu.au/au/legis/cth/num_reg_es/mr1991n60334.html.

16. 478 U.S. 186 (1986).

17. See Young, *supra* note 16.

18. *Id.*

19. *Id.* See also 1 DEP'T OF IMMIGRATION & CITIZENSHIP, PARTNER MIGRATION 37 (2008) (Austl.), available at <http://www.immi.gov.au/allforms/booklets/1127.pdf>.

20. See Young, *supra* note 16.

21. *Id.*

unions, it has had a more severe history of significant anti-gay violence than the United States.²² Second, unlike the United States and Australia, it does not have a large, middle class, well-educated body politic that often proves a moderating force on populist anti-gay political rhetoric and legislation.²³ Third, it is the largest country in Latin America; a region that has proven to be among the most violently anti-gay in the world.²⁴ Fourth, as one of the larger developing countries in the world, and the largest developing country in the Western Hemisphere, its steps towards recognition of same-sex unions²⁵ and same-sex couple immigration have important ramifications for the developing world in general, and Latin America in particular. Fifth, like many countries in Latin America, it has a growing fundamentalist Christian movement, although the majority of the population continues to be Roman Catholics.²⁶ Sixth, and perhaps most significantly, unlike those countries that share a British colonial heritage, Brazil inherited Portugal's markedly more tolerant heritage of tolerance of homosexuality and generally less ascetic view of sexuality in general.²⁷

The best way to reconcile the history of anti-gay violence in Brazil with the progressive recent legislation on same-sex unions and same-sex couple immigration is to acknowledge that the level of violence in Brazil is very elevated throughout the society. Thus, gays and lesbians, although disproportionately targeted by that violence, are targeted not so much because of virulently anti-gay societal attitudes, but because they are easy targets because of the relative impunity with which people can commit crimes against gays and lesbians without fear of prosecution or reprisal.

In December, 2003, the National Immigration Council issued a decree that:

[A]llows temporary or permanent visas to be given to same-sex partners of Brazilian citizens who have *any* of the following: A

22. See *Out of the Closet*, ECONOMIST, Mar. 10, 2007, at 60.

23. Compare Drucker, *supra* note 12, at 2–3, with LONG ET AL., *supra* note 3, app. B at 154.

24. *Out of the Closet*, *supra* note 23.

25. *Brazilian Go-Ahead for Gay Unions*, BBC NEWS, March 5, 2004, <http://news.bbc.co.uk/2/hi/americas/3534959.stm>.

26. See Monte Reel, *In Brazil, Pope to Face A Church Losing Hold*, WASH. POST, May 9, 2007, at A1. For example, in June 2006, more than three million evangelicals marched in Sao Paulo, the largest city in Brazil. Alan Clendenning, *'March for Jesus' Draws 3 Million Evangelicals in Brazil*, CHRISTIAN POST, June 16, 2006, available at <http://www.christianpost.com/pages/print.htm?aid=668>.

27. See Spain and Portugal for Visitors, Gay and Lesbian Spain and Portugal, <http://spainforvisitors.com/sections/gayandlesbian.htm> (last visited May 30, 2008).

“certificate of concubinage” issued by a governmental office in Brazil or abroad; [p]roof of “stable partnership issued by a Family Court Judge or corresponding authority in Brazil or abroad;” [p]roof of mutual dependency issued by a government body in Brazil or abroad; [c]ertification “or similar document, issued by a civil registry authority or the equivalent abroad, of cohabitation for more than five consecutive years;” [or] [p]roof of “a common dependent child.”²⁸

Human Rights Watch and Immigration Equality note “that couples with children . . . who have legally formalized their partnership [within or outside Brazil], . . . can enjoy immigration rights similar to married couples. Same-sex couples unable to meet these criteria, like unmarried opposite-sex couples, can apply for a so-called ‘concubine visa,’ granted on a discretionary basis.”²⁹

C. *The Case of France*

France shares with the United States a large, well-educated middle class and a strong political democracy. It has also been dominated by politically conservative parties for over a decade.³⁰ France, however, differs from the United States in some very significant ways.³¹

France has generally had a very weak fundamentalist Christian movement, and the French people, in general, do not subscribe to the more conservative or moralistic tenets of the Roman Catholic Church.³² Because of this, the French tend to be significantly less ascetic or moralistic in matters of sexuality in general.³³ It is interesting to note that Quebec, the French speaking province of Canada, is similarly noted for its more open attitudes towards sexuality and less hostile attitudes towards homosexuality than those prov-

28. LONG ET AL, *supra* note 3, app. B at 154 (referencing Resolução Administrativa No. 05, de 03 de dezembro de 2003, D.O.U de 12.12.2003 (Braz.), available at http://www.mte.gov.br/legislacao/resolucoes_administrativas/2003/ra_20031203_05.asp#).

29. *Id.*

30. See Anthony Chase, *The Real French Constitution*, 30 NOVA L. REV. 209, 215–16 (2006).

31. *Id.* at 213.

32. Pierre Bréchon, *Influence of Religious Integration on Attitudes: A Comparative Analysis of European Countries*, 45 REVUE FRANÇAISE DE SOCIOLOGIE 26, 31–32 (2004), available at http://www.cairn.info/load_pdf.php?ID_ARTICLE=RFS_455_0026.

33. See INT’L LESBIAN & GAY ASS’N (ILGA-EUROPE), EQUALITY FOR LESBIANS AND GAY MEN: A RELEVANT ISSUE IN THE CIVIL AND SOCIAL DIALOGUE 48 (1998), available at <http://www.ilga-europe.org/content/download/409/1857/file/1998%20Equality%20in%20EU%20English.pdf> [hereinafter EQUALITY FOR LESBIANS AND GAY MEN].

inces of Canada with a more American-style, fundamentalist protestant religious population.³⁴ It is interesting to note, however, that France has not gone as far as the United Kingdom in granting marriage rights to same-sex couples,³⁵ which is surprising given the British reputation for asceticism in matters of sexuality. Part of the explanation may lie in the simple fact that the Labour Party has been in power in the United Kingdom during the last decade,³⁶ as opposed to the conservatives in France.³⁷ France, however, has promulgated civil partnerships for same-sex couples that do provide some of the same rights of marriage.³⁸

The Pacte Civil de Solidarité law (PACS) is a civil partnership act for same-sex couples passed in 1999.³⁹ The act defines the PACS as “a contract concluded between two physical persons who have reached the age of majority, of different or the same gender, for the purposes of organizing their life in common.”⁴⁰ The French civil partnership grants the couple the following rights: 1) joint taxation status as married couple for purposes of social security benefits; 2) legal recognition of the partnership; and 3) naturalization of a same-sex foreign partner.⁴¹

According to the U.K. Lesbian and Gay Immigration Group, a foreign partner in a PACS with a French citizen can obtain a temporary residence permit—*permit de séjour*—after a one-year waiting period.⁴² “It is subject to annual renewal through the local [m]ayor's office”⁴³ After five years, a *permit de séjour* holder is eligible to apply for permanent residency, which in France means a ten-year permit.⁴⁴

34. Press Release, The Canadian Values Study: A Joint Project of Innovative Research Group, the Dominion Institute & the National Post, Social Conservatives Own Reluctance to Politicize Moral Issues Key Hurdle for this Political Minority (Sept. 25, 2005), http://www.innovativeresearch.ca/Canadian%20Values%20Study_Factum%20260905.pdf [hereinafter Press Release, The Canadian Values Study].

35. EQUALITY FOR LESBIANS AND GAY MEN, *supra* note 34, at 47.

36. *Id.* at 91.

37. See Chase, *supra* note 31, at 215.

38. Frédéric Martel, Embassy of France in the United States, The PACS—A Civil Solidarity Pact (July 2001), <http://www.ambafrance-us.org/atoz/pacs.asp>.

39. *Id.*

40. *Id.* However, there are obstacles in the path to obtaining these rights. See *id.* In order to be taxed jointly, there is “a three-year waiting period before” they may take advantage of this benefit. *Id.* Additionally, there are conditions that must be met by the partners “in order to obtain a residenc[y] permit.” Martel, *supra* note 39.

41. *Id.*

42. UK Lesbian & Gay Immigration Group, Europe - Residency Requirements, http://www.uklgig.org.uk/europe_residency.htm (last visited May 30, 2008) [hereinafter Europe - Residency Requirements].

43. *Id.*

44. *Id.*

According to the Institut National d'Études Démographiques de France, a foreign partner of a French resident national is entitled to a residence permit and "[f]oreign spouses immediately and automatically receive a temporary residence permit."⁴⁵ The formation "of a registered partnership is one of the elements that indicate the existence of personal ties [sufficient to satisfy the requirements] of Art. 12b, par. 7, of Decree n° 45-2658 of 2 November 1945 establishing the conditions of entry and residence of foreigners in France."⁴⁶ "Foreign cohabitants must prove a certain period of cohabitation (exceptionally less than 5 years)."⁴⁷ Registered foreign partners of a French citizen

must prove at least one year of conjugal life on French territory, irrespective of the nationality of the partner and the date of signature of the registered partnership (telegram of 4 April 2002 and Council of State, 29/7/02, n°231158). The issuing of a temporary residence permit to registered partners or cohabitants is left to the discretion of the public authorities.⁴⁸

D. *The Case of Germany*

Germany, like the United States, Australia and France, has a large, well-educated middle class. However, in almost all other socio-economic and political respects it resembles France and Australia more than the United States.⁴⁹ Like France, and unlike the United States, Germany has a very weak fundamentalist Christian movement, and the German people, in general, do not subscribe to the more conservative or moralistic tenets of the Roman Catholic Church or Protestant denominations.⁵⁰ Because of this, Germans tend to be significantly less ascetic or moralistic in matters of sexuality in general.⁵¹ Indeed, Germany was one of the first countries in the world in which a gay rights movement developed.⁵²

45. KEES WAALDIJK ET AL., INSTITUT NATIONAL D'ÉTUDES DÉMOGRAPHIQUES, MORE OR LESS TOGETHER: LEVELS OF LEGAL CONSEQUENCES OF MARRIAGE, COHABITATION AND REGISTERED PARTNERSHIP FOR DIFFERENT-SEX AND SAME-SEX PARTNERS 100 (2004), *available at* http://www.ined.fr/fichier/t_publication/1034/publi_pdf1_document_de_travail_125.pdf.

46. *Id.*

47. *Id.*

48. *Id.*

49. *See generally* EQUALITY FOR LESBIANS AND GAY MEN, *supra* note 34, at 48, 51.

50. *See* Bréchon, *supra* note 33, at 31–32.

51. *See id.* at 42; EQUALITY FOR LESBIANS AND GAY MEN, *supra* note 34, at 51.

52. *See* EQUALITY FOR LESBIANS AND GAY MEN, *supra* note 34, at 51–54.

In a 1996 decision, the Higher Administrative Court in Münster, “which has sole jurisdiction in Germany [over visa appeals], ruled that the European Convention on Human Rights” required that the same-sex foreign partner of a German national “be granted a residence permit.”⁵³ The government was thus obliged to give “a visa to a Romanian citizen so that he could cohabit with his German . . . partner.”⁵⁴ “However, the decision was disregarded in many *Länder* (provinces), which have broad authority in Germany’s federal system.”⁵⁵ Nevertheless, because of federal legislation passed in 2001, same-sex couples now enjoy the same immigration rights as married couples.⁵⁶

On August 1, 2001, the German Parliament passed the Lifetime Partnership Act (*Lebenspartnerschaftsgesetz*).⁵⁷ “It allow[s] same-sex couples throughout Germany to enter a new legal status [of] *Eingetragene Lebenspartnerschaft*, ‘registered life partnership,’ [which] carr[ies] most, [but not all], of the rights enjoyed by married heterosexual couples.”⁵⁸

The legislation provides “equal immigration rights to same-sex couples.”⁵⁹ Now, according to Human Rights Watch and Immigration Equality,

[t]he foreign partner of a German national or resident can apply for a “long-stay visa” at a German consulate in their country, showing their partner’s sponsorship and the intention of registering their partnership after arriving in Germany. Foreign partners already in Germany, as temporary residents or visitors, can change their status to permanent resident once the partnership is registered.⁶⁰

According to the United Kingdom Lesbian and Gay Immigration Group, “[i]f the sponsor is a German citizen [or permanent resident], their partner has a legal right to a residence permit.”⁶¹ “If the sponsor is a citizen of another [European Union] country, living and working in Germany with [a temporary] ‘[European Union] Residence permit,’ . . . granting of a resi-

53. *Id.* at 53.

54. *Id.*

55. LONG ET AL., *supra* note 3, app. B at 159.

56. Russell Miller & Volker Röben, *Constitutional Court Upholds Lifetime Partnership Act*, 3 GERMAN L.J. ¶¶ 2–3 (2002), <http://www.germanlawjournal.com/print.php?id=176>.

57. *Lebenspartnerschaftsgesetz* [LPartG] [Lifetime Partnership Act], Aug. 1, 2001 (F.R.G.), available at <http://bundesrecht.juris.de/bundesrecht/lpartg/gesamt.pdf>. See also LONG ET AL., *supra* note 3, app. B at 159.

58. LONG ET AL., *supra* note 3, app. B at 159.

59. *Id.*

60. *Id.*

61. Europe - Residency Requirements, *supra* note 43.

dence permit to the partner [remains] discretionary.”⁶² All the sponsoring partners have to demonstrate is that he or she is financially able to support both partners and that he or she is not receiving social assistance.⁶³

E. *The Case of Israel*

Israel provides a somewhat unique and important case study for precisely the opposite reasons of most of the other industrialized democracies discussed herein. Unlike the other industrialized democracies, Israel *does* have various politically powerful conservative religious groupings that exert a significant influence over a wide variety of national policies.⁶⁴ It also has been under the leadership of a conservative coalition for approximately thirty years, in which the religious parties have exerted a political influence far greater than their already considerable share of the Israeli electorate.⁶⁵ However, part of the explanation for Israel’s encouraging approach to same-sex partner rights could be explained by the government’s active encouragement of increasing the Jewish demographics in Israel,⁶⁶ although it should be noted that the Israeli rules apply to Jewish and non-Jewish Israeli citizens alike. Nevertheless, to the extent that the more gay-friendly immigration rules keep a gay Jewish citizen living in Israel, the desire to maintain Jewish individuals in Israel appears to override religious hostility towards homosexuality.⁶⁷

The analogy to South Africa is somewhat instructive. During the apartheid era, the government was run by a very socially and politically conservative white elite.⁶⁸ Nevertheless, the government’s attitude towards homosexuality was relatively tolerant, reflecting the government’s concern with

62. *Id.*

63. *Id.*

64. See David Margolis, MyJewishLearning.com, Israeli Political Parties, http://www.myjewishlearning.com/history_community/Israel/Israeli_Politics/IsraeliElectoralSystem/IsraeliPoliticalParties.htm (last visited May 30, 2008).

65. See Israel Ministry of Foreign Affairs, Facts About Israel: History (Oct. 1, 2006), <http://www.mfa.gov.il/MFA/Facts%20About%20Israel/History/Facts%20About%20Israel-%20History>.

66. Yuval Merin, *The Right to Family Life and Civil Marriage Under the International Law and its Implementation in the State of Israel*, 28 B.C. INT’L & COMP. L. REV. 79, 104 (2005).

67. See *id.* See generally Einat Fishbein, *Two Foreigners Recognized as Residents of Israel Based on Same-Sex Relationship*, HA’ARETZ, Feb. 14, 2000 (Lee I. Walzer trans.), http://www.gay.org.il/joh/articles/foreignres_art.htm.

68. Kelly Cogswell, *Property of the State: The Torture of Queer Soldiers in the Apartheid Military*, GULLY, Aug. 25, 2000, <http://thegully.com/essays/africa/000825aversion.html>.

keeping white gay citizens from emigrating to other countries.⁶⁹ As noted below, the current South African government, which is politically the opposite of the former apartheid regime, is among the most legally progressive countries in the world, recognizing full equality of its gay citizens with respect to marriage and immigration, albeit for very different reasons than the relatively tolerant policy of the otherwise intolerant and conservative predecessor apartheid regime.⁷⁰

“In 2000, the Israeli Ministry of the Interior granted resident status to two same-sex partners of Israeli citizens.⁷¹ Israel recognized the status of *yedu'a ba-tzibur* (common law spouse), and these couples obtained citizenship based on their ‘married’ status.”⁷² This status is, however, only relevant for non-Jewish partners of an Israeli citizen, since all Jews enjoy the “right of return” entitling them to Israeli citizenship.⁷³

Same-sex couples must convince ministry officials that their relationship is genuine or “sincere” and that they maintain a home together. The foreign national is then granted a one-year work permit. After one year and a reexamination, the foreign national can receive temporary resident status. This status is renewed yearly. After seven years, the foreign national can become a permanent resident. “This differs from the procedure for a foreign national in a heterosexual marriage to an Israel citizen or resident, who can receive a temporary resident visa after six months and is eligible . . . for full citizenship four years later.”⁷⁴

F. *The Case of Switzerland*

Switzerland shares many of the socio-economic characteristics of France and Germany. This is unsurprising since it is a confederation of four national groups, the German, French and Italian national groups being dominant.

Like Germany, France, the United Kingdom and most of the other countries of Western Europe, Switzerland extends many of the rights of mar-

69. *Contra id.*

70. B.A. Robinson, Ontario Consultants on Religious Tolerance, Recognition of Same-Sex Partnerships and Marriages in South Africa (Jan. 28, 2000), http://www.religioustolerance.org/hom_mare.htm.

71. MARRIAGE & SAME-SEX UNIONS: A DEBATE 356 (Lynn D. Wardle et al. eds., 2003).

72. *Id.*

73. See Fishbein, *supra* note 68.

74. LONG ET AL., *supra* note 3, app. B at 161 (citing State of Israel Ministry of Interior, Population Registry Regulation 5.2.0009, [http://www.moin.gov.il/Apps/PubWebSite/publications.nsf/All/9CD5C9CFC6C82B85422570AD00431263/\\$FILE/Publications.2.0009.pdf?OpenElement](http://www.moin.gov.il/Apps/PubWebSite/publications.nsf/All/9CD5C9CFC6C82B85422570AD00431263/$FILE/Publications.2.0009.pdf?OpenElement) (last visited May 30, 2008)).

riage to its same-sex partners and some cantons (provinces) within Switzerland have extended even greater rights than the federal government.

The Swiss Federal Parliament passed a bill in 2004 creating registered partnerships for same-sex couples.⁷⁵ The bill became law in 2007, extending the same immigration rights “to registered partners as to heterosexual spouses and mandated that marriages and civil partnerships between people of the same sex validly entered into in other countries would be recognized in Switzerland.”⁷⁶ Swiss law provides that the foreign same-sex partner of a Swiss citizen may apply for a three-month visa, during which the partner may visit Switzerland and enter into a registered partnership. The foreign partner will then be eligible for a residence permit, which permits the partner to work and exempts the foreign partner from all labor restrictions otherwise applicable to foreign nationals.⁷⁷

III. COUNTRIES THAT DO RECOGNIZE FULL MARITAL RIGHTS FOR SAME-SEX PARTNERS

It should not be surprising that all countries that recognize full marital rights for same-sex partners extend the same immigration rights to same-sex spouses as those accorded to heterosexual spouses. It is nevertheless instructive to look at the steps those countries took to recognize the right of same-sex partner immigration prior to their adoption of full marital rights, as that is precisely the context in which such immigration rights would be accorded to same-sex spouses in the United States.

A. *The Case of Belgium*

Belgium is divided between a Flemish majority, which speaks a dialect of Dutch, and a large Walloon minority, which speaks French.⁷⁸ As such, Belgium shares many of the socio-economic characteristics of both France and the Netherlands. It thus should not be surprising that Belgium was the

75. Loi fédérale sur le partenariat enregistré entre personnes du même sexe [LPart] [Federal Partnership Act], June 18, 2004, Recueil systématique du droit fédéral [RS] 211.231 (Switz.), available at <http://www.admin.ch/ch/f/ff/2004/2935.pdf> [hereinafter Federal Partnership Act]; LONG ET AL., *supra* note 3, app. B at 170.

76. LONG ET AL., *supra* note 3, app. B at 170. See also Federal Partnership Act, *supra* note 76 (amending Loi fédérale du 18 décembre 1987 sur le droit international privé [LDIP], Dec. 18, 1987, Recueil systématique du droit fédéral [RS] 291, art. 45 (Switz.), available at <http://www.admin.ch/ch/f/rs/2/291.fr.pdf>).

77. LONG ET AL., *supra* note 3, app. B at 170.

78. Belgian Tourist Office, Facts and Figures, <http://www.visitbelgium.com/factsfigures.htm> (last visited May 30, 2008).

second country in the world, after the Netherlands, to recognize full marriage equality for gay couples.

The first step towards immigration equality was a Belgian *circulaire* adopted on September 30, 1997, by the Ministry of the Interior that authorized both Belgian nationals and aliens established in Belgium, or authorized to reside in Belgium for periods of more than three months, to be joined in Belgium by the person with whom they have a “stable relationship”—also known as “relation durable”.⁷⁹ This benefited all *de facto* couples, whether heterosexual or homosexual. Indeed, the very purpose of the *circulaire* was to put an end to the discrimination against homosexuals with respect to family reunification, as they had no access to marriage.⁸⁰

With the advent of full marriage rights for gay couples in both terminology and substance, same-sex couples enjoy the same immigration rights as heterosexual married couples.

The implementation of the Ministry of Interior *circulaire* is one example of how countries have extended the principle of equal protection and non-discrimination, even before extending those principles to full marriage equality.⁸¹

B. *The Case of Canada*

Canada, along with Australia,⁸² is the country that most resembles the United States from a socio-economic perspective.⁸³ However, like most industrialized democracies, it has demonstrated a much more progressive policy towards extending the principles of non-discrimination and equal protection to its gay citizens, including in the area of same-sex couple immigration rights. It shouldn't be surprising that the analysis of the reasons for its progressive position towards same-sex partner equality is largely the same analysis as that presented above with respect to Australia. In many respects, Australia resembles the United States even more than Canada. As discussed, Australia has a somewhat “macho” culture like the United States that differs

79. *Circulaire relative à l'octroi d'une autorisation de séjour sur la base de la cohabitation dans le cadre d'une relation durable* (Sept. 30, 1997), MONITEUR BELGE, Nov. 14, 1997, at 30333, available at <http://reflex.raadvst-consetat.be/reflex/pdf/Mbbs/1997/11/14/37585.pdf>.

80. *Id.*

81. See Olivier De Schutter & Kees Waaldijk, *Major Legal Consequences of Marriage, Cohabitation and Registered Partnership for Different-Sex and Same-Sex Partners in Belgium*, in WAALDIJK ET AL., *supra* note 46, at 49–50.

82. See discussion *supra* Part II.A.

83. See Todd H. Girshon, *Wrongful Discharge Reform in the United States: International & Domestic Perspectives on the Model Employment Termination Act*, 6 EMORY INT'L L. REV. 635, 652 (1992).

significantly from Canada. Explanations for Canada's less "macho" culture, and correspondingly greater recognition of same-sex rights than either Australia or the United States, could arguably be found in Canada's self-conscious differentiation from the United States, particularly with respect to certain foreign and domestic policies with which it would prefer not to be associated. Further distinguishing Canada from the United States is the existence of Quebec, which, as discussed above in the discussion of France, is particularly open-minded with respect to full equality for sexual minorities. Indeed, Quebec was the first province to recognize full same-sex marriage rights. It is interesting to note that those Canadian provinces that are the most similar to the American heartland, such as Alberta, Manitoba and Saskatchewan, were also the most resistant to implementation of full marriage rights for same-sex couples.

In 2001, even before the adoption of full marriage rights, Canada's Immigration and Refugee Protection Act (C-31) provided the statutory basis for the recognition of the right of same-sex partners to immigrate.⁸⁴ This Act, along with the corresponding Immigration and Refugee Protection Regulations, provided extremely broad immigration rights to lesbian and gay couples.⁸⁵

The 2005 Civil Marriage Act, which provides for full marriage rights for same-sex couples, in both terminology and substance, has completely eliminated any legal discrimination between heterosexual and same-sex couples, including in the area of immigration.⁸⁶

The implementation of the Canadian Immigration and Refugee Protection Act, prior to Canada's recognition of full marriage equality, is another example of how a country that had not yet recognized full marriage equality nevertheless extended the principle of equal protection and non-discrimination to same-sex couples.⁸⁷

Despite the differences between Canada and the United States, Canada's close geographic proximity to the United States, combined with its strong cultural and economic ties, and similar level of economic development to the United States, all suggest that Canada could provide a particu-

84. See Immigration and Refugee Protection Act, 2001 S.C., ch. 27, §§ 12, 28, 38, 64 (Can.), available at <http://laws.justice.gc.ca/en/PDF/I-2.5.pdf>.

85. See generally Immigration and Refugee Protection Regulations SOR/2002-227, §§ 116-37 (Can.), available at <http://canadagazette.gc.ca/partII/2002/20020614-x/pdf/g2-136x9.pdf>.

86. Civil Marriage Act, 2005 S.C., ch. 33, §§ 2, 3.1 (Can.) (defining "marriage" in Canada as "the lawful union of two persons to the exclusion of all others").

87. See Immigration and Refugee Protection Act, *supra* note 85, § 12.

larly useful example for the United States in eliminating discrimination in the area of same-sex couple immigration.

C. *The Case of the United Kingdom*

The United Kingdom provides a compelling case for the de-coupling of marriage rights and the rights of same-sex couple immigration. The United Kingdom not only shares a common legal and cultural heritage with the United States, but it also has a historical reputation as being somewhat more ascetic and conservative with respect to issues of sexuality than many of its continental European counterparts.⁸⁸ This is reflected in the legal framework by which it recognized same-sex couples' rights.⁸⁹ It did so in the framework of a registered partnership act, roughly analogous to the legal civil unions in existence in Vermont, Connecticut, New Hampshire, and to a lesser extent, California.⁹⁰ The United Kingdom, like California, Connecticut, New Hampshire, Belgium, and the Netherlands, accomplished this by legislative, rather than judicial action.⁹¹

Foreign same-sex partners of British citizens were allowed to immigrate as of October 1994, even before the adoption of same-sex registered unions.⁹² On November 18, 2004, the Civil Partnership Act was enacted, legally recognizing same-sex couples in a committed relationship and providing those couples with the same immigration rights enjoyed by opposite-sex couples.⁹³ After registering the civil partnership, the applicant partner is granted residence for up to two years.⁹⁴ After that, if the partnership continues, he or she can apply for permanent residence.⁹⁵

88. See generally EQUALITY FOR LESBIANS AND GAY MEN, *supra* note 34, at 91–99.

89. See generally Civil Partnership Act, 2004, c. 33 (U.K.), available at http://www.opsi.gov.uk/acts/acts2004/pdf/ukpga_20040033_en.pdf.

90. Compare *id.*, with CAL. FAM. CODE § 297.5 (2007); CONN. GEN. STAT. ANN. § 46b-38bb (2007); N.H. REV. STAT. ANN. § 457-A:1 (2008); VT. STAT. ANN. tit. 15, § 1202 (2007).

91. See Civil Partnership Act, *supra* note 90; Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years from Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589, 613 (2004).

92. See Border & Immigration Agency, Immigration Rules: Introduction (U.K.), <http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/introduction/> (last visited May 30, 2008).

93. See generally Civil Partnership Act, *supra* note 90.

94. Border & Immigration Agency, Immigration Rules § 282 (U.K.), <http://www.bia.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/> (last visited May 30, 2008) [hereinafter Immigration Rules]. See also UK Lesbian & Gay Immigration Group, Civil Partnership - Immigration Guide (2007), http://www.uklgig.org.uk/civil_partnership.htm (last visited May 30, 2008).

95. See Immigration Rules, *supra* note 95, § 287.

Nevertheless, the discussion above begs the question of why the United Kingdom, which is the most similar of the European countries to the United States in cultural, socio-economic and legal terms, took such a markedly different path than the United States with respect to same-sex unions, and even earlier with respect to same-sex immigration rights. The answer is the same one that is applicable to the differences between the United States and almost all other industrialized democracies: fundamentalist religious forces in the United States that exercise a particularly strong influence on the political debate in the United States.⁹⁶ The reasons for this phenomenon are discussed in much greater depth at the conclusion of this article. Seen this way, the United Kingdom's approach is very consistent with the approach of the other countries that are most similar to the United States: Canada and Australia.⁹⁷ Put differently, the United Kingdom's similarity to Australia and Canada in not having a strong fundamentalist religious force dominating its political debate trumps the other similarities between the United Kingdom, Canada, and Australia on the one hand, and the United States on the other hand.⁹⁸

D. *The Case of Denmark*

Denmark, along with Finland, the Scandinavian countries and the United Kingdom, has adopted registered partnerships that grant the substantive rights of marriage, without using the terminology of marriage.⁹⁹ It should not be surprising that Denmark and the other Scandinavian countries have gone further than many other European countries in recognizing same-sex couple rights since Scandinavia as a whole is characterized by a low incidence of fundamentalist Christians and a correspondingly very high level of gender equality.¹⁰⁰ As discussed further below, comparative and historical evidence indicates that the prevalence of gender equality is one of the highest correlates with recognition of same-sex partner rights.

A foreign national "who is married [or] registered with a Dane, . . . a citizen of [an]other Nordic countr[y], or a 'convention refugee,' can apply for a residence permit."¹⁰¹

In the event that neither Danish resident is a Danish citizen,

96. See Wojcik, *supra* note 92, at 597.

97. See Drucker, *supra* note 12, at 9; Girshon, *supra* note 84, at 652.

98. See Bréchon, *supra* note 33, at 31; Press Release, The Canadian Values Study, *supra* note 35, at 2–3; Rowbotham, *supra* note 14.

99. See WAALDIJK ET AL., *supra* note 46, at 68.

100. See Bréchon, *supra* note 33, at 32, 42.

101. WAALDIJK ET AL, *supra* note 46, at 73.

the spouses have to be 24 years of age or more—and their relation to Denmark has to be stronger than the [couple’s] relation to the foreigner’s homeland. The Minister of Integration has decided that these two [limiting] rules do not necessarily apply [to] registered partners since they can not go to most of the countries and live as partners there.¹⁰²

E. *The Case of Finland*

Finland granted immigration benefits to same-sex couples in 2004 with the passage of the Aliens Act.¹⁰³ The purpose of the Aliens Act was “to implement and promote good governance and legal protection in matters concerning aliens [and] to promote managed immigration and provision of international protection with respect for human rights and basic rights and in consideration of international agreements binding on Finland.”¹⁰⁴

The same-sex partner of a Finnish citizen or permanent resident is considered a family member under the Aliens Act and is eligible to apply for a residence permit.¹⁰⁵ The following categories of individuals constitute family members within the meaning of the Aliens Act:

- 1) A person of the same-sex in a nationally registered partnership is also considered a family member.
- 2) Persons living continuously in a marriage-like relationship within the same household regardless of their sex are comparable to a married couple. The requirement is that they have lived together for at least two years. This is not required if the persons have a child in their joint custody or if there is some other weighty reason for it.¹⁰⁶

A foreign national “may apply for a residence permit abroad on the basis of family ties by filing an application with a Finnish mission, or a sponsor may initiate the procedure by filing an application with the District Police.”¹⁰⁷

102. *Id.*

103. Aliens Act, 301/2004 § 37 (Fin.), available at <http://www.finlex.fi/en/laki/kaannokset/2004/en20040301.pdf>. See also Act on Registered Partnerships, 950/2001 § 10(2) (Fin.), available at <http://www.finlex.fi/en/laki/kaannokset/2001/en20010950.pdf>.

104. Aliens Act, *supra* note 104, § 1.

105. *Id.* § 37.

106. *Id.*

107. *Id.* § 62(1).

A resident national may form a Registered Partnership with a non-resident foreigner.¹⁰⁸ As noted above, the foreign partner of a resident national is entitled to apply for a residence permit.¹⁰⁹

F. *The Case of Iceland*

Iceland, like other Scandinavian countries, recognizes the equivalent of civil unions.¹¹⁰ Iceland granted same-sex couples the right to enter into Registered Partnerships in 1996.¹¹¹ According to the Act on Registered Partnership, subject to laws regulating adoption, the “registration of partnership has the same legal effects as marriage. The [legal] provisions . . . relating to marriage and spouses . . . apply to registered partnership and individuals in registered partnership.”¹¹² This provision includes equal immigration rights for same-sex couples.¹¹³

According to the Act on Foreigners, No. 96, section 13, “[t]he closest family members [eligible for permanent residence] . . . shall be the foreigner’s spouse, a partner in cohabitation or registered partnership”¹¹⁴

Iceland’s Regulation on Foreigners requires registered and cohabiting partners to: 1) be at least eighteen years old; and 2) “be able to demonstrate that they have lived together in registered cohabitation or cohabitation otherwise confirmed for at least two years, and intend to continue their cohabitation.”¹¹⁵

G. *The Case of the Netherlands*

In April, 2001, The Netherlands was the world’s first country to grant full marriage equality to same-sex couples, both in terminology and substance.¹¹⁶ As noted above, this is consistent with The Netherlands’ histori-

108. Act on Registered Partnerships, *supra* note 104, § 10(1).

109. Aliens Act, *supra* note 104, §§ 37(1), 62(1).

110. See Act on Registered Partnership, No. 87, art. 5, 7–8 (June 12, 1996) (Ice.), available at <http://eng.domsmalaraduneyti.is/laws-and-regulations/nr/117>.

111. *Id.* art. 1.

112. *Id.* art. 5.

113. See *id.*

114. Act on Foreigners, No. 96, § 13 (May 15, 2002) (Ice.), available at <http://eng.domsmalaraduneyti.is/laws-and-regulations/nr/105>.

115. Regulation on Foreigners, No. 53, art. 47c (Jan. 23, 2003) (Ice.), available at <http://eng.domsmalaraduneyti.is/laws-and-regulations/nr/860>; LONG ET AL., *supra* note 3, app. B at 160.

116. See GAY & LESBIAN ADVOCATES & DEFENDERS (GLAD), CIVIL MARRIAGE FOR SAME-SEX COUPLES: THE FACTS 36 (2003), available at http://www.pflagsanjose.org/advocacy/CivilMarriage_TheFacts.pdf.

cally welcoming approach to national minorities and gay individuals. Although The Netherlands is not technically a Scandinavian country, it shares many of the socio-economic, cultural and political characteristics of those countries. It could be argued that some of the reasons for Dutch progressive policies towards racial and sexual minorities are related to the reasons for Canadian tolerance of those same minorities: both countries share a common border with a much more powerful neighbor with histories of intolerant policies towards racial and/or ethnic minorities.

Although this article is not intended to be a treatise on World War II, some discussion of that history is helpful to understand why The Netherlands went even further than its Scandinavian neighbors in being the first country in the world to recognize same-sex marriage.¹¹⁷ The Netherlands, along with Canada, maintains a self-conscious distinction between itself and its more powerful neighbor, which is Germany in the case of The Netherlands. This self-conscious desire to distinguish itself from its neighbor was heightened by the German occupation of The Netherlands and the extermination of more than 100,000 Jewish Dutch citizens.¹¹⁸ Many Dutch, unlike many of their European counterparts, considered the extermination of Dutch Jews to be no less outrageous than if Germany exterminated over a hundred thousand non-Jewish Dutch citizens. This self-conscious differentiation with Germany is further heightened by Dutch consciousness of the extraordinary rates of Jewish extermination in The Netherlands as compared to other Western European countries, although it should be noted that the high rate of extermination was related more to Hitler's desire to make an example of The Netherlands, rather than a particularly anti-Semitic attitude of the Dutch. Nevertheless, the Dutch are keenly aware that in Denmark virtually no Jew died at the hands of Hitler because of specific resistance activities undertaken by the Danish government and the Danish people in general. This distinction is all the more striking since, as noted above, The Netherlands shares many cultural socio-economic and political characteristics with Denmark.

Before recognition of full marriage equality in April 1, 2001, full immigration rights of same-sex partners were granted by policy guidelines (*Vreemdelingendecirculaire*) that legally recognized, since 1975, informally cohabiting different-sex and same-sex partners of Dutch citizens.¹¹⁹ Those guidelines provided:

117. See Ralf Michaels, *Same-Sex Marriage: Canada, Europe and the United States*, ASIL INSIGHTS (Am. Soc'y of Int'l L., Wash. D.C.), June 2003, <http://www.asil.org/insights/insigh111.htm>.

118. See Linda M. Woolf, Webster Univ., *Survival and Resistance: The Netherlands Under Nazi Occupation* (April 6, 1999), <http://www.webster.edu/~woolfm/netherlands.html>.

119. WAALDIJK ET AL., *supra* note 46, at 147 n.C2.

[Articles] 3.13 to 3.17 of the [Dutch] Aliens Decree 2000 (*Vreemdelingenbesluit 2000*, *Staatsblad 497*, in force since April [1], 2001) allow for the immigration of married, registered and unmarried/unregistered partners, provided that they live together and have a joint household. One of the conditions is that the 'receiving' partner has a sufficient income¹²⁰

H. *The Case of New Zealand*

New Zealand shares many of the same socio-economic characteristics of Australia, but has evidenced an even more progressive approach to the equal protection rights of its gay citizens than even the relatively progressive policies of Australia.¹²¹ Part of the explanation for this approach could be explained by the relatively homogenous nature of New Zealand's society and its much smaller population of just over 4,000,000.¹²² It could be argued that more homogenous, smaller populations are much more likely to adopt policies benefiting even unrelated members of the population since the sense of commonality shared by New Zealanders is heightened by their relative insularity and lack of diversity. One could argue that this sense of commonality is not entirely dissimilar to the sense of common interests exhibited by Israel towards all of its Jewish citizens, whether gay or heterosexual. It can also be argued that New Zealand shares with Canada and The Netherlands, to a lesser degree, a desire to differentiate itself from its much larger Australian neighbor, with which it is 'lumped together' as Oceania.

Parliament created civil unions for both same-sex and opposite-sex couples in 2004, "giving the same rights as marriage [to same-sex couples]."¹²³ However, even before 2004, the New Zealand Immigration Department announced that the "lovers" of gay and lesbian citizens would be able to apply for residency.¹²⁴ Same-sex partners could apply for residence under the family relationship category.¹²⁵ The gay or lesbian couple must prove the relationship is genuine, stable, and of at least four years duration.¹²⁶

120. *Id.* at 146 n.C2.

121. See LONG ET AL., *supra* note 3, app. B at 151–52. See also *id.* at 63–65.

122. See National Geographic, New Zealand Information and History, http://www3.nationalgeographic.com/places/countries/country_newzealand.html (last visited May 30, 2008).

123. LONG ET AL., *supra* note 3, app. B at 163.

124. Young, *supra* note 16. See also Sura Rubenstein, *Homosexuals Fail to Get Marriage OK*, OREGONIAN, Dec. 10, 1991, at D1.

125. Young, *supra* note 16.

126. *Id.*

“Immigration authorities must be satisfied that the relationship is ‘genuine and stable,’”¹²⁷ and an eligible sponsor must be a citizen or resident of New Zealand and must not have been “the perpetrator of an incident [of] domestic violence which . . . resulted in the grant of [permanent] residence . . . to a person under [the asylum] policy for victims of domestic violence.”¹²⁸

I. *The Case of Norway*

Norway, like the rest of Scandinavia, grants same-sex couples full marriage rights, in substance, if not in terminology. The analysis for Norway is therefore similar to that of the other Scandinavian countries. In 1993, Norway implemented the Registered Partnership Act No. 40.¹²⁹ Section three of the Registered Partnership Act states that with the exception of adoption, “[r]egistration of a partnership has the same legal consequences as contraction of a marriage.”¹³⁰

The Registered Partnership Act limits two foreign nationals’ ability to enter into a registered partnership with each other.¹³¹ For example, at least one of the parties must have been a resident of Norway for two years prior to registration.¹³²

J. *The Case of Sweden*

Sweden, like the rest of Scandinavia, provides same-sex couples full marriage rights—in substance, if not in terminology—in its Registration of Partnership Act of 1994.¹³³ Moreover, the Swedish Parliament is now in the

127. LONG ET AL., *supra* note 3, app. B at 164.

128. Immigration New Zealand, Eligible Sponsor, <http://www.immigration.govt.nz/migrant/stream/live/partner/canisponsormypartner/eligiblesponsor.htm> (last visited May 30, 2008).

129. Registered Partnership Act, No. 40 (Apr. 30, 1993) (Nor.), <http://www.lovddata.no/all/tl-19930430-040-0.html#3>.

130. NORWEGIAN MINISTRY OF CHILDREN & EQUALITY, REGISTERED PARTNERSHIP 2 (2001), available at http://www.regjeringen.no/upload/kilde/bfd/bro/2000/0009/ddd/pdfv/292713-partnerskap_internet.pdf. See also Registered Partnership Act, *supra* note 130, § 3.

131. See Registered Partnership Act, *supra* note 130, § 2(1); NORWEGIAN MINISTRY OF CHILDREN & EQUALITY, *supra* note 131, at 2.

132. See Registered Partnership Act, *supra* note 130, § 2(2); NORWEGIAN MINISTRY OF CHILDREN & EQUALITY, *supra* note 131, at 2.

133. See Registration of Partnership Act (SFS 1994:1117) (Swed.), available at <http://www.homo.se/o.o.i.s/1630>. See also LONG ET AL., *supra* note 3, app. B at 169.

process of changing their Registered Partnership Act to provide for full marriage rights for same-sex couples in substance *and* terminology.¹³⁴

Sweden, however, permitted same-sex partner immigration long before it legally recognized same-sex unions. According to the Institut National d'Etudes Démographiques of France:

It has been a very long tradition (at least since the 1970s) not to tie the right to obtain a residence permit to civil status [in Sweden]. Instead the immigration authorities have evaluated every application on its own merits, trying to determine if an intimate relationship between a legal resident and her or his non-resident foreign partner (regardless of sexual orientation) is a genuine one or not. This practice is now codified in art. 4 of chapter 2 of the Aliens Act¹³⁵

The Registered Partnership Act provides full spousal immigration rights to same-sex couples.¹³⁶ In 2003, an act was passed regarding same-sex cohabitating couples who have not entered a registered partnership, affording them equal rights to other cohabitating couples.¹³⁷

On March 10, 2003, "the Swedish Government announced that . . . its Embassies around the world [will] officiate at same sex unions, if the country concerned allows such unions."¹³⁸

K. *The Case of South Africa*

South Africa is the only country on the African Continent to fully recognize same-sex marriages in substance and terminology.¹³⁹ It has done this through a series of legislative enactments and judicial rulings, progressively expanding the rights of non-discrimination and equal protection to its gay and lesbian citizens.¹⁴⁰ For example, South Africa was the first country in

134. *Sweden Moves Closer to Marriage Equality*, ADVOC., Aug. 26, 2006, available at http://www.advocate.com/news_detail_ektid35997.asp.

135. Hans Ytterberg & Kees Waaldijk, Major Legal Consequences of Marriage, Cohabitation and Registered Partnership for Different-Sex and Same-Sex Partners in Sweden, in WAALDIJK ET AL., *supra* note 46, at 178 n.C2.

136. See LONG ET AL., *supra* note 3, app. B at 169.

137. See Cohabitation Act (SFS 2003:376) (Swed.), available at <http://www.homo.se/o.o.i.s/1784>. See also LONG ET AL., *supra* note 3, app. B at 169.

138. Europe - Residency Requirements, *supra* note 43.

139. See Human Rights Watch, Resource Library for International Jurisprudence on Sexual Orientation and Gender Identity: South Africa, <http://www.hrw.org/lgbt/jurisprudence.htm#3> (last visited May 30, 2008).

140. See *id.*

the world to contain explicit references in its constitution to non-discrimination based on “sexual orientation.”¹⁴¹ Although the South African populace is not particularly supportive of gay rights, the national struggle against the apartheid regime has imbued its leaders with a strong commitment to non-discrimination and equal protection of the laws.¹⁴²

Well before the grant of full marriage, the South African Constitutional Court ruled on December 2, 1999, that section 25(5) of the Aliens Control Act 96 of 1991, which did not permit immigration of same-sex partners, was unconstitutional.¹⁴³ The Court found that section 25(5) reinforced harmful stereotypes of gays and lesbians relating to the rights of equality and dignity to this case.¹⁴⁴ In a later case, the Court further stated that it was an invasion of gays’ and lesbians’ dignity to convey the message that gays and lesbians lack the inherent humanity to have their family lives in same-sex relationships respected or protected.¹⁴⁵

The Immigration Act of 2002 provided that “the Department [of Home Affairs] shall issue a permanent residence permit to a foreigner who . . . is the spouse of a citizen or resident”¹⁴⁶ It defined “spouse” as “a person who is party to a marriage, or a customary union, or to a permanent homosexual or heterosexual relationship which calls for cohabitation and mutual financial and emotional support, and is proven by a prescribed affidavit substantiated by a notarial contract.”¹⁴⁷ Provisions in the Immigration Act of 2002 about obtaining permits for employment also extended equally to same-sex partners.¹⁴⁸

Finally, in 2005, the Constitutional Court ruled that Parliament must implement same-sex marriage within one year, although that decision did not grant same-sex partners any more immigration rights than they previously had since they were already treated equally to heterosexual couples for immigration purposes under the law.¹⁴⁹

141. *Id.*

142. *See id.*

143. *Nat’l Coal. for Gay & Lesbian Equal. & Others v Minister of Home Affairs & Others* 1999 (3) BCLR 280 (CC), 1999 SACLR LEXIS 13, at *38 (S. Afr.).

144. LONG ET AL., *supra* note 3, app. B at 167–68. *See also Nat’l Coal. for Gay & Lesbian Equal.*, 1999 SACLR LEXIS 13, at *37.

145. *See Minister of Home Affairs & Another v Fourie & Others* 2005 (3) BCLR 355 (CC), 2005 SACLR LEXIS 34, at *158 (S. Afr.).

146. Immigration Act 13 of 2002 § 26(b) (S. Afr.), available at <http://www.info.gov.za/gazette/acts/2002/a13-02.pdf>.

147. *Id.* § 1(xxxvi).

148. *Id.* § 27(a)(iv).

149. *See Minister of Home Affairs & Another*, 2005 SACLR LEXIS 34, at *121, *161.

IV. SAME-SEX IMMIGRATION IN A “FEDERAL” CONTEXT: THE CASE OF THE EUROPEAN UNION

The European Union (“EU”) provides a particularly interesting case study in the treatment of same-sex partners since its “federal” structure is legally almost identical to that of the United States and presents the same issues regarding federal recognition of the rights of foreign spouses of U.S. citizens legally married under state law to live and work throughout the United States.

The legal doctrine of EU citizenship is of particular relevance to this comparative analysis. EU citizenship is analogous to the rights of privileges and immunity found in Article IV, Section 2 of the U.S. Constitution, and grants each citizen of any EU country the rights of European Citizenship, enabling that citizen to travel or work anywhere in the European Union.¹⁵⁰ This “right to travel” and live and work anywhere in the EU operates almost identically to the U.S. legal doctrine of the “right to travel,” granted to U.S. citizens through the Equal Protection Clause and Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution.,¹⁵¹

EU law mirrors the U.S. federal legal system in four fundamental ways. First, EU law is supreme over individual countries’ laws and even their constitutions.¹⁵² Second, the European Court of Justice conducts judicial review of national court decisions and legislation.¹⁵³ Third, EU law has direct effect in individual European Union countries like federal legislation in the United States. Fourth, EU lawmaking bodies have implied powers to implement legislation suggested by, but not explicitly provided for, in the EU treaties, commonly referred to as the “European Constitution.”¹⁵⁴

Because EU law recognizes the right of any citizen of an EU country to live and work anywhere in the European Union, any non-EU individual who legally marries a citizen in an EU country obtains the same rights of EU citizenship as any other EU citizen, including the right to live and work anywhere in the European Union.¹⁵⁵

150. Council Directive 2004/58, 2004 O.J. (L 229) 35, 35 (EC).

151. *Compare id.*, with U.S. CONST. art. IV, § 2, and *id.* amend XIV.

152. Martin Stierstrom, *The Relationship Between Community Law and National Law* 10 (Univ. of Miami, Jean Monnet/Robert Schuman Paper Series No. 33, 2005), <http://www6.miami.edu/EUCenter/stierstromfinal.pdf>.

153. See Duncan E. Alford, *European Union Legal Materials: A Guide for Infrequent Users*, 97 LAW LIBR. J. 49, 56 (2005).

154. *Id.*

155. See Council Directive 2004/58, 2004 O.J. (L 229) at 38.

The EU, however, has gone even further than simply recognizing the citizenship rights of non-EU individuals who have become EU citizens through marriage to a EU citizen. It has also adopted immigration laws for partners of EU citizens that permit foreign partners to live and work in countries that do not recognize same-sex marriage or civil unions. The European Union adopted a Directive—a kind of “federal” EU law—in 2004 that permits same-sex partners to immigrate to the state of his or her partner under specific guidelines.¹⁵⁶ The Directive only applies when one partner is a citizen of a European Union member state, but it states that discrimination in granting immigration is strictly forbidden on the basis of sexual orientation.¹⁵⁷ “By [April 30, 2006], all 25 Member States must ensure that domestic immigration laws have been revised in order to comply with the Directive.”¹⁵⁸

V. CONCLUSION

The comparative analysis contained in this article permits a number of conclusions regarding the reasons for the widespread recognition of same-sex couple immigration rights in most industrialized democracies, and the non-recognition of such rights by the United States.

First, as an empirical matter, those countries that have recognized immigration rights for same-sex couples have also enjoyed a level of legal and political gender equality at least equal to, and in most cases, greater than that found in the United States. This is consistent with the comparative, anthropological, and historical research demonstrating a very high correlation between legal and political gender equality and legal equality for gays and lesbians.

Second, there does not appear to be a notable difference in approach between those countries sharing an Anglo-Saxon common law legal heritage and those countries sharing the more predominant civil law systems. There are examples of countries from both systems that recognize both full marriage equality in substance and terminology, and more limited marriage rights that include immigration rights.

156. MARK BELL, INT’L LESBIAN & GAY ASS’N (ILGA-EUROPE), EU DIRECTIVE ON FREE MOVEMENT AND SAME-SEX FAMILIES: GUIDELINES ON THE IMPLEMENTATION PROCESS 2 (2005), available at www.ilga-europe.org/content/download/1448/9061/file/freedom.pdf. See also Council Directive 2004/58, 2004 O.J. (L 229) at 35.

157. See Council Directive 2004/58, 2004 O.J. (L 229) at 38.

158. BELL, *supra* note 157, at 2. See also Council Directive 2004/58, 2004 O.J. (L 229) at 48.

Third, the role of religion appears to be a critical factor in the differing approaches of the United States and other industrialized democracies towards same sex partner immigration. However, it is not the role of religion in isolation that is significant, but rather the interrelationship between religion and race. These joint, interrelated factors of religion and race will be discussed after some preliminary empirical observations about the role of religion itself in explaining the divergent approaches exhibited by the case studies herein.

The first empirical observation with respect to religion is that all of the countries discussed herein, with the exception of Israel, are predominantly Christian countries. The second empirical observation is that there is little correlation between a country's legal approach to same-sex couple immigration and whether that country is Catholic or Protestant. The only countries to grant full marriage equality in substance and terminology in Europe are countries such as Spain, with a strong and longstanding Catholic tradition, Belgium, and the Netherlands, also with very sizable Catholic populations. Moreover, Quebec, a strongly Catholic Canadian province, was the first Canadian province to recognize civil unions for its gay and lesbian citizens; well before the granting of full marriage equality in predominantly Protestant Canada. On the other hand, the first countries in the world to grant civil unions to its gay and lesbian citizens were the predominantly Protestant countries of Scandinavia and Finland.

The critical difference in the approach of countries towards same-sex couple immigration, from a religious perspective, is the prominence of fundamentalist religious influence in the body politic. It is interesting to note, however, that Israel—with a very strong fundamentalist Jewish influence in its Parliament and government—is relatively progressive in its policies towards same-sex couple immigration for reasons that are more fully described in the Israel case study.

However, noting the influence of fundamentalist religious influence in the body politic only begs the deeper question of *why* the United States differs in that respect from other industrialized democracies. After accounting for all possible variables that could account for this difference, the answer appears to be the unique American history with race, and the involvement of some of its largest Christian denominations with that history. The only significant difference between the United States and its fellow industrialized democracies is the unique historical experience of the United States with over 200 years of slavery and almost 100 additional years of apartheid. No other variable distinguishes the United States so significantly from the other industrialized democracies. Australia and Canada also both had frontier histories and a history of forcefully subjugating an indigenous people. Every major Western European country has had a history of militarization and colonialism and some of the more progressive countries have had some of the

most brutal histories as colonizers. Almost all other socio-economic, political, cultural, and economic variables are largely similar among the United States and other industrialized democracies. Indeed, if one were to carve out those U.S. states that had institutionalized slavery and/or apartheid for almost 300 years, the United States would resemble the rest of the industrialized democracies with respect to its legal and political approach towards equal protection and non-discrimination rights for its gay and lesbian citizens. Some areas of this “non-slave state” United States would still be conservative, as are certain areas of all countries, but social attitudes and state legislation would be broadly similar to those of Europe, Canada, and Oceania.

The difference between the United States and other Western, industrialized countries, but what it shares with apartheid era South Africa, is the involvement of its largest Christian denominations with that history of slavery and apartheid. For example, the largest protestant denomination in the United States is the Southern Baptist Convention.¹⁵⁹ The Convention was created through a split between southern and northern Baptists over the issue of slavery, and later over segregation. The northern Baptists ultimately formed the American Baptist Convention. The Southern Baptist Convention shares a history with the South African Dutch Reformed Church of using religion to justify the legal separation of the races. The areas of the United States where fundamentalist Christian theology is the strongest, with some significant exceptions, are those states that institutionalized slavery and apartheid.

Nevertheless, just because this correlation is most evident in those states that institutionalized slavery and apartheid does not mean that these attitudes did not affect other parts of the United States. For example, Mormonism, which is most predominant in Utah and other Western states that never had slavery, has historically evidenced strong opposition to non-discrimination based on race, gender, and sexual orientation. As late as 1978, persons of African descent were forbidden to participate as priests in the Mormon religion,¹⁶⁰ even though priesthood is a status that is open to a far greater number of men in the Mormon faith than priesthood in other Christian denominations. It is no coincidence that both the Southern Baptist Convention and the Mormon religion also endorse strictly defined gender roles and eschew gender equality, which, as noted above, is very tightly correlated with opposition to legal rights for sexual minorities.

It could be argued that the religious experience of the United States with respect to race, gender equality, and sexual orientation may be unique to the

159. Lillian Kwon, *Southern Baptists Discuss Identity, Controversy*, CHRISTIAN POST, Feb. 16, 2007, <http://www.christianpost.com/pages/print.htm?aid=25848>.

160. Mary Jordan, *The New Face of Global Mormonism*, WASH. POST, Nov. 19, 2007, at A1.

United States because the people that founded the United States had a pre-existing ascetic and fundamentalist theological outlook that was hostile to gender equality and homosexuality. The Puritans, for example, were notable for their narrow or “pure” theological views on a wide variety of issues, and for their harsh measures in dealing with those who disagreed with them. Their approach to theological dissent was evidenced by their forcible ejection of Roger Williams from Massachusetts Bay Colony, who subsequently founded the colony of Rhode Island as a haven for people of all faiths.¹⁶¹ However, even the ascetic Puritans ultimately evolved into Congregationalists, Presbyterians, and Baptists. Congregationalists and Presbyterians are currently considered mainstream Protestant faiths that tend to be relatively moderate on issues of gender equality, sexual orientation, and progressive on issues of race. Moreover, until the break between the southern and northern Baptists over slavery, the Baptist faith was not particularly associated with intolerance. Roger Williams, considered the founder of American Baptism, was himself a strong advocate of tolerance and amicable relations with Native-Americans,¹⁶² and northern Baptists are not currently considered notably immoderate on issues of gender equality and/or sexual orientation. It is thus difficult to argue that there was something inherent in the Baptist faith that created this linkage between the conservative views of the Southern Baptist Convention on race, gender, and sexual orientation. As is usually the case, theology followed the existing cultural and socio-political realities, rather than the other way around.

Moreover, the founders of the United States were predominantly Deists, the antecedents of modern day Unitarianism. Unitarianism is currently one of the most progressive religions in the world on matters of gender equality, race, and sexual orientation, again suggesting that there was nothing unique in the history of the United States, other than its history with slavery and apartheid, that can account for the emergence of large Christian sects that simultaneously supported discrimination based on race, gender, and sexual orientation.

It is beyond the scope of this article to explore the *reasons* for the correlations among support for gender, racial, and sexual orientation discrimination, but as an empirical matter, they appear to exist.

It is difficult to determine whether the unique history of the United States means that the progress made in otherwise similarly situated countries with respect to same-sex immigration has relevance for future developments

161. Jimmy D. Neff, *Roger Williams: Pious Puritan and Strict Separationist*, 8 J. CHURCH & STATE 529, 533–34 (1996).

162. *Id.* at 535.

in the United States. It nevertheless, seems reasonable to conclude that the same inexorable forces that have led to legal equality for gays and lesbians in other countries will ultimately lead to similar legal equality in the United States. As noted in the case studies discussed above, the principal obstacle to such recognition of legal equality in the United States is the existence of powerful fundamentalist Christian groups with an unusual degree of political influence. However, those groups have themselves radically altered their own position on some of their most strongly held beliefs regarding discrimination. For example, the Southern Baptist Convention has apologized for its theological endorsement of slavery and apartheid,¹⁶³ and the Mormon faith came to accept persons of African descent into the priesthood. More people were opposed to mixed race marriages in 1963 than are currently opposed to same-sex marriage.¹⁶⁴ Moreover, same-sex marriage is a much greater step than simply recognizing the basic rights of a United States citizen to be united with their foreign same-sex partner.

Finally, the European Union provides an extremely useful example of how a federal legal system can accommodate the diverse views of its member states towards gays and lesbians, and yet still accommodate the rights of all of its citizens to immigration rights on an equal plane. Whereas in the United States, the federal government refuses to recognize *state* same-sex marriages for any federal purpose,¹⁶⁵ the European Union permits any foreign partner of a European Union citizen to immigrate to the European Union and enjoy all the rights of European Union citizenship, even though same-sex couples do not otherwise enjoy the benefits of marriage in all EU states.¹⁶⁶

163. *SBC Renounces Racist Past*, CHRISTIAN CENTURY, July 5, 1995, at 671.

164. See Josephine Ross, *The Sexualization of Difference: A Comparison of Mixed-Race and Same-Gender Marriage*, 37 HARV. C.R.-C.L. L. REV. 255, 256 (2002).

165. Liz Seaton, *The Debate Over the Denial of Marriage Rights and Benefits to Same-Sex Couples and Their Children*, 4 MARGINS 127, 137 (2004).

166. See BELL, *supra* note 157, at 2.