LECTURE

EQUALITY PRACTICE: LIBERAL REFLECTIONS ON THE JURISPRUDENCE OF CIVIL UNIONS

THE 2000 EDWARD C. SOBOTA MEMORIAL LECTURE*

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On April 26, 2000, Vermont's governor signed legislation recognizing civil unions between same-sex couples.[1] Under the new law, same-sex couples entering into civil unions will enjoy the same benefits and obligations that Vermont law provides for different-sex couples who enter into civil marriages. The law was a legislative response to *Baker v. State*,[2] a state supreme court decision interpreting the state constitution as requiring the state to equalize the benefits and obligations afforded same-sex couples and different-sex married couples.[3] The court's decision explicitly contemplated the possibility that the legislature could remedy the discrimination either by extending civil marriage to same-sex couples, or by creating a new institution entailing the same state-

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The Edward C. Sobota '79 Memorial Lecture Series was established in 1988 in memory of Edward C. Sobota '79 by his brother Henry Sobota '77, the Sobota family, and by Weil, Gotshal & Manges.

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[1] An Act Relating to Civil Unions, H.B. 847, 1999 Gen. Assem., Adjourned Sess. (Vt. 1999).

[2] 744 A.2d 864 (Vt. 1999); *see also* An Act Relating to Civil Unions, H.B. 847, 1999 Gen. Assem., Adjourned Sess. (Vt. 1999) (stating that the "purpose of [the civil unions] act is to respond to the constitutional violation found by the Vermont Supreme Court in *Baker v. State*").

[3] *Baker*, 744 A.2d at 867.

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sanctioned benefits (such as the right to bring a lawsuit for the wrongful death of a spouse) or obligations (such as the duty of support and maintenance) for same-sex couples that are afforded to different-sex married couples. Six European countries had created such new institutions, called registered partnerships.

Most of the criticism of *Baker*, and the ensuing civil union law, came from traditionalists who assailed these moves as compromising the institution of marriage, or promoting homosexuality. Some of the criticism, however, came from liberals who assailed these moves as falling short of full legal equality for lesbian, gay, and bisexual people—in essence creating a "separate but equal" regime for gays. In important respects, the civil union law is inconsistent with the premises of the liberal state as applied to same-sex couples: it treats them differently from different-sex couples, and for reasons that are hard to justify without resort to arguments grounded in status denigration or even prejudices. Justice Denise Johnson dissented from *Baker*'s reluctance to require the state to issue marriage licenses to same-sex couples. The majority's concern with "disruptive and unforeseen consequences," she argued, was the same kind of concern raised by segregationist states opposing judicial remediation of apartheid in the 1950s and 1960s. "The Supreme Court's 'compelling answer' to that contention was 'that constitutional rights may not be denied simply because of hostility to their assertion or exercise.'"[4]

In the legislature, Representative Steve Hingtgen opposed any compromise on the ground that it "validates the bigotry" against lesbians, gay men, and bisexuals.[5] Representative Hingtgen expressed his opposition, saying "[i]t does more than validate it. It institutionalizes the bigotry and affirmatively creates an apartheid system of family recognition in Vermont."[6] Although I think the analogy of civil unions and *Baker* to racial apartheid and *Plessy v. Ferguson* is inapt, Justice Johnson and Representative Hingtgen raise pertinent issues. The legislation is a compromise of liberal principles—but a small and perhaps temporary one that both contributes to liberal projects and reveals some limitations in the liberal ideal for our polity.

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[4] *Id.* at 902 (Johnson, J., dissenting in part) (quoting Watson v. City of Memphis, 373 U.S. 526, 535 (1963)).

[5] Transcript of Hearing Before the Vermont House Comm. on the Judiciary, Feb. 9, 2000, at 4 [hereinafter Transcript of Hearing].

[6] *Id.*

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I. CIVIL UNIONS AS A SACRIFICE OF LIBERAL PRINCIPLES

Liberal theories maintain that the state exists to provide a context within which its members can flourish. The state properly creates public goods (like roads), prevents people from hurting one another or unnecessarily interfering in one another's affairs, and (by some accounts) inculcates civic virtues of toleration and cooperation in the citizenry.[7] On the whole, the state is supposed to be neutral as to its citizens' moral virtue.[8] Thus, the liberal state is not permitted to hurt people or treat them differently because they are unpopular or even objectionable, so long as they are not positively harming other people or depriving them of their recognized liberties.[9] The liberal state can arrest and otherwise penalize a person for coercing another person to have penile-vaginal sex with him, but not for engaging in oral intercourse with a consenting adult. The former harms another; the latter does not.

Liberal premises do not require the state to recognize any two people's marriages, nor to attach legal obligations and benefits to such interpersonal commitments, but once the state has made a policy decision to recognize and even encourage marriages, the state may not arbitrarily deny that recognition and bundle of regulations. For example, the state presumptively cannot give marriage licenses to same-race couples but deny them to different-race couples. The United States Supreme Court elevated this liberal principle to a constitutional rule in *Loving v. Virginia*,[10] which held that the state could not bar different-race marriages. The primary ground for the Court's holding was that the law prohibiting different-race marriages was an invidious discrimination on the basis of race, which is a highly suspect classification. Under the Court's liberal reading of the equal protection clause, the state cannot deny

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[7] *See, e.g.*, BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 349-78 (1980); JOHN RAWLS, A THEORY OF JUSTICE 31 (1971).

[8] *See* JOHN RAWLS, POLITICAL LIBERALISM 4 (1993).

[9] *See, e.g.*, JOHN STUART MILL, ON LIBERTY, ch. 4 (Currin V. Shields ed., Liberal Arts Press 1956) (1859); RICHARD A. POSNER, SEX AND REASON 3-4, 202-03, 215, 230-31, 233-34, 259, 288, 379-80, 438 (1992) (applying this Millian insight to sexual minorities, such as gays).

[10] 388 U.S. 1, 2 (1967) (invalidating a state bar to different-race marriages as both an unconstitutional discriminatory act and unjustified deprivation of a fundamental liberty). The state had made a liberal argument justifying its discrimination: different-race marriages would produce public harms, namely, a "'mongrel breed of citizens.'" *Id.* at 7. This argument was factually unfounded and was, as the Court held, simply a rationalization for the state's goal of promoting "White Supremacy." *Id.* at 11-12. Such a goal is invalid under liberal premises.

marriage licenses to a black-white couple because of the race of one partner.

Today, the Court's liberal jurisprudence considers sex a quasi-suspect classification, namely, one that is presumptively arbitrary and requires strong justification when deployed by state policy. To the irritation of many, but refutation by none, Andrew Koppelman has argued that, by analogy to miscegenation, state recognition of same-sex marriage is required by this liberal sex discrimination jurisprudence: just as it is race discrimination for the state to deny marriage licenses to black-white couples because of the race of one partner, so it is sex discrimination for the state to deny marriage licenses to female-female couples because of the sex of one partner.[11] Koppelman's argument takes the liberal case for same-sex marriage and shows how it is mandated by the Court's constitutional jurisprudence.[12]

An alternative holding of *Loving* was even broader: the Court said that the state presumptively could not deny couples the "fundamental" right to marry without strong justification.[13] The Court has elaborated on this principle by holding, in a later case, that the state cannot presumptively deny convicted felons the ability to marry, even during their confinement in prison.[14] The Court reasoned that the extensive bundle of individual and partnership rights and benefits entailed in marriage were just as important for felons as for civilians.[15] This is a demanding liberalism and one wonders how far it reaches. The Court's answer is that state restriction on the "freedom of personal choice in matters of marriage and family life" can only be acceptable if it is "supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[16] Some restrictions can

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[11] *See generally* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994). The main argument against Koppelman's thesis—that the class of people hurt by miscegenation laws (blacks) matches up with the classification (race) and the equal protection goal (anti-racism), while the class of people hurt by different-sex marriage laws (gays) does not match up with the classification (sex) or the equal protection goal (anti-sexism)—is answered in WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 162-72 (1996). *See also id.* at 172-82 (arguing that the same-sex marriage bar is also irrational sexual orientation discrimination).

[12] *See* Koppelman, *supra* note 11, at 208-19.

[13] *Loving*, 388 U.S. at 12.

[14] *See* Turner v. Safley, 482 U.S. 78, 95-99 (1987). Consistent with liberal theory, the Court said that deprivation of the right to marry might be justified under some circumstances as part of an appropriate punishment for felons who have harmed others. *See id.* at 97.

[15] *Id.* at 95-96.

[16] Zablocki v. Redhail, 434 U.S. 374, 385, 388 (1978) (striking down a law requiring deadbeat dads to discharge their outstanding support obligations before they could remarry). The

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pass this test. For example, the state can deny marriage licenses to minors, under the reasonable supposition that a minor does not have the maturity of judgment to consent to the life-changing commitment of marriage. Although not so easy a case, the state can plausibly maintain that marriage licenses should not be given to closely related persons, such as siblings or uncles and nieces, because the possibility of marriage between close relatives risks undermining the family as a safe haven where children can receive emotional support without sexual attachment.[17] In both of these cases, there is an important state interest that motivates the restriction on civil marriage. (In both cases, by the way, churches could recognize such marriages even if the state did not.)

Can the liberal state deny marriage licenses to polygamous partners, typically one man and two women? This was once the main argument against same-sex marriage recognition—it would require the state to recognize polygamous ones as well. That is hardly clear. John Stuart Mill believed liberalism to be hostile to laws making polygamy a crime, but disapproved of state recognition of polygamy, on the ground that it has third-party effects harmful to women.[18] In our society, polygamy would make it easier for many women to find husbands, but a modern Millian would doubt that women who share their husbands with other women would find happiness, because the bargaining position of the man within marriage would be so much greater. In fact, this liberal argument against polygamy is one of the best arguments for same-sex marriage. If women had other options, other than marrying men, their bargaining power within male-female marriage would be greater, and wives might actually start getting the equal treatment our society has long claimed that they have.

The state that cannot legitimately deny different-race couples, or even convicted felons, marriage licenses ought not to deny two adult

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Court in *Zablocki* discussed the family and procreative features of traditional marriage, but did not tie marriage to procreation. *See generally id.*; *see also* ESKRIDGE, *supra* note 11, at 128-29 (discussing *Zablocki* and *Turner*, both of which failed to even discuss procreation as issues involved in state-recognized marriages).

[17] The old rationale that incestuous marriages would pose high genetic risks is criticized in Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257, 267-81 (1984).

[18] *See* MILL, *supra* note 9, at 112-13. For current debate, compare CAROL ROSE, PROPERTY AND PERSUASION 240-41 (1994), arguing that polygamy would be good for women; and ROBERT WRIGHT, THE MORAL ANIMAL: EVOLUTIONARY PSYCHOLOGY AND EVERYDAY LIFE 93-107 (1996), arguing that "*most* men are probably better off in a monogamous system and *most* women worse off;" with WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 290-92 (1999).

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women the same basic right, and the associated state rights and benefits.[19] Liberal philosophy would reject outright the notion that the state can deny two women the right to marry simply because third parties consider lesbian relationships morally objectionable or desire to disrespect such relationships. These are not good liberal reasons for denying some people state benefits and obligations owed to other people. For this and other reasons, opponents of same-sex marriage in Vermont and elsewhere have de-emphasized these kinds of arguments and instead have maintained that state recognition of same-sex marriages would have harmful third-party effects.

The main third-party effect invoked by states defending their marriage bars in Vermont and Hawaii was the claim that children would suffer. The argument usually goes something like this: same-sex marriage would create more households where lesbian and gay parents are raising children; children are much better off being raised in households where the parents are heterosexual; therefore, same-sex marriage would be bad for a number of children.[20] The Vermont and Hawaii courts rejected this argument as factually unsupported.[21] Social scientists who have studied mom-and-mom households with children have found no material differences in the well-being of the children, compared with those

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[19] For more detailed liberal philosophical and legal arguments for same-sex marriage, see generally ESKRIDGE, *supra* note 11; MORRIS B. KAPLAN, SEXUAL JUSTICE: DEMOCRATIC CITIZENSHIP AND THE POLITICS OF DESIRE (1997); RICHARD D. MOHR, A MORE PERFECT UNION: WHY STRAIGHT AMERICA MUST STAND UP FOR GAY RIGHTS (1994); DAVID A.J. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION 29-83 (1982); Mary Becker, *Women, Morality, and Sexual Orientation*, 8 UCLA WOMEN'S L.J. 165 (1998); Mary Coombs, *Sexual Dis-Orientation: Transgendered People and Same-Sex Marriage*, 8 UCLA WOMEN'S L.J. 219 (1998); Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 LAW & SEXUALITY 62 (1991); Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9 (1991); Koppelman, *supra* note 11; Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1994-95).

[20] Factual underpinnings for this argument are developed in Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833 (1997) (criticizing studies finding no impact of lesbian parents on children, and invoking social scientists who assert bad influences). *But see infra* note 22.

[21] *See* Baker v. State, 744 A.2d 864, 884-85 (Vt. 1999); Baehr v. Miike, 1996 WL 694235, 18, 27, 28, 30, 31, 38, 52, 55, 91, 123 (Haw. Cir. Ct. 1996), *aff'd*, 950 P.2d 1234 (Hawaii 1997) (refuting the state's argument that it had an interest in protecting children by prohibiting same-sex marriages because, as their witnesses testified, children receive an "overabundance of information about one gender and little information about the other gender"), *rev'd and remanded*, 994 P.2d 566 (Haw. 1999).

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reared in straight mom-and-dad households.[22] Because most of the studies have involved small samples, and none have been able to sample randomly, these conclusions remain provisional. But the consensus of the studies certainly forebodes against claims that same-sex marriage will have third-party effects on children.

Vermont's civil unions law recognizes that the liberal state cannot discriminate against same-sex couples, and that including them within the state's family law regime is consistent with the purposes of those legal benefits and duties.[23] Consistent with *Baker*, the law posits as its central goal "to provide eligible same-sex couples the opportunity 'to obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples.'"[24] And the law itself specifically assures same-sex couples the same statutory benefits and obligations as different-sex couples and meticulously integrates civil unions into Vermont's family law. The most thoughtful officials in Vermont—from Representative Tom Little who chaired the House Committee that drafted the bill, to Representative Hingtgen who ultimately voted for it notwithstanding his earlier reservations, to Governor Howard Dean, who risked his political career by signing the bill into law—believed that this law satisfies the obligations of liberalism. Yet, it is clear that the law does not assure the full equality liberalism would seem to demand.

A. Unequal Status

To begin with, the civil unions law forthrightly concedes that it "does not bestow the status of civil marriage"[25] on same-sex couples, even though the legislature clearly had the authority to do that; the law justifies its choice as one that "will provide due respect for tradition and long-standing social institutions."[26] On the face of it, this is a compromise of liberal principles. The legislature acknowledges that marriage is a matter of status, as well as rights and duties. Socially, the married couple has long had a special, and generally privileged, status in American society. That privileged status remains reserved for different-sex—presumptively

[22] *See* Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253 (1998) (surveying social science evidence extensively and refuting the claims made in Wardle, *supra* note 20).

[23] *See* An Act Relating to Civil Unions, H.B. 847, 1999 Gen. Assem., Adjourned Sess., §§ 1(3)-(9) (Vt. 1999) (enumerating legislative findings, and emphasizing the state's interest in protecting families).

[24] *Id.* at § 2(a).

[25] *Id.* at § 1(10).

[26] *Id.*

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heterosexual—couples; same-sex couples, who are acknowledged to form similar commitments and families, get another institution which is presented as marriage without the name. The historically excluded group can easily view this as second-class citizenship, the only justification for which is "tradition"—the belief that marriage has long been limited to unions between men and women.[27] Tradition is generally not a liberal justification for a polity's treating some citizens differently from others—if it were, liberalism would lose most of its analytical bite.

There is a disturbing parallel between the civil unions law and the segregation of railroad cars upheld by the United States Supreme Court in *Plessy v. Ferguson*.[28] Just as Louisiana gave blacks and whites separate and (assertedly) equal railroad cars,[29] so Vermont gives gays and straights separate and (assertedly) equal legal forms for their committed relationships. In each case, the separate forms were defended on grounds of formal equality: blacks got a railroad coach, just not the same one whites enjoyed; gays get state recognition for their committed relationships, just not the same one straights enjoy. In each case, the minority objected that separation, viewed in its social context, symbolically reflected and deepened a functional inequality—whose relevance the state denied. Dissenting in *Plessy*, Justice Harlan argued that, "[e]very one knows that the statute in question had its origin in the purpose . . . to exclude colored people from coaches occupied by or assigned to white persons."[30] Analogously, the Vermont statutory reaffirmation that "marriage . . . consists of a union between a man and a woman"[31] had its origin in the purpose to exclude homosexual people from the institution of marriage occupied by, or assigned to, straight persons. In each case, the state pandered to private prejudices in creating a symbolic discrimination and invoked tradition to justify it. Just as the U.S. Supreme Court deferred to Louisiana's discretion "to act with reference to the established usages, customs and traditions of the people,"[32] so the Vermont

[27] This assertion in the text is true as far as formal American law is concerned, but it is not true historically or functionally. Many societies in human history have recognized same-sex unions as marriages. For example, Native American societies within the United States have done so, and same-sex couples have received marriage licenses in the United States by various means. *See* ESKRIDGE, *supra* note 11, at ch. 2.

[28] 163 U.S. 537 (1896).

[29] *See id.* at 551-52.

[30] *Id.* at 557 (Harlan, J., dissenting).

[31] An Act Relating to Civil Unions, H.B. 847, 1999 Gen. Assem., Adjourned Sess., § 1(1) (Vt. 1999).

[32] *Plessy*, 163 U.S. at 550.

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legislature exercised its discretion to give "due respect for tradition and long-standing social institutions" to create a new institution rather than admit lesbian and gay couples into marriage.[33] The next part of this lecture will explore the analogy in greater depth, but for now my point is that liberal concerns about *Plessy* parallel those with same-sex unions: each regime acquiesces in tradition-based distinctions that connote second-class citizenship for the historically subordinated group.

B. Unequal Benefits and Obligations (Federal Law)

To the liberal it is highly disturbing that a Vermont couple entering into a civil union is not equally situated with a married couple in regard to benefits and obligations afforded by federal law. Spousehood, or being married, entitles persons or couples to 1049 benefits and duties under federal statutes, ranging from immigration law's allowance of citizenship to spouses of American citizens, to a multitude of conflict of interest rules disabling federal officials from making decisions affecting the interests of their spouses as well as themselves.[34] The Defense of Marriage Act of 1996 (DOMA) provides that, for purposes of federal statutes and regulations, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[35] Although DOMA does not explicitly say whether a same-sex civil union can be treated as a "marriage" for purposes of federal law, or whether civil union partners can be "spouses," it can easily be read to preclude federal agencies and courts from treating civil unions like marriages.

If DOMA were read this way, the inconsistency between state treatment of same-sex unions and different-sex marriages becomes much greater: not only do lesbian and gay couples suffer the symbolic disrespect associated with separate-but-equal regimes, but they do not even get an institution that is close to equal in terms of benefits and duties. The situation of gay people would flunk even the *Plessy* "separate but equal" test, which required at least formal equality. That civil unions are separate but ridiculously unequal in

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[33] An Act Relating to Civil Unions, H.B. 847, 1999 Gen. Assem., Adjourned Sess., § 1(10) (Vt. 1999).

[34] *See generally* GENERAL ACCOUNTING OFFICE, REPORT TO THE HONORABLE HENRY J. HYDE, CHAIRMAN, COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES: THE DEFENSE OF MARRIAGE ACT, GAO/OCG 97-16 (1996).

[35] Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (codified at 1 U.S.C. § 7 (1996)).

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this way is no fault of Vermont's, of course, for no state can alter the rules dictated by the 1996 federal law. Indeed, DOMA would more clearly deny benefits and obligations if Vermont had adopted same-sex marriage. The liberal's complaint is therefore with the federal government, whose law treats citizens very differently without any neutral justification.[36]

C. Unequal Benefits and Duties (State Level)

Another way in which civil unions will constitute a separate-but-unequal regime for same-sex couples is their relative lack of portability. As of October 2000, thirty-four states have adopted junior-DOMAs, that is, statutes providing that their courts should not recognize same-sex marriages validly entered into in another jurisdiction or state.[37] The Mississippi law, for example, says that "[a]ny marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi."[38] Subject to constitutional challenges, these laws would in almost all cases prevent same-sex couples married in Vermont from taking advantage of the legal benefits of marriage. Junior-DOMA states would surely not treat civil unions any more liberally: absent constitutional problems, the courts in such states would accord no benefits to civil union partners, either because state marriage benefit law does not include civil unions, or because the junior-DOMA precludes recognition of any kind of same-sex union.

In at least some states that have not adopted junior DOMAs, or whose statutes are loosely drafted or found to be unconstitutional, a Vermont same-sex marriage would probably be recognized. Most states have statutes or judicial precedents requiring recognition of out-of-state marriages if they were valid in the states where they were entered, unless such marriages would be contrary to a fundamental public policy of the recognizing state.[39] If Vermont

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[36] For arguments that DOMA is unconstitutional, see, for example, Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221, 231-39 (1996).

[37] Most of the laws are collected and analyzed in Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105, 134-50 (1996).

[38] MISS. CODE ANN. § 93-1-1(2) (1997).

[39] Choice-of-law precepts for interstate recognition of same-sex marriages are laid down by Barbara J. Cox in *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1062-1118 (1994), and by

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had amended its marriage law to include same-sex couples, it is likely that a few states would have recognized those marriages when couples engaged in transactions or even relocated to their jurisdictions. Some of the states, but probably not all of them, that would have been willing to recognize Vermont same-sex marriages would not be willing to recognize Vermont same-sex civil unions. For example, assume a Vermont same-sex couple that relocates to Massachusetts. One partner is killed by a negligent motorist. If the couple were married in Vermont, there is a good chance that Massachusetts would allow the survivor to sue for her own anguish, and as the presumptive representative of the decedent's estate. The odds go down—no one knows how much—if the couple is just civil unioned, rather than married, in Vermont. Although the extent of the problem is indeterminate, Vermont's decision to recognize same-sex unions but not marriages may affect the portability rights of same-sex couples.

II. SUBSTANTIAL EQUALITY AND THE INAPTNESS OF THE APARTHEID TAG: CIVIL UNIONS AS A BIG STEP FORWARD IN THE POLITICS OF RECOGNITION

I am a classical liberal and a gay person who supports legal recognition of same-sex marriages. My last book criticized the twentieth century legal regime that created an "apartheid of the closet" for lesbian, bisexual, gay, and transgendered people.[40] Yet I do not think the civil unions law creates an apartheid, as Representative Hingtgen charged. Nor do I believe the analogy to *Plessy* holds up: formally, the law is neither separate nor equal; functionally, the law ameliorates, rather than ratifies, a sexuality caste system. The racial apartheid adopted by southern state legislatures and upheld in *Plessy* was very different from the new institution suggested in *Baker* and adopted by the Vermont legislature. The analogical relationship of apartheid and civil unions is complicated, however, and does not establish that the civil unions law creates a liberal regime.

Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values*, 16 QUINNIPIAC L. REV. 191, 192-203 (1996).

[40] ESKRIDGE, *supra* note 18.

A. The Inapt Analogy to Apartheid

I start with the socio-legal background of apartheid. During Reconstruction (1866-1877), the southern states were readmitted to the union upon the condition that they would assure black people (the former slaves) free and equal citizenship as required by the Thirteenth and Fourteenth Amendments. Hence, the constitutions and laws of those states did not initially require segregation of the races, a practice that some of the Reconstructors considered antithetical to the equality principle of the Fourteenth Amendment.[41] After Reconstruction ended, southern states backslid, adopting laws and amending their constitutions to create the legal foundations for apartheid. Segregation of the sort upheld in *Plessy* was at least a compromise of the equality baseline set during Reconstruction and, as practiced, a betrayal of the goals of Reconstruction. In short, apartheid was a major setback in the politics of recognition for African-Americans and their allies.

Contrast the socio-legal background of same-sex unions. For most of the twentieth century, lesbian and gay people were outlaws, potential felons on the basis of their consensual activities and social outcasts if their identities were revealed. Even after gay rights activists initiated a serious politics of recognition following Stonewall (1969),[42] the focus of legal reform remained fixed on the repeal of sex crime laws and the enactment of anti-discrimination laws, not on state recognition of same-sex relationships. Gay rights leaders all but abandoned same-sex marriage as an issue in the 1980s, even before the Supreme Court announced a gay-hostile constitutional baseline. In *Bowers v. Hardwick*,[43] the Court ruled that the state could make "homosexual sodomy" between consenting adults a criminal felony.[44] *Hardwick* is the gay parallel to *Plessy*, or even to *Scott v. Sanford*,[45] where the Supreme Court held that African Americans could not be U.S. citizens.[46] Just as *Plessy* accepted an apartheid, where people of color were physically

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[41] See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 947-1049 (1995) for an excellent collection of the historical evidence recounted in text– and a controversial thesis that segregation was contrary to the original expectations of the Fourteenth Amendment ratifiers.

[42] *See* Cox, *supra* note 39, at 1033-34 (acknowledging the universal recognition of the riots at Stonewall on June 27, 1969, as "the ignition point for the modern lesbian and gay civil rights movement").

[43] 478 U.S. 186 (1986).

[44] *See id.* at 188-89, 196.

[45] 60 U.S. 393 (1857).

[46] *Id.* at 404-05.

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separated from white people, so *Hardwick* accepted an apartheid of the closet, where gay people were psychically separated from straight people.

Socially, politically, and even constitutionally, *Baker* bears a closer kinship to *Brown v. Board of Education.*[47] *Baker* is like *Brown* just as *Hardwick* is like *Plessy.* Like *Brown*, and unlike *Plessy*, *Baker* reflected an advancement of gay people's politics of recognition, from the outlaw status reflected in *Hardwick*, to the status of substantially equal citizens before the law. Like *Brown I*, which insisted on functional, as well as formal, equality for blacks, *Baker* required functional as well as formal equality for gays. But, like *Brown II*, which allowed the political system the opportunity to create a regime of equal benefits for black schoolchildren, *Baker* gave the political system the opportunity to create a regime of equal rights for same-sex couples. The Vermont legislative response, the civil unions law, came much more rapidly than the response of southern states and school districts in the wake of *Brown.*

B. Substantial Equality of Civil Unions and Marriage for Serving the Purposes of Committed Couples

Plessy ratified a regime that took away rights from people of color that many of them wanted to have, such as the right to ride in the railroad car of their choice. A later case, *Cumming v. Richmond County Board of Education,*[48] extended *Plessy* to public education, and denied black families choice as to schooling as well.[49] Although these cases announced a constitutional rule of separate but equal, there is no doubt that separate rarely meant anything close to equal, especially in the context of public schools: the schools for black children were greatly under-funded, and in practice there was gross inequality in the education provided the different classes of citizens.

Contrast *Baker*, which insisted that same-sex couples wanting state recognition be given the same benefits and rights as different-sex couples who want state recognition. Following *Baker*, the civil unions law gives civil-unioned partners a variety of state-supported

[47] 347 U.S. 483, 492-96 (1954) (Brown I) (concluding "that in the field of public education the doctrine of 'separate but equal' has no place"); 349 U.S. 294, 294-301 (1955) (Brown II) (requiring that the parties to the action be admitted to the schools at issue "with all deliberate speed").

[48] 175 U.S. 528 (1899).

[49] *See id.* at 542-45.

rights and benefits that they did not have before the law was adopted, including the rights to:

1. receive maintenance and support from their partners;[50]

2. access to state courts and rules for division of property[51] and child custody upon divorce,[52] as well as for remediation of spousal abuse;[53]

3. priority of inheritance if their partners die without wills, as well as legal capacity to hold property as tenants in the entirety;[54]

4. bring lawsuits for wrongful death of partners, and seek damages for loss of consortium and emotional distress;[55]

5. visitation and notification when their partners are hospitalized;[56]

6. make or revoke anatomical gifts by partners;[57]

7. the joint care and parenthood of children born to one of the partners during the union;[58]

8. adopt children jointly with their partners, or adopt the children their partners bring to the union;[59]

9. be free of discrimination on the basis of being married;[60]

10. victim's and workers' compensation benefits as a family unit;[61]

11. family leave and public assistance benefits under state law;[62]

12. immunity from testifying against their partners, if they choose to invoke it;[63]

13. equal treatment as married couples under state and local tax laws;[64]

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[50] VT. STAT. ANN. tit. 15, § 1204(d) (1991).
[51] *Id.* § 1204(d).
[52] *Id.*
[53] *Id.* § 1204(e)(6).
[54] *Id.* § 1204(e)(1), (3).
[55] *Id.* § 1204(e)(2).
[56] *Id.* § 1204(e)(10).
[57] *Id.* § 1204(e)(19).
[58] *Id.* § 1204(f).
[59] *Id.* § 1204(e)(4).
[60] *Id.* § 1204(e)(7).
[61] *Id.* § 1204(e)(8)-(9).
[62] *Id.* § 1204(e)(12)-(13).
[63] *Id.* § 1240(e)(15).
[64] *Id.* §§ 1204(e)(14), 1204(e)(16).

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and so forth. This is a long list of rights and benefits, and I could have made it longer. Moreover, these rights and benefits of civil unions narrow, and for some couples will eliminate, the gap between rights accorded married different-sex couples and those of unioned same-sex couples.

Family law scholar David Chambers has organized the cluster of state-sanctioned benefits and rights of being married in a helpful way.[65] Some state regulations, such as the first six in my list above, require private parties to respect or be accountable to the emotional unity of the married or unioned couple. These *emotional unity* rules[66] create a presumption that each partner acts for the well-being of the other partner. Such rules can sometimes be achieved through wills, powers of attorney, and negotiations with third parties, but special state laws make it easier for married or unioned partners to take it for granted that hospitals, blood relatives, employers, and even one another will treat each as the family of the other. Other regulations, such as the next two in my list, relate to *parental rights*,[67] or the ability of both partners to adopt children and to be considered parents of children born to either of them during the course of their marriage or civil union. The parental rights regulations, which vary widely among the states, would usually be more useful for lesbian and gay couples than straight couples, because the former can have children together only by adoption or by a legal presumption for children born within the relationship. The last five items on the list above, as well as the first item, are regulations whereby the state will treat the married or unioned partners as an *economic unit*[68] for purposes of their own internal accounting, their commercial dealings with third parties, and their obligations (taxes) to the state.

However one categorizes the array of rights and benefits that accrue to both married and unioned couples in Vermont, their overall purpose is a classic liberal one, "a facilitating function–offering couples opportunities to shape satisfying lives as formal equals and as they, rather than the state, see fit."[69] Within the

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[65] David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 454-85 (1996). Chambers' article does not focus on Vermont, but the large majority of his generalizations would apply just as well to that state as to others. My textual discussion changes his categorizations in ways that I find productive, but that he may not.

[66] *See id.* at 454-61 (describing regulations that recognize emotional attachments, which "can best be seen as facilitators of the affective aspects of couples' relationships").

[67] *See id.* at 461-70.

[68] *See id.* at 470-85.

[69] *Id.* at 454.

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confines of Vermont law, the civil unions statute has not only conferred rights and benefits that are the same as those conferred by state law on married couples, but those rights and benefits subserve the classical goal of liberalism, facilitating people's abilities to structure their committed relationships. This full formal equality within Vermont contrasts with formal inequalities introduced by federal law and by the laws of other states if they do not recognize civil unions, and with functional inequalities created by social hostility to same-sex unions.

C. Civil Unions and Liberal Values

A final difference between the separate-but-grossly-unequal regime of apartheid and the separate-but-substantially-equal regime of civil unions is that the latter seeks to, and probably will, advance liberal values. Segregation of the races in railroad cars and public schools was part of the larger social program of *apartheid.* The massive separation of the races in all avenues of public life—drinking fountains, swimming pools, colleges, restaurants, restrooms, hotels, workplaces—had the intended effect of inculcating what we today would consider racist values. Most of the people who grew up under apartheid harbored irrational beliefs (e.g., that human beings of African ancestry were materially different from human beings of European ancestry) and accepted the social as well as political subordination of minority races as natural. The acceptance of irrational stereotypes and social subordination both reflected and generated deep and complex racial prejudices.[70] The dismantling of legal apartheid has not ended racial prejudice, stereotypes, or social subordination, but social science surveys suggest that this move has helped ameliorate all three. Surveys of white people over the latter half of the twentieth century—the period when *de jure* segregation ended and *de facto* segregation eroded—demonstrate that the popularity of negative stereotypes about people of color has plummeted and that their material status has improved (both absolutely and *vis-à-vis* whites) and suggest that whites have more positive feelings and less inclination to discriminate against blacks than they did before

[70] Social scientists separate the emotive component, *prejudice*, from the cognitive component, *stereotyping*, of category-based reactions. *See, e.g.*, Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY, ch. 25 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

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Brown.[71] While these surveys need to be read critically,[72] even the critics believe that progress has been made and that white people harbor diminished prejudice-based attitudes, believe fewer stereotypes, and discriminate against people of color less deliberately in 2000 than they did in 1950.[73]

With a few exceptions, most scholars praise *Brown* not only for moving the law in a liberal direction, but also for contributing to a socio-legal regime where liberal values of rationality, mutual respect, and tolerance among black and white people could flourish.[74] One way that *Brown* contributed to liberal values was by facilitating, and later being read to require, racial integration. Social psychologists have formed a consensus that the best strategy for ameliorating prejudice is cooperation between in-group and out-group members, working on an equal status basis in pursuit of common goals.[75] If the state itself refuses to discriminate, its tolerant policy will create many opportunities for this kind of cooperation among soldiers, teachers and students, researchers, and ordinary bureaucrats working together and with private actors to accomplish routine state goals. If the state can also reduce

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[71] *See, e.g.*, John F. Dovidio & Samuel L. Gaertner, *Prejudice, Discrimination, and Racism: Historical Trends and Contemporary Approaches*, *in* PREJUDICE, DISCRIMINATION, AND RACISM 1, 4-12 (John F. Dovidio & Samuel L. Gaertner, eds. 1986). The data does not help us much in understanding how much of this progress was due to state anti-discrimination policies and how much to other social trends.

[72] *See, e.g.*, John B. McConahay et al., *Has Racism Declined in America?*, 25 J. CONFLICT RES. 563, 578-79 (1981) (concluding that white respondents often answer questionnaires to appear more egalitarian than they actually are); *see also* Dovidio & Gaertner, *supra* note 71, at 8 (acknowledging that "these figures may overestimate the degree to which white America has truly reversed its disaffection for blacks and other minorities" and "may be more superficial than real").

[73] *See* ROY L. BROOKS, RETHINKING THE AMERICAN RACE PROBLEM 37 (1990) (stating that, notwithstanding decades of progress, the median black family income is only fifty-seven percent of that for a similar white family); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1619, 1656-57 (1991) (advocating a new Title VII paradigm based on the fact that attitudes prevalent in the 1960s have changed substantially).

[74] The socio-political impact of *Brown* in either the short- or long-term remains controversial. *Compare* Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991) (reporting doubt about any impact), *with* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1-31 (arguing that there was a significant impact).

[75] GORDON W. ALLPORT, THE NATURE OF PREJUDICE 250-67 (1958). For empirical testing substantially confirming Allport's insight, see, for example, Yehuda Amir, *The Role of Inter-Group Contact in Change of Prejudice and Ethnic Relations*, *in* TOWARDS THE ELIMINATION OF RACISM 245-94 (Phyllis A. Katz ed., 1976); Gregory M. Herek & John P. Capitanio, "*Some of My Best Friends:" Intergroup Contact, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*," 23 PERSONALITY & SOC. PSYCHOL. BULL. 412 (1995); Norman Miller et al., *Cooperative Interaction in Desegregated Settings: A Laboratory Analogue*, 41 J. SOC. ISSUES 63, 63-79 (1985).

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discrimination by private employers and public accommodations through anti-discrimination laws and the like, it can have an even bigger impact. Not only does inter-group cooperation contribute to better understanding about out-group members, but it more importantly fosters feelings of empathy for out-group members. The former reduces stereotyping, the latter ameliorates prejudice.

In this respect, too, *Baker* is much more like *Brown* than like *Plessy*. With the addition of the civil unions law, Vermont's regulatory regime is one where liberal values of rationality, mutual respect, and tolerance among gay and straight people can flourish. At the dawn of the millennium, Vermont not only conducts its public business without discrimination on the basis of sexual orientation, but requires private employers, public accommodations, and schools to do the same. Like other states, Vermont takes a strong legal stand against hate crimes, enhancing the penalties for offenses motivated by race-, sex-, or sexuality-based prejudice.[76] It is the only state to have adopted statutes explicitly allowing same-sex partners to adopt one another's children and recognizing same-sex unions. Not surprisingly, Vermont has one of the lowest levels of anti-gay violence and discrimination in the United States.

Theories of prejudice suggest how Vermont's newest move, same-sex unions, will contribute to the rational and tolerant society of that state in a way that anti-discrimination laws do not. Anti-gay prejudice is among the deepest in American society, and stereotypes about gay people among the most outlandish. There is some social science support for the proposition that prejudice is most intense when in-group people view the out-group as challenging the in-group's cherished norms and values.[77]

III. THE TENSION BETWEEN RIGHTS AND REMEDIES: EQUALITY PRACTICE

Given the substantial equality assured by the civil unions law and its positive contribution to a minority group's politics of recognition, analogies to *Plessy* and racial apartheid are inapt if not ridiculous. A more apt critique would start instead with *Loving*, which invalidated laws barring different-race marriages. Assume

[76] VT. STAT. ANN. tit. 13, § 1455. Similar state laws including antigay prejudice in their penalty enhancements are collected in William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEO. L. REV. 641, 661-72, app. II (2000).

[77] *See generally* T.F. Pettigrew & R.W. Meertens, *Subtle and Blatant Prejudice in Western Europe*, 25 EUR. J. SOC. PSYCHOL. 57 (1992).

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that Virginia had responded to *Loving* by passing a law creating a new institution of civil unions just for different-race couples, and that Virginia justified the new law on grounds of "due respect for tradition and long-standing social institutions," which in Virginia had never recognized different-race couples as civilly married. Would that new law have satisfied the liberal standard of equality? It would have been more defensible than the previous one, which had imposed criminal sanctions on offending couples such as the Lovings and had been bottomed on the goal of preserving the purity of the white race and of "White Supremacy" generally. But would substantial equality—the same benefits and duties but a different name and possibly less portability—have been acceptable? Reasonable minds might disagree, but I think my hypothetical legislative response would have been and should have been unacceptable in 1967. The uneasy parallel between my hypothetical legislative response to *Loving* and the actual response to *Baker* suggests that the liberal should, ultimately, be disappointed with the civil unions law.

But should the liberal have voted against the civil unions law? The answer to that, it seems to me, is no. The liberal should have supported the law and the liberal's disappointment should be mixed with satisfaction and a sense of achievement. If the civil unions law is not equality, it is at least *equality practice.* Full equality ought to be the goal for a liberal polity, but a polity which is a democracy and whose citizens have heterogeneous views about important matters is one where immediate full equality is not always possible, not practical, not even desirable. In this final part, I want to point out a problem inherent in liberal democracy, namely, the tension between liberal rights and pragmatic remedies. There are a number of ways to handle this tension. Although most liberal theorists are not aware of it, or ignore it, I urge liberals to consider this lesson of lesbian and gay experience: the process by which equal rights and respect are achieved is one that is incremental and dialogic. The idea of *equality practice,* suggested by lesbian and gay coming-out stories, suggests a *pragmatics* that ought to be incorporated in real-world liberalism.

A. Strategic Compromise of Liberal Principles in a Heterogeneous Democracy

Representative Tom Little, the chief architect of the civil unions law, defended the compromise to his committee: "Leadership

untempered by a practical assessment of the world we live in is not sound leadership. What is achievable in this general assembly and this body politic, is a broad civil rights bill and, speaking for myself, that does not cross the threshold of marriage."[78] His stance was both humane and politically shrewd. Among the choices confronting Representative Little's committee were the following:

A. amend the marriage law to include same-sex couples

B. create a parallel institution for same-sex couples, with all or many of the same rights and benefits of marriage

C. do nothing, or as little as possible.

In my view, a majority of the committee, after listening to the testimony, was at least theoretically open to option A. Yet, in February 2000, the committee voted 8-3 to pursue option B, and reported a bill embodying option B by a 10-1 vote in March. In the short term, this was not only rational from their point of view, but rational from the perspective of a liberal gay person, such as Representative Lippert (the vice-chair of the committee), who favored same-sex marriage.

I assume that Representative Little's own preferences were fully liberal and that he personally favored option A. Voting without consideration of views outside his committee, he would have proposed option A. But, in politics, as in life, people vote *strategically*—that is, they take account of other people's reactions and vote for the option that when others have acted will best accord with their preferences.[79] In February, Representative Little knew that most Vermonters favored option C, that a large majority of his House favored either option C or option B, and that Governor Howard Dean favored option B and might have vetoed option A. In the short term, if the committee chair had mobilized a bare majority of the committee to report a same-sex marriage bill—as Representative Little could probably have done—Vermont would have ended up with option C: an option A bill would have been defeated. Every member of the committee was strongly opposed to option C, yet that is what they would have ended up with if the committee had pursued its preferred option. The best *is* sometimes the enemy of the good.

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[78] *See* Transcript of Hearing, *supra* note 5.

[79] Strategic behavior is explained in WILLIAM H. RIKER & PETER C. ORDESHOOK, AN INTRODUCTION TO POSITIVE POLITICAL THEORY 1-7 (1973), and is applied to courts as well as legislatures in, for example, *Symposium: Positive Political Theory and Public Law*, 80 GEO. L.J. 457 (1992).

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Representative Little could have pursued another strategy, of course: he could have gotten the committee to report option A, but with option B as a fallback. This strategy would have had the advantage of revealing to his colleagues outside the committee how strongly impressed the committee members were by the testimony they heard. Some minds might have been changed, but even if the chamber defeated the committee's proposal it could still have voted for option B, the next best choice. This alternative strategy would not have been a good one, however, and it might have been disastrous. The House debates were anguished enough when only option B was before its members; forcing the representatives to confront option A would have required them to make a harder choice—between full equality and the wrath of the electorate. Faced with the worst array of choices, some House members might have blamed the committee and fallen back on option C instead. The abstract liberal flourishes on making hard choices, the liberal in politics dies by them.

Giving the House option A, with a fallback option B, would not have improved the odds of option A being adopted, would have posed some risk of ending up with option C, and, most importantly, would have assured that the next legislature would have been filled with a lot more supporters of option C. The legislature's choice of civil unions, option B, was controversial enough. Four of eight Republican House members targeted for voting in favor of civil unions were defeated in the September twelfth Republican primary; Representative Little himself won only sixty percent of the vote against a political unknown. One state senator was knocked off in the primary for his support of same-sex unions. Democratic Governor Dean found himself locked in an intense battle for reelection against a Republican whose main issue was the governor's support for "homosexual marriage." Little, Dean, and others who supported the civil unions law had the credible response that they supported a compromise, the least that the Vermont Supreme Court would have found acceptable, and not quite the same thing as "gay marriage."[80] Legislative adoption of same-sex marriage might have polarized the electorate and yielded a traditionalist backlash even more than civil unions have done. In

[80] This was ultimately a successful strategy. In the November 2000 election, Governor Dean was reelected by wide margin against two opponents (one of whom supported the civil unions law), Democrats won the other statewide offices and retained control of the Senate, and the main Republican winner, Senator Jeffords, was a strong supporter of civil unions. More conservative Republicans gained control of the state House, however.

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that event, not only would the next legislature and governor have been able to repeal the civil unions law, but they might have had enough votes to propose a constitutional amendment overriding *Baker*. In this nightmare scenario, pushing for option A, the best choice, would not only have resulted in option C, the worst choice, but would have run the risk of hard-wiring option C into Vermont constitutional law.

The nightmare scenario is also the reason the Vermont Supreme Court pulled its punches in *Baker*. The justices on that court were aware of the fate of earlier same-sex marriage rulings in other states. In 1993, the Hawaii Supreme Court held that the state bar to recognition of same-sex marriages was sex discrimination under the state constitution, and a trial court on remand ruled that the state had not justified the discrimination, leaving it unconstitutional.[81] An Alaska trial judge found his state's same-sex marriage bar unconstitutional as well.[82] In November 1998, voters in both states overrode the court decisions by adopting amendments to their state constitutions that encoded different-sex marriage as the constitutional, as well as statutory, norm. More than two-thirds of the voters in both liberal Democratic Hawaii and libertarian Republican Alaska supported the overrides. Enforcing liberal constitutional principles, judges in both states had required option A—and the electoral backlash not only insisted on option C but took option A off the judicial and legislative agendas for the foreseeable future. Aware of this background, the *Baker* court hedged its constitutional ruling, leaving the legislature free to choose option B, which would stand a greater chance of political survival.

Dissenting from this compromise, Justice Johnson invoked the liberal principle she found in the U.S. Supreme Court's anti-apartheid case law, "'that constitutional rights may not be denied simply because of hostility to their assertion or exercise.'"[83] I admire her principled opinion, but as a scholarly liberal, I must concede that the desegregation cases carry a more ambiguous message. The cases from the beginning displayed a sharp disconnection between liberal rights and practical remedies. For example, Chief Justice Warren's opinion in *Brown I* was a

[81] Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), *reh'g granted in part*, 875 P.2d 225 (Hawaii 1993), *on remand to* Baehr v. Miike, 1996 WL 694235 (Haw. Cir. Ct. 1996), *aff'd*, 950 P.2d 1234 (Hawaii 1997).

[82] Brause v. Bureau of Vital Statistics, 1998 WL 88743 (Alaska Sup. Ct. Feb. 1998).

[83] Baker v. State, 744 A.2d 864, 902 (Vt. 1999) (quoting Watson v. City of Memphis, 373 U.S. 526, 535 (1963)).

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potentially far-reaching statement of liberal principle: the public school system cannot discriminate on the basis of race. But this was immediately followed by *Brown II*, which required political process free to remedy the constitutional violation, but "with all deliberate speed."[84] District judges in the south required very little actual desegregation until the late 1960s, when federal legislative action and the futility of local compliance led the Supreme Court to require more intrusive remedies. In the desegregation cases, judges at all levels were playing a less aggressive strategic game than Representative Little and the *Baker* court: the judges were settling for option C (doing nothing) until they felt political conditions were receptive—and then judges often settled for option B (partial integration), rather than option A (full racial integration).

Even the Supreme Court's rejection of different-race marriage bars in *Loving* reflects the power of strategic calculations to delay the implementation of unquestionably correct liberal rights. The openly racist Virginia statute first came to the Court in 1955, right after *Brown*. The Court remanded the case to the state court to reconsider its holding.[85] The Virginia Supreme Court reaffirmed the validity of the statute, which was supported by traditionalist fears of a "mongrel race" and other consequences of different-race marriage; this had been a decidedly illiberal justification, but the United States Supreme Court in 1956 dismissed the appeal from that ruling.[86] Some liberals were appalled by the Court's action, because it was not only unprincipled, but was a retreat from the greatest principle the Court had ever announced: anti-apartheid. Defenders of the Court maintained that dodging the different-race marriage issue in 1956 was necessary to protect the result in *Brown*.[87] Southern racists were mad enough about the threat of school desegregation; they were virtually hysterical at the prospect of different-race marriage, and their prejudice was shared by many northerners and people of color. To preserve option B (*Brown II*), the Court was willing to postpone enforcement of option A for more than a decade (*Loving*), at which point half the states with miscegenation statutes had repealed them.

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[84] *See* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

[85] Naim v. Naim, 350 U.S. 891 (1955), *remanded to* 90 S.E.2d 849 (Va. 1956).

[86] Naim v. Naim, 90 S.E.2d. 849 (Va.), *appeal denied*, 350 U.S. 985 (1956).

[87] *See* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, *in* THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW cx (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

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There is a broader lesson for the modern state: its constitution may promise liberal rights that its political system cannot immediately deliver and that its judiciary dare not insist upon. Different-race marriage was such a right in the 1950s and 1960s, and same-sex marriage is such a right today. That the political and judicial system cannot practically implement such rights immediately does not mean that they are entirely empty. Justice delayed is not always justice denied. Sometimes rights come on little cat's feet.

B. Equality Practice: A Pragmatic Implementation of Liberal Equality

Gaylegal experience in both the United States and other countries provides some support for the foregoing analysis, at least as a descriptive matter. As Professor Kees Waaldjik has argued, comparative law information provides insight into the movement toward same-sex marriage in general and in his country, The Netherlands, whose Parliament just passed a same-sex marriage law.[88] One lesson Professor Waaldjik and I would draw from the experience of same-sex marriage, or union recognition, in other countries is that legal recognition of same-sex marriage comes through a step-by-step process. Such a process is *sequential* and *incremental*: it proceeds by little steps taken in a particular order. Registered partnership or civil union-type laws have not been adopted until a particular country has first decriminalized consensual sodomy and equalized the age of consent for homosexual and heterosexual intercourse, then has adopted laws prohibiting employment and other kinds of discrimination against gay people, and, finally, has provided other kinds of more limited state recognition for same-sex relationships, such as giving legal benefits to or enforcing legal obligations on cohabiting same-sex couples.[89] That The Netherlands is on the brink of recognizing same-sex marriages was facilitated by its prior recognition of, and successful experience with, registered partnerships.

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[88] *See* KEES WAALDIJK, SMALL CHANGE: HOW THE ROAD TO SAME-SEX MARRIAGE GOT PAVED IN THE NETHERLANDS, *in* LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW (Robert Wintemute & Mads Andenaes eds., forthcoming from Oxford Univ. Press 2001).

[89] *See* Eskridge, supra note 76 (tabulating gay-equality measures in various countries and various states of this country and showing that there is a sequential progression toward state recognition of same-sex unions).

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The recurrence of the pattern suggests this paradox: law cannot liberalize unless public opinion moves, but public attitudes can be influenced by changes in the law. For gay rights, the impasse suggested by this paradox can be ameliorated or broken if the proponents of reform move step by step along a continuum of little reforms. There are pragmatic reasons why such a step-by-step process can break the impasse: it permits gradual adjustment of antigay mindsets, slowly empowers gay rights advocates, and can discredit antigay arguments. The step-by-step approach to achieving the liberal goal of full equality that is suggested by the American pragmatist tradition in philosophy and by our experience with the race cases (*Loving*) also finds support in gay experience.

Coming out of the closet to one's friends and family has in the last two generations been the defining moment, or cluster of moments, for many lesbians and gay men. Coming out is an expression of identity and an association of the individual with the gay community, but it is also an invitation to equal treatment: you have been my parent/friend/coworker, and I want you to continue to be my parent/friend/coworker now that you know more about me. This is an invitation sometimes declined and sometimes accepted unconditionally. Most often, however, the invitation is accepted with conditions, such as a tacit insistence that the lesbian or gay person be discreet in her discussions of sexuality.[90] The conditions themselves may change over time, as the parent/friend/coworker becomes accustomed to the lesbian or gay person's identity, and as she or he talks about the issues that coming out raises. Is it unprincipled for the open lesbian or gay person to trim her openness in order to accommodate the needs of other persons? In my view, no. Even for most of us who would prefer completely equal treatment as an aspiration ought to settle for conditional equality out of humane respect for other people's feelings. Especially when loved ones are willing to accommodate our identities as gay people, we ought to accommodate their identities as gay-ambivalent people. For many, this accommodation becomes a permanent compromise of equal treatment. But it need not be.

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[90] *See* Rodney Christopher, *Explaining It to Dad, in* BOYS LIKE US: GAY WRITERS TELL THEIR COMING OUT STORIES 302-11 (Patrick Merla ed., 1996) [hereinafter BOYS LIKE US]. For other examples of accommodation, see William Sterling Walker, *January 18, 1989, in id.* at 293-301, relating a mother's acceptance of her son's homosexuality, and also her insistence that he not share food with his nieces and nephews; Ron Caldwell, *Out-Takes, in id.* at 270, relating the author's agreement not to tell his brother about his homosexual identification until the latter graduates from high school.

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Philip Bockman's short story, *Fishing Practice*, recounts the shock his disclosure yielded for his parents. His father, who was the first to know, implored the author to soften the blow of disclosure to his ill mother by agreeing to see a psychiatrist. Bockman agreed to do this (the psychiatrist turned out to be a "friend of Dorothy"). That he was seeking professional help made it easier for his parents to deal with this new knowledge, and each parent privately expressed continued love, but not yet comfortableness in talking about the subject.

> Once, I expressed my frustration to my father about "the silent treatment." "We're trying," he explained. "Please give us time." He smiled, and I was reminded of an incident from my childhood, at about the age of six. He had taken me fishing. He hauled in one fish after the other, while I caught none. At the end of the day, I burst out crying. Kneeling beside me, he told me gently, "Don't be too sad. Remember, it takes a long time to get good at something. Be patient. Don't think of today as fishing, just think of it as fishing practice."[91]

After several years, Bockman brought his lover home to meet his parents, who welcomed the friend but still did not feel comfortable talking about homosexuality.[92] Still later, after his mother's death, the author found his father positively affirming and finally willing to talk.[93] Bockman's coming out of the closet with his family occurred over a period of discursive time, not in an instant road-to-Damascus revelation.

The same fishing-practice dynamics are needed for a political culture, even an aspirationally liberal one, to come to terms with new identity knowledge. The dynamics of gradual racial integration, step-by-step advancement of gay rights, and the process leading up to Vermont's civil unions law is what I call *equality practice*. Like liberal rights themselves, this is an aspiration that may or may not be realized: equality practice that moves too swiftly, as same-sex marriage apparently did in Hawaii and Alaska, may yield a counterproductive backlash, but one that moves too slowly risks entrenching a grating inequality. In my liberal view, Vermont got it right, but the views that really count are those of Vermonters themselves. And those views are still being formed.

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[91] Philip Bockman, *Fishing Practice*, *in* BOYS LIKE US, *supra* note 90, at 80.
[92] *See id.*
[93] *See id.*

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C. Pragmatic Liberalism and the Conditions for Equality

Equality practice poses a normative problem for liberal theory. What stance *should* the liberal take toward the failure of the political system to remedy a denial of rights? One approach is the liberal pragmatism of Judge Richard Posner.[94] He takes private attitudes and prejudices as a limit on the ability of law to implement liberal rights and urges the liberal to wait until those attitudes change. This stance ought not be attractive to most liberals, because it is too ready to sacrifice rights and because remediation is too conflict-laden. Also, Posner's particular theory is too passive as to private illiberal attitudes: not only does the state often bear some responsibility for such attitudes, but the state can affect those attitudes and, more important, can influence the kinds of arguments that are acceptable in public debate. The liberal idea of public reason insists that the state deem certain kinds of arguments out of bounds, and gaylegal experience suggests that this is not an impractical aspiration. Given the experience in Vermont and the comparative law survey in Part III, there can be little doubt that state insistence on public reason as a condition of debate has an effect on the conduct of the debate. Notwithstanding the perseverance of private homophobia or anxiety, countries adopting equality measures have seen a shift in public discourse about lesbian and gay relationships and have been increasingly willing to recognize them legally.

The opposite stance would be disavowal: equality practice may be inevitable and even admirable in some ways, but is not defensible under liberal premises. Recall Chief Justice Amestoy's opinion in *Baker*, which defied exclusionary tradition when it articulated a constitutional right for same-sex couples, but then invoked that tradition in fashioning a remedy.[95] One could plausibly reject this deployment of tradition as incoherent with liberal principles, and comfortably conclude that the court's equality practice is a great advance in the direction of liberal equality but must be faulted for not going all the way. Initially, I must object that this is an

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[94] *See* Richard Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1585-86 (1997) (reviewing WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE (1996)).

[95] *Compare* Baker v. State, 744 A.2d 864, 885-86 (Vt. 1999) (rejecting exclusionary tradition as a reason to deny the right), *with* POSNER, *supra* 94, at 887 (finding traditional attitudes not altogether irrelevant in fashioning a remedy), *and* DEBATING DEMOCRACY'S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY 117-25 (Anita L. Allen & Milton C. Regan, Jr. eds., 1998).

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idealized liberalism. Any liberal who insists that recognition of rights—such as the right to marry—proceed through the legal process has already accepted a delay between the existence of a liberal right and its implementation. The point of equality practice is that the more disconnected a right is from our specific legal traditions, as same-sex marriage is, the more time the legal process needs to effectuate it. In The Netherlands, it only took three years to move from registered partnership to same-sex marriage—faster than many court cases are heard in this country. In Vermont, the shift would certainly take much longer, and it might never come. Can a strict liberal accept a compromise that might never advance to full equality?

Probably not, but there is a liberal reason to consider a long gap between rights recognition and implementation, under certain circumstances. The fishing practice analogy in Bockman's story worked because all the participants were respectful of the other's perspectives and of the fact that the parents needed learning time to assimilate that perspective. Like the family dynamics in the story, public reason in state deliberations depends on reciprocity: all citizens and officials invoke public-regarding justifications with the understanding that each is giving up her own parochial justifications and is trying to learn from the other participants. The Vermont House Judiciary Committee deliberations met these conditions for public reason, for it was a heterogeneous group whose members studied the matter exhaustively and argued respectfully and reasonably.[96] Its conclusion was that the primary needs of lesbian and gay couples, including dignity and public respect, could be met by a new institution with the name civil union. There is no doubt that the committee not only considered but internalized the lesbian and gay perspective—including the fact that many lesbians and gay men do not want to be associated with the institution of "marriage" and its patriarchal baggage. Two of its three strongest supporters of same-sex marriage, Representatives Lippert and Hingtgen, voted for the civil unions bill when it was reported to the House and made passionate speeches for it on the House floor. Their motivations included not just respect for their colleagues and a judgment that civil unions were the closest they could come to marriage under the circumstances, but also the notion that the political process has a learning curve, to which civil unions in practice could contribute to.

[96] This is in contrast to the cursory and disrespectful deliberation surrounding DOMA.

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A liberal could reject the foregoing argument on the ground that the committee members compromised their commitment to public reason when they acquiesced in the illiberal attitudes of the rest of the legislature (recall the strategic analysis above). One could concede that equality practice advances the liberal project but is also an unprincipled sacrifice of public reason. If I am right about this, equality practice not only exposes a big gap between liberal aspiration and the likely operation of a political system, but also suggests a big problem with liberal theory, for it would then ignore the dynamics of public education. There is no sound justification for viewing public reason statically. A lesson of lesbian, gay, and bisexual experience is that coming out of the closet changes the circumstances of discourse and opens up the possibility of candid and equal conversation—but typically after a process of observation and learning.

There is a third way of evaluating equality practice, a *pragmatic liberalism*.[97] The goal of such a theory would be full equality for citizens in the strictest liberal sense, but with recognition that equality cannot be imposed upon and must be worked for within a political system of heterogeneous preferences. As Part I demonstrates, the same-sex marriage movement teaches us that process matters and that equality cannot be shoved down unwilling throats, especially by the judiciary. So liberalism in operation cannot ignore pragmatic features such as those entailed in equality practice. If a goal of liberalism is the inculcation of the values of tolerance and mutual respect, the way in which liberal projects are accomplished must be consistent with these values. For the judiciary, or the professorate, to tell traditionalist citizens that their time-tested family values count for *nothing* in the same-sex marriage debate is a time-tested path to political alienation or revolt. The genius of Vermont's equality practice is that the state insisted that traditional family values give way to the recognition of lesbian and gay rights, but lesbian and gay family values give way to accommodation of traditionalist anxieties for the time being. Once civil unions in action reveal to Vermonters that lesbian and gay relationships are serious and loving (and fraught with most of the same problems as marital unions), the state might be ripe for graduation from equality practice to equality, simpliciter.

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[97] Pragmatic liberalism has substantial affinity with the *minimalist liberalism* articulated by Richard Rorty, *A Defense of Minimalist Liberalism, in* DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY (Michael J. Sandel ed., 1996).

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SYMPOSIUM ON SEXUAL ORIENTATION: "FAMILY" AND THE POLITICAL LANDSCAPE FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE (LGBT)

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