BUT WHY NOT MARRIAGE: AN ESSAY ON VERMONT'S CIVIL UNIONS LAW, SAME-SEX MARRIAGE, AND SEPARATE BUT (UN)EQUAL

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How can I describe the immense respect that I feel for the members of the Vermont Legislature which enacted Public Act 91, "An Act Relating to Civil Unions," and for its Governor Howard Dean who signed it into law in April 2000, granting same-sex couples the right to enter into government-sponsored civil unions?[1] Despite threats from anti-marriage constituents that they would attempt to replace those legislators and the Governor who are seeking re-election in the November 2000 elections, these brave elected officials followed the command of the Vermont Supreme Court in *Baker v. State*[2] by developing a legislative system which would grant virtually all of the state rights, responsibilities, and protections of marriage to same-sex couples who enter into civil unions.[3] Too often in the past several years, elected officials have been unable or have refused to understand the harm they cause their sexual minority[4] constituents by passing statutes purporting[5] to restrict

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1. An Act Relating To Civil Unions, VT. STAT. ANN. tit. 15, § 1201-1207 (Supp. 2000).

2. Baker v. State, 10 Vt. L. Wk. 363, 744 A.2d 864 (1999).

3. VT. STAT. ANN. tit. 15, § 1204(a) states: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage." Section 1204(e)(1) provides a "nonexclusive list of legal benefits, protections and responsibilities of spouses," which apply to parties to a civil union, including laws relating to title, intestate succession or other incidents of the acquisition, ownership, or transfer of real or personal property; causes of action dependent on spousal status, including actions for wrongful death, emotional distress, and loss of consortium; probate law and procedure; adoption law and procedure; group insurance for state employees; spousal abuse programs; prohibitions against discrimination based on marital status; victims' and workers' compensation benefits; medical and terminal care; family leave and public assistance benefits; taxes other than estate taxes; immunity from compelled testimony and the marital communication privilege; homestead rights of surviving spouses; veterans loans; definitions of family farmer; anatomical gifts; state pay for military service; absentee ballots; rights to fish and hunt; assignment of wages; and rights with respect to a child of whom either party is a natural parent. Given the U.S. government's refusal to recognize marriage-like relationships like civil unions of same-sex couples for federal purposes, VT. STAT. ANN. tit. 32, § 7401 (Supp. 2000) explains that parties to a civil union will have to pay Vermont estate taxes based on their federal estate tax liability since the federal marital deduction would not be available. *See infra* Part III.B.

4. I use the term "sexual minority" throughout this essay to refer to lesbians, gay men, bisexuals, and transgendered persons. All of these individuals may enter into same-sex relationships and thus are impacted by restricting marriage to opposite-sex couples.

5. The constitutionality of these statutes has not been challenged yet. Thus, I refer to these statutes as legislative attempts to refuse recognition of marriages by same-sex couples, not laws that actually

marriage to opposite-sex couples and attempting to deny legal recognition of marriages by same-sex couples.[6] But the elected officials of Vermont, and by proxy the citizens of that state, were able to show a level of courage that has become particularly scarce in American political life.

As urged by Iowa Representative Ed Fallon, in his ringing denunciation of Iowa HF 2183 which was intended to refuse recognition of same-sex marriages in Iowa,[7] the Vermont Legislature and its Governor withstood the political pressure and carried out the Vermont Supreme Court's mandate. Perhaps some had read Fallon's stirring charge to elected officials facing this politically divisive issue:

> If you are weighing the political consequences of opposing this bill and find they are too heavy, I'd like you to think about the great moral changes that have occurred in this country over the past two hundred years. Ask yourself when you would have felt safe to speak in favor of the separation of the colonies from Great Britain? When would you have taken a public stand for the abolition of slavery? When would you have spoken in favor of women's suffrage? In the 1960s, when would you have joined Martin Luther King and others in calling for equal rights for African Americans? When would you

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achieve that result. For a discussion of the constitutionality of the Defense of Marriage Act (DOMA), see Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263 (1997); 142 Cong. Rec. S13359-61 (daily ed. June 6, 1996) (letter from Professor Laurence H. Tribe to Senator Kennedy); MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 127-58 (1997) [hereinafter LEGALLY WED]. *See also* articles cited in Edward H. Sadtler, Note, *A Right to Same-Sex Marriage Under International Law: Can It Be Vindicated in the United States?*, 40 VA. J. INT'L L. 405, 415 n.56 (1999).

6. *See* Defense of Marriage Act of 1996, 28 U.S.C. § 1738C (Supp. IV 1998) *and* 1 U.S.C. § 7 (Supp. V 1999) (28 U.S.C. § 1738C states that no state, territory, possession of the United States, or Indian tribe shall be required to give effect to any public act, record, or judicial proceeding concerning a relationship of same-sex couples that is "treated as a marriage . . . or a right or claim arising from such relationship." 1 U.S.C. § 7 states that, for all federal purposes, "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."). Additionally, thirty-three states have adopted laws restricting same-sex couples from marrying and/or refusing recognition of their marriages from other states. Seven additional states have anti-marriage bills pending. *See* Lambda Legal Defense and Education Fund, *State-by-State Anti-Marriage Measures*, *at* http://www.lambdalegal.org/cgi-bin/pages/states/antimarriage-map (last visited August 28, 2000). For the language of most of these statutes, see Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105, 134-151 (1996). Koppelman notes that some statutes indicate that marriage licenses may not be issued to persons of the same sex, but do not say anything about the effect of marriages celebrated elsewhere. Some other statutes are ambiguous in whether they claim to invalidate or not to reach extraterritorial marriages. *See id.* at 128-129. *See also infra* notes 131-33 and accompanying text.

7. Iowa passed its anti-marriage measure in 1998. *See* Lambda Legal Defense and Education Fund, *2000 Anti-Marriage Bills Status Report*, *at* http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=578 (last visited Aug. 28, 2000).

> have spoken out against restrictive marriage laws banning interracial marriages? . . .
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> We're elected not to follow but to lead. We're elected to cast what might sometimes be a difficult, challenging, and politically inexpedient vote. We're elected to represent our constituents when they're right, and to vote our consciences regardless of whether our constituents are right. And our conscience should be telling us to stand up for civil rights regardless of how unpopular it may appear.[8]

What happened in Vermont is something unexpected at this point in the movement toward civil rights for sexual minorities: an elected body withstood the threats and fears that come from supporting civil rights for same-sex couples. For countless sexual minorities in America, that vote by the Vermont Legislature and its Governor signing the bill into law changed the political landscape surrounding us. While some legislative victories have occurred in those states where discrimination against individuals on the basis of sexual orientation or HIV/AIDS status has been outlawed,[9] state-wide legislative victories have been rare when seeking rights for same-sex couples. Some states, municipalities, and other political subdivisions have enacted domestic partnership legislation over the past fifteen years,[10] but most victories have been in the courts following successful litigation in areas such as challenging restrictive family definitions[11] and recognizing parental rights.[12] These limited

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8. Representative Ed Fallon, *I Have Anguished*, *in* SAME SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 185 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997) [hereinafter THE MORAL AND LEGAL DEBATE].

9. *See* Lambda Legal Defense and Education Fund, *Summary of States Which Prohibit Discrimination Based on Sexual Orientation*, *at* http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=185 (last visited Aug. 28, 2000) (indicating that eleven states have anti-discrimination laws, all of which at least protect public and private employees from discrimination. The federal government and six additional states also prohibit sexual orientation discrimination against employees by Executive Order).

10. *See* Barbara J. Cox, *"The Little Project": From Alternative Families to Domestic Partnerships to Same-Sex Marriage*, 15 WIS. WOMEN'S L.J. 77 (2000) [hereinafter *Little Project*] (this is an introduction to the republication of my article, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation, and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1 (1986) in the Wisconsin Women's Law Journal's 15th Anniversary volume.) [hereinafter *Alternative Families*].

11. *See e.g.*, Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (defined "family" in a rent-control ordinance to include "two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence"); *In re* Guardianship of Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991) (finding a "family of affinity" between lesbian partners, and granting guardianship to Thompson to care for Kowalski).

12. *See e.g.*, *In re* H.S.H-K, 533 N.W.2d 419 (Wis. 1995) (recognizing visitation rights of a non-biological lesbian parent); *In re* the Adoption of Evan, 583 N.Y.S.2d 997 (Sur. Ct. 1992) (permitting second parent adoption by non-biological lesbian co-parent). *But see* Matter of Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) *and* Nancy S. v. Michelle G., 279 Cal. Rptr. 212 (Cal. Ct. App. 1991) (where both courts denied visitation rights to the non-biological lesbian parent); Barbara J. Cox, *Love Makes a*

legislative victories have been overshadowed in recent years by the legislation restricting marriage to opposite-sex couples passed by Congress and state legislatures and signed into law by the President and Governors.[13]

Here is a state-wide legislative victory that deserves applause. This law includes same-sex couples in civic society to an extent not seen before in this country. As of July 1, 2000, same-sex couples from inside and outside Vermont are able to obtain state-certified licenses of civil union. While the out-of-state and federal recognition of these licenses remains to be seen,[14] one thing is clear: Vermont citizens who enter into civil unions and remain in the state have gained virtually all the state-created rights and responsibilities given to married couples. Joining their counterparts in several countries,[15] these citizens can protect their relationships, receive state tax benefits (and burdens), must divorce to end their unions using the same courts used by opposite-sex couples to end their marriages, and are recognized by their state government as having relationships that have become visible to the civic eye. So why is this wonderful step forward so troubling? After working for years seeking legal rights for same-sex couples,[16] I had expected that this step would feel like a tremendous victory for those of us who oppose heterosexism in society. Clearly, the lives of those Vermont couples who have already entered into civil unions and those who plan to do so in the near future are immeasurably improved. Unquestionably, this combined judicial, legislative, and executive action provides "greater recognition of—and protection

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Family—Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families, VIII J.L. & POL. 5 (1991) (discussing these cases); WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 873 n.1 (2d ed. 1997) (citing numerous other cases).

13. Judge Richard Posner believes that legislatures, not courts, should be the ones that make decisions granting rights to same-sex couples. *See* Richard Posner, *Sex, Law, and Equality: Should There Be Homosexual Marriage, and If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1584 (1997) (book review of WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996)). *See also* David Orgon Coolidge, *Playing the Loving Card: Same-Sex Marriage and the Politics of Analogy*, 12 BYU J. PUB. L. 201, 228-29 (1998); Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 739-740 (1998). *But see* Mark Strasser, *Loving, Baehr, and the Right to Marry: On Legal Argumentation and Sophistical Rhetoric*, 24 NOVA L. REV. 769, 778-80 (2000); Nicholas Bala, *Symposium: Alternatives for Extending Spousal Status in Canada*, 17 CAN. J. FAM. L. 169, 171-72 (2000).

14. *See infra* Part III.

15. *See infra* Part I and sources cited therein; *see also* William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 663-70 (2000) (Appendix I describes the laws or cases in Belgium, Canada, Denmark, France, Greenland, Hungary, Iceland, Israel, Netherlands, Norway, South Africa, Spain, and Sweden, which all grant some or all of the rights of opposite-sex couples to same-sex couples).

16. *See Alternative Families*, *supra* note 10, at 1 n.1 (referring to my work on the Madison, Wisconsin Equal Opportunities Commission's Alternative Family Rights Task Force which began its work in 1983) and other articles cited herein.

for—same[-]sex relationships than has been recognized" by any other civic branches in U.S. history.[17] We should celebrate this hugely important step.

But I am reminded of testifying in 1996 before the California State Senate Judiciary Committee against A.B. 1982 (which was defeated five times in the legislature before being passed as Proposition 22 in the March 7, 2000 elections in California). Democratic opponents of the original bill proposed an amendment which would have accepted the proposed exclusion of same-sex couples from those whose marriages would be recognized under California's marriage validation statute in exchange for adoption of a comprehensive domestic partnership system for same-sex couples.[18] From my work on domestic partnership legislation elsewhere, I knew that vitally important benefits, protections, and responsibilities would be gained for same-sex couples by adoption of a state-wide statute. It was politically, morally, and ethically troublesome not to embrace this compromise knowing it would immediately improve hundreds of thousands, if not millions, of people's lives. But pride in my life as a lesbian and others in our community led me to conclude that such a politically motivated trade-off should be resisted.[19] This same pride and belief in the importance of gaining the freedom to marry for same-sex couples detracts from my excitement about the passage of the Vermont civil unions bill.

This same question arose during a symposium at Harvard University Law School in February 1999, when panelists were discussing whether to accept domestic partnership (no one was using the term civil union then) rather than marriage as a politically-expedient compromise that would assist same-sex couples in need of recognition and assistance by society.[20] In questioning this

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17. *See* Baker v. State, 10 Vt. L. Wk. 363, 372, 744 A.2d 864, 888 (1999).

18. That bill was intended to change over 130 years of settled California law recognizing out-of-state marriages by all couples who were prevented from marrying in California and restricting recognition to only those marriages entered into by opposite-sex couples. For a discussion of the California case law on recognizing out-of-state marriages, see Sandra Cavazos, Note, *Harmful to None: Why California Should Recognize Out-of-State Same-Sex Marriages Under Its Current Marital Choice of Law Rule*, 9 UCLA WOMEN'S L.J. 133 (1998).

19. I began writing this essay during gay pride weekend in San Diego, CA. The theme of San Diego Pride 2000 is "Open Hearts + Open Minds = Pride in Action."

20. *See* Linda S. Eckols, *The Marriage Mirage: The Personal and Social Identity Implications of Same-Gender Matrimony*, 5 MICH. J. GENDER & L. 353, 357 (1999). Eckols states: "I am concerned that moving too quickly on legalization of same-gender marriage disregards the feelings of a large segment of the American population and puts same-gender couples at risk. The more prudent, and, perhaps, wiser course of action is to acknowledge and accept the fears of opposite-gender couples, to encourage reflective discourse, to increase gradually the visibility of same-gender couples on a local, individual scale, and to foster support within the general public. Then, when same-gender marriage is legalized, the backlash out of fear and resentment will be minimized." *Id.* In response, I refer her to Martin Luther King, Jr., who explained that the greatest stumbling block in the movement for African-American freedom was the white moderate "who paternalistically believes he [or she] can set the timetable for another [person's] freedom; who lives by a mythical concept of time and who constantly advises the [African-American] to wait for a

strategy, I referred to the background research supporting *Brown v. Board of Education*.[21] Juan Williams, in his book *Eyes on the Prize*, discussed research by Psychologist Kenneth Clark that was used in the litigation supporting *Brown* and its companion lawsuits.[22] Clark tested sixteen African-American children in Clarendon County, South Carolina, ages six to nine. The children were given white dolls and black dolls, and all of the children were able to describe which doll was which. When asked questions by Clark, ten of the children indicated that they liked the white doll better, eleven added that the black doll looked "bad," and nine said the white doll looked "nice."[23] Seven of the sixteen children said they saw themselves as the white doll. Then Clark asked a final question—one that he said "really made me, even as a scientist, upset. . . . 'Now show me the doll that's most like you.'"[24] "Many of the children became emotionally upset when they had to identify with the doll they had rejected. These children saw themselves as inferior, and they accepted the inferiority as part of reality."[25] Clark found this result matched similar tests he had conducted throughout the South.[26] The studies showed that "the damage wrought by the mere existence of segregation causes inequality. Separate could never be equal, no matter how comparable the separate schools were."[27]

Explaining my concerns to the conference participants, I said I looked forward to a day when little children, playing dolls and marriage, would know of a world where two "girl" dolls or two "boy" dolls could marry each other, just as well as a "girl" doll could marry a "boy" doll.[28] Only then will we have

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'more convenient season.'" MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 84-85 (1964). *See also* 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 (1993-94).

21. Brown v. Board of Educ., 347 U.S. 483 (1954).

22. JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965 20-21 (1987).

23. *See id.* at 20.

24. *Id.*

25. *Id.*

26. *See id.*

27. *Id.* at 21.

28. I hesitated when I wrote this story because of my fear of feeding the homophobic fears of some who believe that gay men and lesbians prey on young children. *See e.g.*, Heather Stephenson, *Opponents Target November Election*, RUTLAND HERALD, July 5, 2000, *available at* http://www.rutlandherald.com/vtruling/novelection.html ("Adult sex with children is part of a gay 'manifesto.' Further legitimizing homosexuality is just going to put our children in harm's way." (quoting Steven Cable of Rutland, Vermont, organizer of Who Would Have Thought)). Despite such incredible ignorance, we need to be open about wanting gay children to grow up with role models that will help them be better adjusted to living in a predominantly heterosexual society. For a discussion of whether sexual orientation is a result of "nature" or "nurture" *see* Baehr v. Lewin, 852 P.2d 44, 69-70 (Haw. 1993)(Burns, J., concurring).

obtained the results that are possible from permitting same-sex couples to marry.[29]

This article is divided into three sections. Section one considers the positive results from the civil unions law. It recognizes that this legislation represents an important step along the path toward full recognition of same-sex couples by extending significant rights, benefits, and responsibilities beyond opposite-sex marriage.[30] With these benefits, however, come several problems. Section two places the civil unions law along side other examples of "separate but equal" restrictions in the race and sex contexts and considers it within the sexual orientation context. This section explains how government-sponsored segregation has always caused damage to both groups that are taught they must remain separate from one another. Section three discusses how separate can never be equal. It considers the issues of portability of civil unions and federal recognition of them. The essay concludes that, if these two vital aspects of marriage are not also characteristics of civil unions, then they truly are unequal. While we can view civil unions as an important step in the path of civil rights for sexual minorities, historically, steps which have included "separate but equal" have limited freedom, rather than promoted it.

I. POSITIVE RESULTS FROM CIVIL UNION BILL

Civil unions will become similar to the registered partnerships in European countries. Denmark (1989), Norway (1993), Greenland (1994), Sweden (1995), Iceland (1996), the Netherlands (1998), and France (1999) all recognize same-sex unions through some type of "registered partnerships."[31]

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29. I realize that, for many of our opponents on this issue, this dream is anathema to them. They consider this vision alone as reason enough to oppose marriage by same-sex couples, as may others who do not feel ill will toward gay men and lesbians, but do not embrace a world where it would be just as acceptable for their children to dream of a same-sex marriage as an opposite-sex marriage. But I do hope for exactly that possibility--where marriage is a term that includes same-sex couples as fully as opposite-sex couples.

30. Professor Greg Johnson raises this point citing VT. STAT. ANN. tit. 15, § 1204(b). *See generally* Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000).

31. *Little Project*, *supra* note 10, at 81. Additionally, the Czech Republic permits the survivor of a same-sex relationship to inherit their deceased partner's property if they have lived together for three years, and Hungary's Constitutional Court mandated the recognition of same-sex couples' relationships as common-law marriages. *Id. See also* Eskridge, *supra* note 15, at 663-70 (listing laws and cases from other countries recognizing same-sex couples); Edward Brumby, Note, *What Is In a Name: Why the European Same-sex Partnership Acts Create a Valid Marital Relationship*, 28 GA. J. INT'L & COMP. L. 145, 145 (1999); Wendy M. Schrama, *Registered Partnerships in the Netherlands*, 13 INT'L J.L. POL'Y & FAM. 315 (1999); Bala, *supra* note 13; Craig A. Sloane, Note, *A Rose by Any Other Name: Marriage and the Danish Registered Partnership Act*, 5 CARDOZO J. INT'L & COMP. L. 189 (1997). *See also* the website of the

Same-sex couples in those countries have their relationships recognized by their governments and have received most, but not all, of the rights and responsibilities of married couples. For example, couples in registered partnerships in Norway may not adopt children as a couple because "children should not be educated in homosexual relationships."[32] Additionally, at least as of 1996, no other European countries would recognize Norwegian partnerships, except Denmark and Sweden.[33] Vermont's civil union law has no such exception against the adoption of children, presumably because these adoptions were already permitted in Vermont before the civil union law was passed.[34] But like couples in "registered partnerships," same-sex couples who enter into civil unions in Vermont are unsure whether those unions will be recognized outside Vermont.[35]

Without question, much has been gained for same-sex couples who enter into civil unions. Same-sex couples who remain in Vermont are now entitled to "*all the same* benefits, protections and responsibilities under law, . . . as are granted to spouses in a marriage."[36] The range of these benefits, protections, and responsibilities underscores both the extent to which opposite-sex couples have been privileged in law and society, and the extent to which all same-sex couples need similar recognition. Additionally, the intangible results may be as important to many couples as the tangible ones. As one member of a same-sex couple explained:

> I went into it thinking this is not a real marriage. . . . Well, when the justice of the peace began to read the vows—"I Charles take you Frederic"—I began to cry. . . . We've been together 34 years. It

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International Lesbian and Gay Association at http:\\www.ilga.org, which has up-to-date information on the status of laws around the world recognizing same-sex couples' relationships including the status of the same-sex marriage bill recently passed by the Netherlands Legislature.

32. *Little Project*, *supra* note 10, at 87 (citing Marianne Roth, *The Norwegian Act on Registered Partnership for Homosexual Couples*, 35 U. LOUISVILLE J. FAM. L. 467, 467 (1996-97)).

33. *See Little Project*, *supra* note 10, at 87.

34. *See In re* B.L.V.B., 628 A.2d 1271 (Vt. 1993) (holding that a woman who was co-parenting the two children of her same-sex partner could adopt the children without terminating the natural mother's parental rights); VT. STAT. ANN. tit. 15A, § 1-102(b) (Supp. 2000) (allowing partner of biological parent to adopt if in child's best interest without reference to sex).

35. *See infra* Part III.A.

36. An Act Relating to Civil Unions, VT. STAT. ANN. tit. 15, § 1204(a) (Supp. 2000) (emphasis added). For a discussion of the potentially positive fiscal impact of permitting same-sex couples to enter into civil unions, *see* M.V. Lee Badgett, *Technical Report 98-1: The Fiscal Impact on the State of Vermont of Allowing Same-Sex Couples to Marry*, INST. FOR GAY & LESBIAN STRATEGIC STUDIES (Oct. 1998).

> wasn't like we needed this to cement our relationship. . . . But . . . I never thought we'd be able to say those words.[37]

Another member of a same-sex couple described the impact this way: "[We] knew its legal meaning [in California] . . . was murky, 'and we really weren't expecting it to have a huge emotional impact,' . . . . 'But it really did. It's like our relationship [of fifteen years] is real and validated in the eyes of the world, something that straight people take for granted. . . .'"[38]

Additionally, although preventing same-sex couples from marrying is usually based on conservative desires to preserve marriage's traditional opposite-sex definition,[39] the civil union bill also supports a more progressive challenge intended to end marriage's status as the only relationship that comes with legal and social rights and benefits. Similar to the Hawaii "reciprocal beneficiaries" bill before it,[40] Vermont's civil union law contains a "reciprocal beneficiaries" section which also provides rights and responsibilities to non-gay or lesbian couples who also do not fit the traditional definition of marriage. Section 29 of the bill provides "two persons who are blood-relatives or related by adoption the opportunity to establish a consensual reciprocal beneficiaries relationship so that they may receive the benefits and protections and be subject to the responsibilities that are granted to spouses in . . . specific areas," such as hospital visitation and decision-making, decision-making relating to anatomical gifts and disposition of remains,

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37. Carol Ness, *Couples Flock to Vermont, Only Legal Place to Get Hitched*, S.F. EXAMINER, Aug. 7, 2000, at A1 (Californian Chuck Kredensor's description of his reaction to his civil union ceremony with partner Fred Saunders).

38. *Id.*

39. *See, e.g.*, HAW. REV. STAT. § 572C-2 (Supp. 1999) (indicates that the Hawaii Legislature in passing its reciprocal beneficiaries law did so to preserve "the tradition of marriage as a unique social institution based upon the committed union of one man and one woman").

40. HAW. REV. STAT. § 572C. The law defines "reciprocal beneficiaries" as any two persons, 18 or older, not married or in another reciprocal beneficiaries' relationship, legally prohibited from getting married, who have declared themselves to be in such a relationship. HAW. REV. STAT. § 574C-4. The law's validity remains somewhat questionable given several ongoing challenges to its terms. *See* Dominick Vetri, *Almost Everything You Always Wanted to Know About Lesbians and Gay Men, Their Families, and the Law*, 26 S.U. L. REV. 1, 76 (1998). The benefits the law provides include (1) hospital visitation and medical decision-making, (2) the right to bring a wrongful death action, (3) intestate inheritance rights, and (4) the ability to hold property as tenants by the entirety. *Id.* at 55-56. *See also* W. Brian Burnette, Note, *Hawaii's Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same-Sex Marriage*, 37 BRANDEIS L.J. 81, 87-88 (1998-99) (while arguing that this legislation was the only "viable alternative" available to lesbian and gay couples following the constitutional amendment in Hawaii restricting marriage to opposite-sex couples, Burnette does note that this bill only includes three of the fourteen rights and benefits enjoyed by married couples but denied to same-sex couples under Hawaii law, as listed by the Hawaii Supreme Court in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)).

durable power of attorney for health care and terminal care documents, patient's and nursing home patient's bill of rights, and abuse prevention.[41]

Some commentators have argued that activists should not pursue marriage for same-sex couples.[42] They believe we must abolish marriage's privileged position in society and disconnect the benefits and rights given to those who enter such privileged relationships, rather than expanding marriage to include same-sex couples as well as opposite-sex couples.[43] By providing rights to any two people who are related by blood or adoption and who register as reciprocal beneficiaries, Vermont has taken a step toward eliminating the privileged position that both opposite- and same-sex couples now have in that state. While benefits remain restricted to two-person "couples," an emphasis on the sexual nature of that relationship has been diminished and a single person is able to join with a widowed parent, for example, and obtain recognition for their relationship and their own need for societal benefits.

I am glad to see this movement toward adopting "reciprocal beneficiaries" laws.[44] In an earlier article, I too raised concerns about society's inability to recognize diverse personal relationships.[45] In 1989, I challenged the then even more prevalent reality that families outside the traditional nuclear family definition were denied benefits and protections taken for granted by traditional families.[46] Based on my experience working with the Madison Equal Opportunities Commission's Task Force on

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41. An Act Relating to Civil Unions, VT. STAT. ANN. tit. 15, § 1201-1207 (Supp. 2000). This legislation is not as broad as Hawaii's reciprocal beneficiaries law, and thus may be less subject to challenge as that troubled legislation is in Hawaii.

42. *See* Paula Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107 (1996); Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not 'Dismantle the Legal Structure of Gender in Every Marriage'*, 79 VA. L. REV. 1535 (1993); Nancy Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U.J. GENDER SOC. POL'Y & L. 167 (2000) [hereinafter *Why Lesbians*]; RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 124-27 (1992); Steven K. Homer, *Against Marriage*, 29 HARV. C.R.-C.L. 505 (1993). *But see*, Barbara J. Cox, *The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy*, 33 CAL. W. L. REV. 155 (1997) (questioning the arguments raised by Ettelbrick and Polikoff); Wolfson, *supra* note 20 (challenging Polikoff's arguments); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT 51-85 (1996) (discussing the debate in sexual minority communities).

43. *See Why Lesbians*, *supra* note 42, at 173; Homer *supra* note 42, at 529-30.

44. Perhaps this is because I am a lesbian who has read Martha Fineman.

45. *See* Barbara J. Cox, *Choosing One's Family: Can the Legal System Address the Breadth of Women's Choice of Intimate Relationship?* 8 ST. LOUIS U. PUB. L. REV. 299 (1989) [hereinafter Cox, *Choosing*]. This article was originally presented to the Feminism and Legal Theory Conference at the University of Wisconsin-Madison in July 1987 (which was organized by Professor Fineman, who was then a faculty member at the UW law school and also includes a special thanks to Professor Fineman for her encouragement and assistance both in presenting the article at the conference and publishing it subsequently). *See id.*

46. *See id.* at 300.

Alternative Family Rights which proposed a definition of "alternative family" as including "two or more . . . adult persons involved in a mutually supportive, committed relationship . . . ,"[47] I argued that the legal system perpetuates the status quo and resists social change.[48]

> The legal system perpetuates the traditional nuclear family by recognizing it as the 'only' family and by locating benefits and protection in it. It limits access to these benefits and protection to those individuals who choose the traditional nuclear family as their primary intimate relationship. By so doing, the legal system effectively limits women's choices in making intimate relationship decisions or extracts a high price from those who refuse to be confined to that norm.[49]

Accepting civil unions, like registered or domestic partnerships, instead of marriages may achieve tangible results today and invaluable social and moral changes over the next several years. But obtaining the freedom to marry for same-sex couples, while also expanding the relationships that are entitled to recognition and benefits, should claim the attention of those who wish to end the heterosexist supremacy underlying opposite-sex marriage. The next section reviews earlier manifestations of "separate but equal" in the race and sex contexts and shows how Vermont's civil unions law maintains heterosexual supremacy in much the same way that those examples maintained white supremacy and male supremacy.

II. "SEPARATE BUT EQUAL" IN RACE, SEX, AND SEXUAL ORIENTATION

While I remain open to embracing and helping develop the institution of civil unions, I fear that what can at best be described as a politically-expedient compromise may cost too much for this country's sexual minority communities. This section analyzes the idea of "separate but equal" in the race, sex, and sexual orientation contexts. It concludes that segregation in marriage is as inherently flawed as earlier examples long since rejected in the race and sex contexts. With lessons learned from those struggles for equal

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47. *Id.* at 309. That proposed definition did not survive discussion at the Madison Equal Opportunities Commission (M.E.O.C.) which adopted a definition of alternative families as "two adults unrelated by marriage, blood, or adoption and their dependents living together as a single housekeeping unit in a dwelling unit." *Id.* at 318. The Madison Common Council changed that definition and used "two unrelated adults and the minor children of each." *Id.* at 320.

48. *See id.* at 322.

49. *Id.* at 325. That article refers to "women's choices" because it particularly looks at the negative impact of these restrictions on women. A similar, although slightly different, argument could be made about those men who also choose to live in non-traditional families.

rights, we should reject state-enforced segregation in this context as well. Not only does government-sanctioned segregation harm members of sexual minority communities but it also harms members of the majority; both are taught that the two groups require separation from one another. In the race and sex contexts, this separation was based on beliefs of the minority group's inferiority and the majority group's superiority. Even if such a belief did not motivate either the Vermont Supreme Court or those in its legislature who supported this legislation, equality for sexual minorities will not occur as long as our relationships remain segregated from those in the majority community.

A. "Separate But Equal" in the Race Context

When thinking about Vermont's civil unions law, I am drawn to the language of *Plessy v. Ferguson*.[50] In an opinion now understood to be a national disgrace, Chief Justice Brown upheld the Louisiana statute which required "equal but separate[51] accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations . . . ."[52] In finding that the law requiring this separation was constitutional under both the Thirteenth and Fourteenth Amendments of the Constitution, Justice Brown referred to other constitutional separations of the races, including separate schools for "white and colored children" and laws forbidding intermarriage of the two races.[53] (These have since been rejected as unconstitutional.[54])

Justice Brown acknowledged that the Fourteenth Amendment was intended "to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[55] Justice Brown concluded that these laws, requiring separation of the two races in places where they were likely to come into contact, "do not necessarily imply the inferiority of either race to the other. . . ."[56] He conceded that a

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50. 163 U.S. 537 (1896).

51. I will use the term "separate but equal" throughout the remainder of this discussion because that is how the term has come to be understood. The reversal of terms comes from Justice Harlan's dissent. *See id.* at 552 (Harlan, J., dissenting).

52. *Id.* at 540.

53. *Id.* at 544-45.

54. *See* Brown v. Board of Educ., 347 U.S. 483 (1954) (finding that "separate but equal" schools were unconstitutional) *and* Loving v. Virginia, 388 U.S. 1 (1966) (finding anti-miscegenation statutes unconstitutional).

55. *Plessy*, 163 U.S. at 544.

56. *Id.*

property interest could exist in having a reputation as "belonging to the dominant race, in this instance the white race," even though he concluded that Plessy could not have been deprived of such an interest "since he is not lawfully entitled to the reputation of being a white man."[57]

What ultimately led to Justice Brown's conclusion that the "separate but equal accommodations" were no more "unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children, . . ." was his dismissal of Plessy's argument that the "enforced separation of the two races stamps the colored race with a badge of inferiority."[58]

> If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if . . . the colored race . . . should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the [African-American] except by an enforced commingling of the two races. We cannot accept this proposition.[59]

Justice Brown's argument is flawed in two ways. First, rather than recognizing the added harm that comes from government-sponsored systems of segregation which legitimize enforced distance between the races, he concluded that government action cannot overcome prejudices that are social in nature. While changing social prejudice by legislation is indeed difficult, the challenge is even more difficult when the government approves of and enforces those prejudices.

Second, when one race has controlled the legal and social framework for centuries, it takes little to assert that members of that race would not accept a world view which left their race in an inferior position. Actually, the need to prevent any challenge to or change from the white race's superior position is behind laws such as this one that used the government to ensure that everyone understood that African-Americans had to be kept in their place, one that was inferior to and separate from whites.

In the same vein, heterosexuals would also not accept the second-class status for their most sacred, intimate relationships that sexual minorities have

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57. *Id.* at 549.
58. *Id.* at 551.
59. *Id.*

been asked to accept. Centuries of power, control, and social and psychological affirmation provide both whites and heterosexuals a comfort and expectation of rights, benefits, and protections that neither Plessy nor I have. Plessy and I both recognize that the ability to ride in the white car or to marry my same-sex partner brings with it some automatic inclusion into society.[60]

Justice Harlan's dissent shows he understood the harm that results from government-sanctioned segregation. He recognized the intent of the Constitutional Amendments passed following the Civil War was to empower African-Americans by ending government-sponsored discrimination that implied an "inferiority in civil society."[61] Government mandated and enforced segregation of the races encouraged white citizens to believe in their superiority while telling African-Americans that they were inferior. Justice Harlan explained:

> The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. *What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between those races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches*

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60. Plessy and I are different in one important sense. In the court's opinion, Plessy is referred to as a man of "mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him" and that he was claiming an entitlement to "every recognition, right, privilege and immunity . . . of the white race." *Id.* at 538. Thus, rather than claiming a right as an African-American to ride in the car reserved for whites, he claimed a right to be treated as a white person. That is not the claim I make. I want to marry my same-sex partner, not to obtain heterosexual privilege, but to marry another woman openly as a lesbian. As I have explained elsewhere: "Have I simply joined the flock of lesbians and gay men rushing out to participate in a meaningless ceremony that symbolizes heterosexual superiority? I think not. . . . I find it difficult to understand how two lesbians, standing together openly and proudly, can be seen as accepting that institution. What is more anti-patriarchal and critical of an institution that carries the patriarchal power imbalance into most households than clearly stating that women can commit to one another with no man in sight?—to commit to one another with no claim of dominion or control, but instead with equality and respect? I understand the fears of those who condemn us for our weddings, but I believe they fail to look beyond the symbol and cannot see the radical claim we are making." Barbara J. Cox, *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, 1037 n.12 [hereinafter *If We Marry*] (also reprinted as *A (Personal) Essay on Same-Sex Marriage* in THE MORAL AND LEGAL DEBATE, *supra* note 8, at 27-29). *See also* Cox, *supra* note 42, at 165-67 (explaining how asserting the right for same-sex couples to marry is a radical challenge to heterosexism).

61. *Plessy*, 163 U.S. at 556 (Harlan, J., dissenting).

> *occupied by white citizens?* That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.[62]

As Justice Harlan recognized: "The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done."[63]

Almost fifty years later, the Supreme Court in *Brown v. Board of Education*[64] ended government-sponsored segregation of the races. The Court acknowledged that separating African-American children from white children by sending them to segregated schools "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[65] Segregation alone would have harmed those children, but "[t]he impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the [African-American] group."[66] In conclusion, the Court held that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[67]

The joy of receiving long-withheld governmental recognition and protection of same-sex relationships cannot lessen the harm caused by the "thin disguise" of equality the Vermont Legislature created by segregating those relationships into the separate institution of civil unions. The thinness of that disguise is apparent from the legislature's need to start the civil unions law with a legislative finding that "Civil marriage under Vermont's marriage statutes consists of a union between a man and a woman. This interpretation of the state's marriage laws was upheld by the Supreme Court in *Baker v. State*."[68] Thus, the legislature began a law intended to end the "numerous obstacles and hardships" that same-sex couples have encountered due to their exclusion from civil marriage by reminding everyone that same-sex couples remain excluded from marriage even following enactment of that law.[69] Having seen the negative effects of this "thin disguise" of equality in the race

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62. *Id.* at 560 (emphasis added).
63. *Id.* at 562.
64. 347 U.S. 483 (1954).
65. *Id.* at 494.
66. *Id.*
67. *Id.* at 495.
68. An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91 § 1(1) (legislative findings).
69. *Id.* §§ 1(8), 1(10).

context,[70] it is difficult to embrace the separate status offered by the Vermont Legislature.

B. "Separate but Equal" in the Sex Context

The courts have also considered "separate but equal" in terms of single-sex education.[71] In *United States v. Virginia*, the Supreme Court determined that Virginia had violated the Equal Protection Clause of the Fourteenth Amendment by supporting the males-only admissions policy at the Virginia Military Institute (VMI).[72] Writing for the Court, Justice Ruth Bader Ginsburg explained that Virginia had not presented the "exceedingly persuasive justification" necessary to maintain VMI as a single-sex school.[73] While not deciding that single-sex education was inherently unconstitutional because it was "separate but equal,"[74] the Court held that Virginia had not

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70. Nothing in this essay is meant to imply that racism and heterosexism/homophobia are the same or that the effects of racism, including hundreds of years of slavery, and the effects of homophobia are experienced and felt in the same way. Although this essay is not the place for a full discussion, most lesbians and gay men will encounter neither the generational effects of slavery and Jim Crow laws nor the socioeconomic class impact of those systems. For while some gay men and lesbians are ostracized by their families in ways that African-Americans and other people are not, gay men and lesbians are unlikely to encounter generational impacts from homophobia; either their own parents were heterosexual or their own children are heterosexual. Obviously, some lesbian and gay men have lesbian or gay children and these families may begin to encounter some of the generational impacts of inequality.

71. Justice Ginsburg asserted that the Court was not "faced with the question of whether States can provide 'separate but equal' undergraduate institutions for males and females." United States v. Virginia, 518 U.S. 515, 534 n.7 (1996) (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 720 n.1 (1982)). This assertion responded to concerns raised by several *amici* that "diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity" and that single-sex schools can "'dissipate, rather than perpetuate, traditional gender classifications.'" *Id.* (citing Brief for Twenty-six Private Women's Colleges as *Amici Curiae* 5). The Court indicated that it was not questioning a state's "prerogative" to evenhandedly support "diverse educational opportunities," because it was focused on an educational opportunity in Virginia which the lower courts had regarded as "unique" and available for men at VMI, Virginia's only single-sex public college. *Id. See also infra* note 74 and accompanying text.

72. *Virginia*, 518 U.S. at 515. Interestingly, the Court noted that VMI had successfully ended its whites-only policy in 1968 with the admission of its first African-American cadet. Based on that change, students stopped singing "Dixie" and saluting the Confederate flag and the tomb of Robert E. Lee at sporting events and ceremonies. That change was found to have had little, if any, effect on VMI's method of accomplishing its mission. *See id.* at 546 n.16.

73. *Id.* at 524 (citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

74. *Id.* at 534 n.7 states: "We do not question the Commonwealth's prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized . . . as 'unique.' . . . 'Thus we are not faced with the question of whether States can provide "separate but equal" undergraduate institutions for males and females.'" (citing *Mississippi Univ. for Women*, 458 U.S. at 720 n. 1). *But see id.* at 569-70 (Scalia, J., dissenting); William Henry Hurd, *Gone with the Wind? VMI's Loss and the Future of Same-Sex Public Education*, 4 DUKE J. GENDER L. & POL'Y 27 (1997) (questioning whether single-sex educational institutions will be able to meet the legal requirements set out in *VMI*). For further discussion of the viability of single-sex education following *VMI*,

established that "the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."[75] Thus, Virginia violated the Equal Protection clause by maintaining VMI as an institution for males only.

The Court then considered Virginia's proffered remedy; women who wanted to attend VMI would instead attend the Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College. Rather than change VMI's exclusionary policy, Virginia offered VWIL as a "parallel program" with a mission like VMI's to produce "citizen-soldiers" who were provided "education, military training, mental and physical discipline, character . . . and leadership development."[76] Justice Ginsburg questioned the "methodological differences" between VWIL and VMI, as far as its "adversative training" and other "crucial" aspects of life in the barracks.[77] Virginia maintained that a more collaborative educational pedagogy was better suited to educating and training most women, while claiming that this difference in pedagogy was based on "important differences between men and women in learning and developmental needs," and "psychological and sociological differences" between men and women that are "real" and "not stereotypes."[78] In rejecting Virginia's segregation of women into the VWIL program, Justice Ginsburg explained that, although most women and men might prefer VWIL's program to the one available at VMI, the United States had instituted its lawsuit on behalf of those women who would prefer and thrive in a program such as the one at VMI.[79]

She then determined that "[i]n myriad respects other than military training,"

> VWIL does not qualify as VMI's equal. VWIL's student body, faculty, course offerings and facilities hardly match VMI's. Nor can the VWIL graduate anticipate the benefits associated with VMI's 157-year history, the school's prestige, and its influential alumni network . . . . Virginia, in sum, while maintaining VMI for men only, has failed to provide any 'comparable single-gender women's institution.' Instead, the Commonwealth has created a VWIL program fairly appraised as *a 'pale shadow'* of VMI in terms of the

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see, e.g., Symposium, *Gender & The Higher Education Classroom: Maximizing the Learning Environment*, 4 DUKE J. GENDER L. & POL'Y 27 (1997); Symposium, 6 AM. U.J. GENDER SOC. POL'Y & L. 1, 1-89 (1997); Linda Peter, Note, *What Remains of Public Choice and Parental Rights: Does the VMI Decision Preclude Exclusive Schools or Classes Based on Gender?*, 33 CAL. W. L. REV. 249 (1997).

75. *Virginia*, 518 U.S. at 524.
76. *Id.* at 548.
77. *Id.* at 548-49.
78. *Id.*
79. *See id.* at 550-51.

> range of curricular choices and faculty stature, funding, prestige, alumni support and influence.[80]

Justice Ginsburg found VWIL's "pale shadow" to be "reminiscent" of the remedy that Texas proposed during a challenge to its policy excluding African-Americans from the University of Texas Law School. Rather than admit African-American students to its university law school, Texas established a separate school for Heman Sweatt and other black law students to attend. After pointing out tangible differences between the two law schools similar to those existing between VMI and VWIL, the *Sweatt* court emphasized the intangible "'qualities which are incapable of objective measurement but which make for greatness'" in a school, including "'reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.'"[81]

The civil union bill passed by the Vermont Legislature is as much "a pale shadow" of marriage as those rejected as constitutionally insufficient to support Virginia and Texas' claims of "separate but equal" treatment for the women excluded under VMI's males-only admissions policy and for the African-Americans excluded under the University of Texas Law School's whites-only admissions policy. Civil unions come with none of the "reputation . . . , experience . . . , position and influence . . . , standing in the community, traditions and prestige" as marriage.

By excluding women from VMI, the government of Virginia encouraged its citizens to believe that they had no place in a school as rigorous as VMI. By excluding people of color from the University of Texas Law School, the government of Texas encouraged its citizens to believe that they had no place in a school as demanding as the University of Texas. By excluding same-sex couples from marriage, the government of Vermont is encouraging its citizens to believe that they have no place in an institution as central to society as marriage.[82]

While many question the institution of marriage for a variety of reasons, none question its role or presence in our society. That presence can be seen

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80. *Id.* at 551, 553 (emphasis added and citations omitted).

81. *Id.* at 553-54 (citing Sweatt v. Painter, 339 U.S. 629, 634 (1950)).

82. The *Baker* court said that letting the legislature decide whether to permit same-sex couples to marry or develop "some equivalent statutory alternative" was necessary to avoid "disruptive and unforeseen consequences" and permit legislation enacted "in an orderly and expeditious fashion." Baker v. State, 10 Vt. L. Wk. 363, 364-71, 744 A.2d 864, 867-87 (1999). We know from *Brown v. Board of Education* and *United States v. Virginia* that it is unlikely that a legislative body will have the courage to recognize the unconstitutionality of a long-maintained tradition. In many ways, it is amazing that the Vermont Legislature passed a law that provides virtually all of the state-created rights and responsibilities of marriage to same-sex couples who enter civil unions.

simply from the amount of language describing marriage: husband and wife, bride and groom, married, mother of the bride, groomsmen, maid or matron of honor, wedding announcement and showers, marriage consultants, widow or widower. No such language exists for talking about civil unions. "The term doesn't quite trip off the tongue. 'At first I was calling it getting "civilized," but that wasn't going over very well,' said Jon Pominville, Middlebury town clerk. '"Getting unionized," that's what the TV reporters are saying.' Others are saying 'united.'"[83] If we do not even know how to talk about this institution, how can it possibly be "equal," even if we were willing to accept that it should or now must be "separate."

Justice Ginsburg recognized that the arguments for preserving all-male education were "uncomfortably similar" to the arguments for preserving all-white education.[84]

> The all-male college would be relatively easy to defend if it emerged from a world in which women were established as fully equal to men. But it does not. It is therefore likely to be a witting or unwitting device for preserving tacit assumptions of male superiority—assumptions for which women must eventually pay.[85]

The arguments for preserving opposite-sex marriage are also "uncomfortably similar" to those supporting these other manifestations of "separate but equal." Even if the Vermont Supreme Court and Legislature were "unwitting device[s] for preserving tacit assumptions of [heterosexual] superiority," members of sexual minority communities (like people of color and women) will also have to "pay" for limiting marriage to opposite-sex couples.

C. "Separate But Equal" in the Sexual Orientation Context

The Vermont Supreme Court seemed of two minds when characterizing same-sex couples' exclusion from state protection and recognition. First, it rejected the State's argument that "the long history of official intolerance of intimate same-sex relationships cannot be reconciled with an interpretation of [the Vermont Constitution's Common Benefits Clause] that would give state-sanctioned benefits and protection to individuals of the same sex who commit to a permanent domestic relationship."[86] It explained that, "to the extent that

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83. Ness, *supra* note 37, at A1.

84. *Virginia*, 518 U.S. at 535 n.8 (citing C. JENCKS & D. RIESMAN, THE ACADEMIC REVOLUTION 297-98 (1968)).

85. *Id.*

86. *Baker*, 10 Vt. L. Wk. at 371, 744 A.2d at 885.

state action historically has been motivated by an animus against a class, that history cannot provide a legitimate basis for continued unequal application of the law."[87] It also recognized the "undeniable fact that federal and state statutes—including those in Vermont—have historically disfavored same-sex relationships."[88]

Despite acknowledging this government-sponsored disapproval based on animus, the court rejected the urging of Justice Johnson in her concurring/dissenting opinion that the court immediately order that plaintiffs be given marriage licenses.[89] Explaining its reason for doing so, the court refused to analogize this case to the U.S. Supreme Court's decision in *Watson v. City of Memphis*, where the Court provided injunctive relief to immediately desegregate the publicly owned parks and recreational facilities in Memphis.[90]

> The analogy is flawed. We do not confront in this case the evil that was institutionalized racism. . . . Plaintiffs have not demonstrated that the exclusion of same-sex couples from the definition of marriage was intended to discriminate against women or lesbians and gay men, as racial segregation was designed to maintain the pernicious doctrine of white supremacy.[91]

While "compulsory heterosexuality"[92] may not be the same "evil that was institutionalized racism,"[93] the court's argument seems to be that the exclusion of same-sex couples from marriage is not sufficiently "evil" to merit ending the "undeniable fact" of animus underlying the government's historical disfavoring of same-sex relationships. But not even a weighing of evils sufficiently explains the court's and the legislature's inability to permit same-sex couples to marry.

Instead, Professor Richard Mohr explains clearly why heterosexual society cannot seem to take this step.

> *To put it bluntly: marriage, viewed now as a symbolic event, enacts, institutionalizes, and ritualizes the social meaning of heterosexuality. Marriage is the chief means by which culture maintains heterosexuality as a social identity.* . . . One does not become a heterosexual by having heterosexual sex. Rather,

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87. *Id.*

88. *Id.*

89. *See id.* at 381, 744 A.2d at 898 (Johnson, J., concurring in part and dissenting in part).

90. *See id.* at 380, 744 A.2d at 897 (citing Watson v. City of Memphis, 373 U.S. 526 (1963)).

91. *Id.* at 372, 744 A.2d at 887.

92. *See* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence* (1980), *in* BLOOD, BREAD, AND POETRY: SELECTED PROSE (1979-1985) 23 (1986).

93. *See supra* note 70 and accompanying text.

> marriage is the social essence of heterosexuality. In consequence, on the plane of symbols and identities, if one did not marry, one would not be fully heterosexual. And here's the kicker: if others were allowed to get married, one wouldn't be fully heterosexual either. This analysis explains why the courts, the president and Congress can claim that marriage—by definition—is the union of one man and one woman as husband and wife, even though this definition is circular, lacks any content, and explains nothing. Its function is not to clarify or explain; *its function is to assure heterosexual supremacy as a central cultural form.*[94]

Mohr concludes: "[O]ur aim should be to convince straights that they may have an abiding religious-like faith in the rightness of heterosexuality for their lives, but that it is not a proper function of government to enforce that faith on everyone . . . ."[95]

Professor Sylvia Law has written that relationships by same-sex couples "violate conservative ideology of family . . . ."[96] She explains that "[w]hen homosexual people build relationships of caring and commitment, they deny the traditional belief and prescription that stable relations require the hierarchy and reciprocity of male/female polarity . . . ."[97]

Confronting the fear that the marriages of heterosexual couples will somehow be destabilized if same-sex couples are permitted to marry, Iowa State House Representative Ed Fallon asked:

> What are you trying to protect heterosexual marriages from? There isn't a limited amount of love in Iowa. It isn't a nonrenewable resource. If Amy and Barbara or Mike or Steve love each other, it doesn't mean that John and Mary can't.
>
> Marriage licenses aren't distributed on a first-come, first-served basis here in Iowa. Heterosexual couples don't have to rush out and claim marriage licenses now, before they are all snatched up by gay and lesbian couples.
>
> Heterosexual unions are and will continue to be predominant, regardless of what gay and lesbian couples do. To suggest that

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94. Richard D. Mohr, *The Stakes in the Gay-Marriage Wars*, *in* THE MORAL AND LEGAL DEBATE, *supra* note 8, at 105, 106 (emphasis added).

95. *Id.* at 107.

96. Wolfson, *supra* note 20, at 597 (citing Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, WIS. L. REV. 187, 218 (1998)).

97. *Id.*

> homosexual couples in any way, shape, or form threaten to undermine the stability of heterosexual unions is patently absurd.[98]

Like the *Baker* court (or perhaps following its lead), the Vermont Legislature could not bring itself to end government-mandated segregation between opposite-sex couples and same-sex couples. While recognizing that "[w]ithout the legal protections, benefits and responsibilities associated with civil marriage, same-sex couples suffer numerous obstacles and hardships,"[99] the Vermont Legislature continued to prevent those couples from marrying because:

> Changes in the way significant legal relationships are established under the constitution should be approached carefully, combining respect for the community and cultural institutions most affected with a commitment to the constitutional rights involved. Granting benefits and protections to same-sex couples through a system of civil unions will provide due respect for tradition and long-standing social institutions, and will permit adjustment as unanticipated consequences or unmet needs arise.[100]

The tradition the legislature respects limits the preferred social status of marriage to opposite-sex couples while continuing the corresponding tradition of "historically disfavoring" same-sex couples. Rather than end either tradition, the legislature perpetuated both by segregating same-sex couples into the institution of civil unions, an institution that (at least at its very inception) remains only "a thin disguise" of equality and "a pale shadow" of the institution of heterosexual marriage. The heterosexism inherent in restricting same-sex couples to civil unions is reminiscent of the racism that relegated African-Americans to separate railroad cars and separate schools and of the sexism that relegated women to separate schools. Our society's experiences with "separate but equal" have repeatedly shown that separation can never result in equality because the separation is based on a belief of distance necessary to be maintained between those in the privileged position and those placed in the inferior position.

It may well be that same-sex couples will develop civil unions into a vibrant institution that serves the complex needs of our communities better than the problematic institution of marriage. I remain hopeful. But I fear that we will encounter the same problems as others who have also been segregated

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98. *See* Fallon, *supra* note 8, at 184.
99. An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 91 § 1(8) (legislative findings).
100. *Id.* § 1(10).

by those who would maintain their distance in an attempt to preserve their claim of superiority. Not until same-sex couples obtain the freedom to marry will what remains "a condition of legal inferiority" be lifted from us.[101]

This symbol of inferiority that same-sex couples are being asked to accept by entering into civil unions instead of marriages is similar to the one that James Dale was asked to accept after losing his battle to remain a scoutmaster in the boy scouts. In *Boy Scouts of America v. Dale*,[102] the Supreme Court held that the presence of Dale, "an avowed homosexual,"[103] would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[104]

In dissent, Justice Stevens recognized what Dale's exclusion actually signified:

> Under the majority's reasoning, an openly gay male is irreversibly affixed with the label 'homosexual.' That label, even though unseen, communicates a message that permits his exclusion wherever he goes. His openness is the sole and sufficient justification for his ostracism. Though unintended, reliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority.[105]

This same notion of inferiority due to one's status was also raised in *Romer v. Evans*.[106] In discussing Justice Kennedy's reference to *Plessy v. Ferguson* in his majority opinion in *Romer v. Evans*, Professor Akhil Amar makes the following comparison:

> Justice Harlan knew as a human being that separate was not and would not be equal, and said so as a judge. Similarly, Justice

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101. Plessy v. Ferguson, 163 U.S. 537, 563 (1896) (Harlan, J., dissenting).

102. 120 S. Ct. 2446 (2000).

103. *Id.* at 2455. I have never understood this phrase. Is someone an "avowed" homosexual because he or she is out and open about his or her sexual orientation? If so, would that mean that all heterosexuals who are open about their sexual orientation, such as Justice Rehnquist, are "avowed heterosexuals," a term we never hear.

104. *Id.* at 2454. Justice Stevens' dissent challenged whether the Boy Scouts of America has any message on homosexuality, other than an exclusionary membership policy, since its mission statement, federal charter, membership policy, and Scout Oath and law are silent on the issue, and its guidance for scoutmasters on sexuality is that such matters are not within scouting's purview, and should be left to a scout's parents and religious guidance. *Id.* at 2470 (Stevens, J., dissenting).

105. *See id.* at 2476 (Stevens, J., dissenting).

106. 517 U.S. 620, 623 (1996). Justice Kennedy wrote: "Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.'" (citing *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

> Kennedy's opinion ranges beyond text and form to ponder the exclusionary social meaning beneath the surface of Amendment 2. On this deeper level, the laws at issue in both *Plessy* and *Romer* are about untouchability and uncleanness: *they* are not like *us*.[107]

Maintaining heterosexual institutions, such as the boy scouts and marriage from which sexual minorities are excluded, makes clear the fear and discomfort that those demanding such separation feel. As long as sexual minorities are not permitted to join these institutions, the heterosexism inherent in each will remain unchecked. Accepting civil unions instead of marriage would be the same as African-Americans accepting separate railroad cars or women accepting separate educational institutions. By agreeing to separation, we help them perpetuate their view of us as inferior.

III. SEPARATE MEANS UNEQUAL

In addition to the inherent inequality based on segregation of same-sex couples from marriage and into civil unions, these unions may be unequal to marriage in two other important aspects. First, the portability of marriages entered into both by Vermont couples who later move to other states and by non-Vermont couples who marry in Vermont and then return to their home states is uncertain. This uncertainty is due to the "public policy" exception to the general choice of law principle that marriages valid in the state of celebration are valid everywhere and due to the various Defense of Marriage Acts passed by Congress and numerous state legislatures. That uncertainty is even greater now that same-sex couples may only enter into civil unions, rather than marriages, thus perhaps making it more difficult for them to use prior marriage recognition cases that would have supported the portability of their marital status. Second, civil unions may be even less likely to be recognized for federal purposes than marriages by same-sex couples. Same-sex couples in either relationship should be able to challenge the validity of the Defense of Marriage Act where the federal government defined marriage for the first time in U.S. history. But, at least during their infancy, civil unions come without the cultural and legal understanding of marriage, which may make it more difficult for same-sex couples to argue that these relationships deserve recognition both from other states and the federal government. In these vastly important ways, civil unions remain a "pale shadow" of marriage and these differences establish that this "separate" institution for same-sex

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107. Akhil Reed Amar, *Essay: Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 223-24 (1996).

couples is not "equal" to the marital institution reserved for opposite-sex couples.

A. Portability of Civil Unions

Same-sex couples from across Vermont and the United States have entered into civil unions since July 1, 2000, when the statute became effective. Vermont couples who remain in Vermont immediately obtain numerous benefits, protections, and responsibilities that same-sex couples have never before received from state government. Except for the segregation that these couples endure by entering civil unions instead of marriages and the possible lack of federal recognition discussed in Section B below, their day-to-day lives improve in drastic and important ways, as long as they remain in Vermont. But should they one day decide to leave Vermont, whether for new careers or educational opportunities, for family or health reasons, or merely to travel around the country or the world, their status as a couple protected by the government will immediately become uncertain.

This uncertainty is even greater for non-Vermont couples who travel to Vermont, enter into civil unions, and then return to their domiciles. By requiring same-sex couples to enter into civil unions instead of marriages, Vermont has increased the uncertainty that out-of-state same-sex couples would have faced concerning the interstate recognition of their marriages.[108] Due to the conflict between the law of their domicile (since no state permits marriages by same-sex couples) and the law of the state of celebration (Vermont), courts would have to determine whether a marriage by same-sex couples should be recognized in their home state or in a new state if the couple were to relocate. Now these same courts have to decide whether to recognize a civil union, without knowing how to use the otherwise applicable precedent to guide them.

Even the most basic understanding of choice-of-law recognizes that one's coupled status must be portable. For example, Section 283(2) of the Restatement (Second) of Conflict of Laws states the general rule: "A marriage which satisfies the requirements of the state where the marriage was contracted will *everywhere be recognized as valid* unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage."[109] Opposite-sex couples who marry in their own state can freely move from state-to-state

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108. *See* Barbara J. Cox, *Same-Sex Marriage and the Public Policy Exception in Choice-of-Law: Does It Really Exist?*, 16 QUINNIPIAC L. REV. 61, 66-67 (1996) [hereinafter *Public Policy*]; Koppelman, *supra* note 6; STRASSER, *supra* note 5.

109. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (emphasis added).

without wondering whether their marital status moves with them. Even opposite-sex couples who marry in a state different than their domicile are likely to find that their marriage will be recognized when they return to their domicile or when they move to other states.[110]

The basic premise is that one's coupled status should not change as one moves or travels from place to place. The general rule preferring validation of marriages, which exists with an "overwhelming tendency" in this country,[111] leads courts to find opposite-sex marriages to be valid if there is any reasonable basis for doing so.[112] This tendency is particularly strong because of the important policies underlying the marriage validation rule: "The validation rule confirms the parties' expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state."[113] A couple needs to know "reliably and certainly, and at once, whether they are married . . . ," not find that they are married in one state and not in another or have their marital status ambiguous during litigation to determine it.[114] It would be absurd to subject any couple to having its "marriage visa" stamped with "valid" and "invalid" as they travel across the country.[115]

These rules and policies have led most courts to recognize the out-of-state marriages of opposite-sex couples even when they traveled to another state to marry, because their domiciliary state prevented them from doing so, and then returned to their domicile and requested recognition of their marriage. "Basically, the law of the place of celebration will apply unless the marriage violates an important public policy of the domicile, in which case the domicile's law will apply and the marriage will be invalid."[116] While this public policy exception has been used to refuse recognition of an out-of-state marriage by a state's domiciliary,[117] courts have not consistently done so even

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110. *See* cases discussed in *If We Marry*, *supra* note 60, and *Public Policy*, *supra* note 108.

111. *If We Marry*, *supra* note 60, at 1064 (citing WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS § 116, at 362 (2d. ed. 1993).

112. *See id.* at 1064-65.

113. *Id.* at 1065.

114. *Id.* at 1065 (citing ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW § 220, at 605 (4th ed. 1986)).

115. Wolfson, *supra* note 20, at 612.

116. LEGALLY WED, *supra* note 5, at 108.

117. *See, e.g.*, Catalano v. Catalono, 170 A.2d 726 (Ct. 1961) (refusing to recognize an uncle/niece marriage entered into in Italy because the Connecticut criminal incest statute expressed a strong public policy against recognition); Whelan v. Whelan, 105 N.E.2d 314 (Ill. App. Ct. 1952) (refusing to recognize Kentucky marriage between Illinois residents who were first cousins); Wilkins v. Zelichowski, 140 A.2d 65 (N.J. 1958) (refusing to recognize marriage by underage New Jersey residents in Indiana); Eggers v. Olson, 231 P. 483 (Okla. 1924) (refusing to recognize interracial marriage by Oklahoma residents entered into in Arkansas); Maurer v. Maurer, 60 A.2d 440 (Pa. Super. Ct. 1948) (refusing to recognize marriage

though the domiciliary state had an explicit statutory prohibition against that type of marriage.[118] In numerous and repeated cases, courts have recognized out-of-state marriages even when the marriage violated the domicile's restrictions on underage marriages, on incestuous marriages (such as first cousin or uncle/niece marriages), on adultery or when divorced persons could remarry, and even on polygamous marriages for some limited purposes.[119] Only in states with anti-miscegenation statutes can one find "consistent and repeated use of public policy exceptions to refuse to recognize otherwise valid out-of-state marriages," and even then only when the couple had not been validly married in its own domicile.[120] Having fallen out of use after the Supreme Court held anti-miscegenation statutes to be unconstitutional,[121] the viability of the public policy exception remains in question today.[122]

If courts were to use the public policy exception to refuse recognition of out-of-state marriages by same-sex couples despite clearly documented willingness to ignore the exception in order to recognize the out-of-state marriages by opposite-sex couples, it would be because "[w]e depart from our normal choice-of-law rule, whatever it is, because the law it chooses in this case is just too much at odds with the policy reflected in our law. Normally, we would defer and apply your law, but not *that* law."[123] The court would be expressing its inability to accept another state's law permitting same-sex couples to marry even though other courts in that same state may well have accepted other states' laws permitting underage, incestuous, interracial, or recently divorced opposite-sex couples to marry despite local prohibitions on those marriages.

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in Maryland for express purpose of evading Pennsylvania's paramour law); *In re* Vetas' Estate, 170 P.2d 183 (Utah 1946) (refusing to recognize a common law marriage entered into in Idaho).

118. *See Public Policy*, *supra* note 108, at 66. The vast majority of cases recognize the out-of-state marriages, whether entered into by residents of the domicile who validly married under that state's laws and then moved to another state which prohibited their marriages, or entered into by residents who were prevented by their domicile's law from marrying but who married in another state where their marriage was legal and then sought recognition within their original domicile.

119. *See id.* at 73. *Compare In re* Dalip Singh Bir's Estate, 188 P.2d 499 (Cal. 1948) (recognizing a polygamous marriage from India for inheritance purposes, while noting it would not do so for cohabitation purposes) *with* People v. Ezeonu, 588 N.Y.S.2d 116 (N.Y. Sup. Ct. 1992) (refusing to recognize a "second" marriage valid in Nigeria as a defense to a charge of rape).

120. *Public Policy*, *supra* note 108, at 67. *But see* Pearson v. Pearson, 51 Cal. 120 (1875) (recognizing interracial marriage validly entered into in Utah despite California laws nullifying them); Medway v. Needham, 16 Mass. 157 (1819) (recognizing interracial marriage validly entered into in Rhode Island despite Massachusetts law prohibiting them); Miller v. Lucks, 36 So. 2d 140 (Miss. 1948) (recognizing an interracial marriage validly contracted in Illinois for inheritance purposes).

121. *See* Loving v. Virginia, 388 U.S. 1 (1966).

122. *See* Larry Kramer, *Same-Sex Marriage, Conflict of Law, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

123. Larry Kramer, *The Public Policy Exception and the Problem of Extra-Territorial Recognition of Same-Sex Marriage*, 16 QUINNIPIAC L. REV. 153, 154 (1996).

Had Vermont given same-sex couples the right to marry by including them within their marriage statutes, the portability of their marriages still would have been more uncertain than the marriages of opposite-sex couples due to the homophobia of the courts[124] and the availability of the public policy exception which permits courts to refuse to recognize marriages that they find to be "odious."[125] But with the right to marry, same-sex couples would have had hundreds of cases in which courts recognized marriages from another state available for use as precedent. While this case law should remain available for use by same-sex couples when arguing that their civil unions are substantially equivalent to marriages, its precedential value is less certain because those cases apply to marriages, not civil unions.

If we expected courts to hesitate before recognizing same-sex couples' marriages, we must expect greater hesitancy when they are asked to recognize out-of-state civil unions—a status previously unknown in the law. Judges may decide that Vermont's statutorily-created status of "civil union" does not extend beyond the state's border, unlike the clearly portable status of "marriage."[126] This unknown portability of civil unions puts these same-sex couples at great risk: they no longer know whether the law considers them to be single or "married" and whether their status in countless contexts, such as property ownership, intestacy, and responsibility for their partner's debts, changes after they leave Vermont.

Even the portability of civil unions entered into by Vermont citizens remains uncertain. Unlike questions that arise when an out-of-state couple travels to another state to obtain the marital status prohibited in the couple's home state, little question about the interstate recognition of marriage usually occurs when a couple enters into a valid marriage under the laws of its own domicile. Vermont couples who enter into civil unions that are legal in their domicile should be able to move from state-to-state with their status unchanged. From a public policy standpoint, while a court may refuse to recognize the out-of-state marriage or civil union entered into by its own

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124. *See* Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979). *See also* Rhonda R. Rivera, *Our Straight-Laced Judges Twenty Years Later*, 50 HASTINGS L.J. 1179 (1999) (preface to the republication of her original article 20 years later which questions whether progress has been made in this regard).

125. Actually, the exception states that "marriage between persons of different races where such marriages are at the domicil[e] regarded as odious," will be invalid everywhere, even though valid where celebrated, if it was prohibited by the law of the parties' domicile. RESTATEMENT OF THE CONFLICT OF LAW § 132(c) (1934).

126. An obvious argument can be made that, if both state and private institutions recognize marriages created in one state in other states and if both marriages and civil unions are statutorily-created statuses intended to change each participant's legal status from single to "coupled," then no principled basis exists for recognizing the Vermont marriage of an opposite-sex couple and not recognizing the Vermont civil union of a same-sex couple.

domiciliaries attempting to evade restrictions on those marriages within their domicile,[127] it has little reason to refuse recognition of the marriage or civil union of another state's domiciliaries. The court cannot assert that it is preventing its own citizens from doing something that they are prevented from doing at home. Instead, the court would be imposing its own public policy on the people of another state. Usually courts recognize the out-of-state marriage in this context under principles of comity that are based on deference and respect for another state's authority to determine the status of its own residents.[128]

Hideous problems would indeed result if the Vermont couple's legal status were to change as they moved from state to state. But these hideous problems may well arise due to language in some states' statutes purporting not to recognize the out-of-state marriages of same-sex couples. For example, the Alaska statute states: "A marriage entered into by persons of the same sex, . . . that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state."[129] Florida statutes indicate: "Marriages between persons of the same sex . . . or relationships between persons of the same sex which are treated as marriages in any jurisdiction, . . . are not recognized for any purpose in this state."[130] Georgia's statute is perhaps the most extreme:

> No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. . . . Any contractual rights granted by virtue of such [a marriage] license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant divorce or separate maintenance . . . or otherwise to consider or rule on any of

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127. *But see Public Policy*, *supra* note 108, for a discussion of cases where courts did not impose the exception on opposite-sex couples who married out of state even though their marriages were not permitted in their home state.

128. *See* LEGALLY WED, *supra* note 5, at 103. This difference can even be seen in the cases considering interracial marriage. Koppelman explains that marriages by interracial couples intending to evade their home state's restrictions were treated differently than those who were domiciled elsewhere during their marriage and then moved into the state or those living outside the state who sought recognition of some incident of their marriage. The first set were most often refused recognition, the second set were usually found to be valid. Koppelman, *supra* note 6, at 117-27. *See also* Mark Strasser, *For Whom the Bell Tolls: On Subsequent Domiciles' Refusing to Recognize Same-Sex Marriage*, 66 U. CIN. L. REV. 339 (1998); Kramer, *supra* note 124, at 1970; Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, 51 FLA. L. REV. 799, 834 (1999).

129. ALASKA STAT. § 25.05.013 (Michie 1998).

130. FLA. STAT. ANN. § 741.212(1) (West 2000).

> the parties' respective rights arising as a result of or in connection with such marriage.[131]

Even if Vermont had provided its citizens with the right to marry, their legal status would have been unclear once they left that state's borders. With civil unions that status is all the more indefinite.

Professor Mark Strasser has argued that the privileges and immunities clauses of the U.S. Constitution should protect the right of Vermont couples to leave Vermont and travel to other states with their marriages (or perhaps even their civil unions) intact.[132] While it is somewhat unclear what substantive rights are included within these constitutional protections, even the most restrictive definition of the privileges and immunities of U.S. citizens includes the right of a citizen of one state to become a citizen of another state.[133] As noted by the Supreme Court, the "constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union . . . [and] is a right that has been firmly established and repeatedly recognized."[134]

That right was reaffirmed recently by the Supreme Court in *Saenz v. Roe* where the court invalidated a California statute which limited the welfare benefits available to residents with less than one year in California to the level provided by their previous domicile.[135]

> The statute was declared unconstitutional because it would have a chilling effect on interstate migration, and because privileges and immunities protections include the right to equal treatment in a citizen's new state of residence. In effect, the statute penalized the exercise of an individual's right to migrate to a new state.[136]

The right at issue in *Saenz* was not the right to obtain welfare benefits at a certain level; instead, the right at issue was "the right not to be discriminated

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131. GA. CODE ANN. § 19-3-3.1(b) (1999).

132. Mark Strasser, *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553 (2000) [hereinafter *Privileges*]. There are two privileges and immunities clauses in the U.S. Constitution: U.S. CONST. art. IV, § 2 reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" and U.S. CONST. amend. XIV, § 1 reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." For a discussion of whether a difference exists between the two clauses, see *Privileges* at 555-57.

133. *See id.* at 566 (citing Slaughter-House Cases, 83 U.S. (1 Wall.) 36, 80 (1872)).

134. *See* United States v. Guest, 383 U.S. 745, 757 (1966). The court found that the right to travel "finds no explicit mention in the Constitution" because "a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." *Id.* at 758.

135. Saenz v. Roe, 526 U.S. 489 (1999).

136. *Privileges*, *supra* note 132, at 569 (citing *Saenz*, 526 U.S. at 504).

against with respect to an interest that was sufficiently important that its denial might significantly chill the exercise of the right to travel."[137]

In the context of same-sex marriage, this right to travel potentially conflicts both with the Defense of Marriage Act[138] and the numerous state statutes purporting to refuse recognition to same-sex marriages from other states.[139] These statutes claim to permit states to refuse recognition of marriages that were validly celebrated in the couple's domicile, even if the refusing state "had *no* contacts to the marriage at the time of its celebration and even if the couple had already been married for several years."[140] The *Saenz* court, however, reaffirmed privileges and immunities protections for citizens seeking to establish a residence in a new state free from laws by the new state that would have a "chilling effect on interstate migration."[141] Thus, Strasser concludes:

> Being forced to surrender one's reasonable expectations and good faith beliefs concerning something so fundamentally important as the existence of one's marriage in order to travel from one state to another simply cannot be countenanced if the states in fact compose a single nation. If the privileges of national citizenship do not include something as fundamental as the right to have one's marriage (valid in the domicile at the time of celebration) recognized in each state through which one might travel or to which one might migrate, then it is not clear what interests could possibly meet the relevant standard.[142]

While the Constitution may protect marriages by same-sex couples from invalidity in a new state of residence or even while traveling, the question remains whether civil unions will be accorded such protection as well. By creating a separate institution without the historical significance and clearly established rules relating to marriage, the Vermont Legislature has made it more difficult for Vermont same-sex couples to know whether they will be abandoning their rights as a couple once they leave the state. In many ways, it appears that the Vermont Legislature has taken the unusual step of making it more inviting for Vermont same-sex couples to remain in Vermont than if it had granted them full marital rights. Perhaps we should consider this as one of the more positive, if perhaps unintended, results of this legislation. Of

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137. *Id.* at 570.
138. *See* 28 U.S.C. § 1738C (Supp. IV 1998).
139. *See supra* note 6 and accompanying text.
140. *Privileges*, *supra* note 132, at 577.
141. *Id.* at 569 (citing *Saenz*, 526 U.S. at 504).
142. *Id.* at 587.

course, if the Vermont Legislature did its job correctly and created an institution that is "some equivalent statutory alternative"[143] to marriage, then civil unions should include the right to take their status as a legally recognized couple with them. Thus, we can hope that courts will actually treat civil unions as the substantial equivalents of marriages and recognize them as they would have marriages. What remains to be seen is whether they will.

B. Federal Recognition of Civil Unions

The Vermont Legislature's refusal to grant same-sex couples the right to marry may also raise added questions about how the federal government will treat these civil unions. If the Vermont Legislature had permitted same-sex couples to marry, those couples could have clearly challenged the Defense of Marriage Act which purports to deny federal benefits and protections to individuals in these marriages. Whether same-sex couples in civil unions will have such a clear challenge available is uncertain.

Before Section 3 of the Defense of Marriage Act (DOMA) defined "marriage" and "spouse" for the first time,[144] under its usual practice, the federal government would have likely recognized same-sex marriages for federal purposes and may have recognized civil unions as well. This is because "[h]istorically, domestic relations has been a paradigmatic area of state control."[145] Supreme Court precedent indicates that family law "has long been regarded as a virtually exclusive province of the States,"[146] and the reluctance of federal courts to hear domestic relations cases is so strong that courts often refer to a "domestic relations exception" to federal court jurisdiction.[147]

Family law is considered one of those areas of law where "the value of preserving localism . . . accords with the federalist theory that a beneficial experimentalism will result from the ability of each state to pursue different policies and realize different values."[148] Based on this historical preference

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143. Baker v. State, 10 Vt. L. Wk. 363, 364, 744 A.2d 864, 867 (1999).

144. 1 U.S.C. § 7 (Supp. V 1999) states: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, 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."

145. Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1469 (1997); *see also* Kristian D. Whitten, *Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States?*, 26 HASTINGS CONST. L.Q. 419 (1998).

146. Ruskay-Kidd, *supra* note 145, at 1469 (citing Sosna v. Iowa, 419 U.S. 393, 404 (1975)).

147. *Id.* at 1470.

148. *Id.* at 1472-73 (citing United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) and New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

for local determinations of one's marital status, "federal statutes that use the terms 'marriage' and 'spouse' have allowed the meaning of those terms to be filled in by substantive laws of the states."[149] In this way, the federal government did not have to decide whether it would recognize the marriages of interracial couples, marriages of individuals who had recently been divorced, marriages of closely related family members, marriages of young people, and marriages of a common-law nature. Before DOMA, rather than establish a federal definition of "marriage" and "spouse," a person was considered to be married for federal purposes if that individual's domicile considered that person to be married.

The opponents to DOMA emphasized this drastic change during the legislative debates:

> The Federal government has always relied on the states' definition of marriage for Federal purposes, and . . . it is unwarranted and an intrusion on states[']rights to change that practice now. The Federal government has no history in determining the legal status of relationships, and to begin to do so now is a derogation of states' traditional right to so determine.[150]

Without DOMA, Vermont's definition of marriage, even if it included same-sex couples, would be recognized for federal purposes. With that recognition would come access to over 1,049 federal laws that include marital status as a factor.[151] But the combination of DOMA and the Vermont Legislature's unwillingness to accord marital status to its same-sex couples has made it somewhat more unlikely that those couples will be recognized as married for federal purposes. DOMA, by its very terms, does not apply to civil unions and federal statutes only refer to "marriages" and those who are "spouses." However, as Professor Johnson of Vermont Law School points out,[152] some hope remains that participants in a civil union can challenge the federal limits on "marriages" and "spouses" since title 15, section 1204(b) provides that "[a] party to a civil union shall be included in any definition or use of the terms 'spouse,' . . . and other terms that denote the spousal

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149. Ruskay-Kidd, *supra* note 145, at 1473. Both the proponents and opponents of DOMA agreed that "the Federal government has always relied on the states' definition of marriage for Federal purposes." *Id.* (citing H.R. Rep. No. 104-664, at 43 (1996)).

150. *Id.* at 1475 (citing H.R. Rep. No. 104-664, at 43 (1996) (dissenting views), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2946).

151. *Little Project*, *supra* note 10, at 90 (referring to the report of the United States General Accounting Office).

152. *See generally* Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000).

relationship, as those terms are used throughout the law."[153] Thus, perhaps even members of a civil union can argue that DOMA unconstitutionally prevents recognition of their "marital" status which would have existed under the previous federal practice.

We are a country based on a vibrant governmental structure that, while preserving and protecting state citizenship and rights, manifests its patriotism and nationalism in the statement "I am an American." But our federal government now claims that, even though a state is willing to grant rights to same-sex couples, it does not have an obligation to recognize those rights. It changed the settled law which had looked to the states for guidance in determining who was married for federal purposes, rather than prevent a couple whose state told them they were married from receiving recognition, rights and benefits from the federal government. This change only applies to marriages or civil unions of same-sex couples; all marriages of opposite-sex couples, regardless of how unusual or rare in practice, remain recognized for federal purposes so long as they are recognized in the couple's home state.

Differences between states in how to define marriage have existed for centuries. Through difficult changes in family law the federal government has remained neutral, content to rely on each state to resolve the issue of who is married. Once the state resolved that issue, the federal government used that definition when determining which individuals were affected by the countless federal statutes and regulations referring to marital status or spouses. Only with same-sex couples has the federal government refused to accept the experiments and differences that exist between states, even though previous differences have been equally significant. Permitting or denying interracial marriage was based on a notion of white supremacy that this country endured a civil war to begin to defeat. Permitting divorce and remarriage challenged patriarchal notions that viewed women as property to be controlled by men as they saw fit. Resolving questions about whether first cousin, uncle/niece, or aunt/nephew marriages were permitted oftentimes revolved around cultural and religious tradition. Through all these differences, the federal government remained willing to defer to the states which resolved them in vastly different ways. But now, as this country and the world struggles with whether notions of heterosexism will continue to control access to necessary benefits, protections, and responsibilities, the federal government has become involved for the first time.

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153. *See supra* note 30 and accompanying text.

CONCLUSION

Had the Vermont Legislature permitted same-sex couples to marry, rather than enter civil unions, it would have provided those citizens with the full and equal status of its other citizens. This would have provided them with the strongest chance to challenge the Defense of Marriage Act and the state DOMAs in their attempts to prevent marriages by same-sex couples from being portable and from obtaining federal recognition. By passing a civil unions law, they did provide significant benefits, protections, and responsibilities to Vermont citizens who choose to remain in Vermont and who do not seek federal recognition of their marital status. But no state legislature would impose similar limitations on its opposite-sex couples. No opposite-sex couple would ever imagine that it was prevented from moving out of the state where its marriage was celebrated. No opposite-sex couple would ever imagine that it was denied federal recognition, given the huge influence that the federal government has over the day-to-day lives of its citizens. Only same-sex couples are expected to be grateful and accepting of this "pale shadow" of the full range of rights and protections granted to opposite-sex couples who have the freedom to marry.

This essay ends as it began with applause for the brave citizens of Vermont, her Supreme Court, her Legislature, and her Governor who have moved the civil rights of sexual minorities closer to equality.[154] But we may look back on this legislation in much the same way we look back at all prior attempts to declare something to be "separate but equal." Those attempts have established beyond a doubt that segregation can never lead to equality. Similarly, this segregation of same-sex couples outside the bounds of marriage will not give us the freedom we so strongly seek.

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154. *See* Eskridge, *supra* note 15, at 647-57 (discussing his "progressivity" thesis that registered partnerships (and presumably civil unions) occur after the country or state has first decriminalized consensual sodomy, adopted laws prohibiting discrimination on the basis of sexual orientation, and provided limited state recognition for same-sex relationships).