

Vermont Commission on Family Recognition and Protection
Meeting at Vermont Law School
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On behalf of Vermont Law School I would like to thank you for agreeing to hold a hearing at the law school. This is a tremendous opportunity for our community to learn about an issue important to many Vermonters. You have previously distributed a set of questions you would like us to address. I will focus principally on the first three Commission questions. That is, I will discuss whether there are any differences in the legal rights that flow marriage and civil union in Vermont. Next I will discuss cases addressing interstate recognition of Vermont civil unions and Massachusetts marriages. Third, I will discuss the outcome of the few cases challenging the so-called Defense of Marriage Acts. Finally, I will offer my opinion on the basis for the separate system of civil union in Vermont.

I will make a push at the end for opening up marriage to same-sex couples, but overall I see my role as more informative than persuasive. I hope to get the Commission up to date on what has happened in Vermont and across the country since the legislature passed the landmark civil union law back in 2000.

1. What are the legal consequences as between marriage and civil union in Vermont? In terms of legal benefits, protection, rights and obligations, what does a marriage license deliver you that a civil union license does not? Do these differences raise any statutory, common law, or constitutional law issues?

I am a gay rights advocate. I support opening up marriage to same-sex couples. Yet my answer to your first question is that a marriage license would not deliver any more rights in

Vermont than a civil union license. Legally, civil union is exactly the same and completely equal to marriage. For this I let the civil union law speak for itself. It grants same-sex couples “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.”¹ The law is comprehensive, it offers not some, many, or most, but “all the same” rights as are offered to opposite-sex couples. The law directs that a “party to a civil union shall be included in any definition or use of the terms ‘spouse,’ ‘family,’ immediate family,’ ‘dependent,’ ‘next of kin,’ and other terms that denote the spousal relationship, as those terms are used throughout the law.”² Couples in a civil union are responsible to each other in the same way as couples in a marriage. Couples seeking to dissolve their civil union must go to family court, just like couples in a marriage, and there the same “law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply[.]”³ In the legal realm, rights matter, and in this regard the civil union law is not ambiguous. It provides same-sex couples with the entire package of rights and responsibilities associated with marriage, bar none.

¹ VT. STAT. ANN. tit. 15 § 1204(a) (2005).

² *Id.* at § 1204(b).

³ *Id.* at § 1204(d).

Of course, this does not mean sam-sex couples in a civil union in Vermont have the same rights as opposite-sex couples in a marriage. Not at all and not even close. There are some 1096 federal rights and benefits that available to married couples that the federal government denies to same-sex couples because of the Defense of Marriage Act. That Act, passed in 1996, has two short sections. The one relevant to this discussion states simply, “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 and wife.”⁴ What few court and administrative decisions as there have been have uniformly held that DOMA prohibits same-sex couples from accessing federal marital benefits. This is as true for same-sex couples in a civil union in Vermont as it is for same-sex couples in a marriage in Massachusetts. Opening up marriage to same-sex couples in Vermont would not change this sad truth.

⁴ PL 104-199.

The harsh federal law has a spill-over effect even for state benefits. In particular, it can effect the health benefits companies offer to employees who are in a civil union. The civil union law requires insurance companies with family plans to offer coverage to same-sex couples under the same terms as they do married couples. However, a federal law called ERISA, or Employee Retirement Income Security Act, preempts most state laws relating to employee benefit plans. I am not an expert on ERISA by any means, and this forum is not the place to probe the niceties of this complex federal law. But it is enough for us today to know that most employers can hide behind ERISA if they do not want to extend benefits to the same-sex civil union spouses of their employees. Unfortunately, we saw this same thing happening in Massachusetts after same-sex marriage was allowed there. According to the Boston Globe, large corporations like General Dynamics, and FedEx are among the employers who do not provide the same health benefits to spouses of married gay workers in Massachusetts available to heterosexual married couples.”⁵

Same-sex marriage advocates do make one interesting argument regarding the conferral of state benefits that is worth your attention. They argue that private employers will often “piggyback” on the state’s definition of marriage in offering benefits. So, in the context of health care benefits, for example, if a company only offers these benefits to the married spouses of its employees, and Vermont opens up marriage to same-sex couples, then married same-sex couples will be entitled to the benefits unless and until the employers chooses to hide behind ERISA. To do so, it would have to take affirmative action. As long as same-sex couples only have civil union, the employer can rest on its policy of just extending coverage to married couples. That is, under today’s system it would have to act to extend benefits to same-sex couples, whereas with

⁵ Kimberly Blanton, *Firms Block Gays’ Benefits, Cite US Law*, Boston Globe, December 18, 2004.

same-sex marriage it would have to act to deny benefits. Since inertia is often a factor in corporate decisions, perhaps more same-sex couples would gain these benefits through marriage than through civil union. This argument makes intuitive sense to me, yet the experience in Massachusetts has been that employers intent on discriminating against same-sex married couples will do so.

The vexing question that has divided courts is whether a separate system of marital rights and benefits for same-sex couples is *inherently* unequal and therefore violative of equal protection. The Vermont Supreme Court sent mixed signals about this question in *Baker v. State*. The court made clear that it was not ordering the state to issue the plaintiffs marriage licenses. In directing the legislature to craft a constitutionally acceptable solution, the court pointed to examples from other states that “establish an alternative legal status to marriage for same-sex couples,” such as the Scandinavian registered partnership acts.⁶ This is what the Vermont Legislature did with the civil union law. Still, the court left open the possibility that even this might not be enough. It suggested that “some future case may attempt to establish that— notwithstanding equal benefits and protections under Vermont law—the denial of a marriage license operates per se to deny constitutionally-protected rights[.]”⁷ The plaintiffs in *Baker* moved for a voluntary dismissal of their action after passage of the civil union law, so this question remains unanswered in Vermont.

⁶ *Baker v. State*, 744 A.2d 864, 886-87 (Vt. 1999).

⁷ *Id.* at 866.

Any party seeking to make such a claim would have to use the new jurisprudential test the court created in *Baker*. There, to the consternation of Justice Dooley, the court abandoned the well-known and “rigid” three tier test used by the Supreme Court under the federal constitution. Under that test, laws which impact fundamental rights or so-called “suspect classes,” such as classes based on race or alienage, are subject to strict scrutiny. Laws discriminating based on gender are subject to a less strict intermediate review, and all other laws, such as economic regulation, are subject to the easily met rational basis test. In *Baker*, the Vermont Supreme Court opted instead for a “balancing approach” which is sometimes called a sliding scale test, with these three categories melded together. Now, under the Common Benefit Clause, the court will first determine “the part of the community disadvantaged by the law” and then to the government’s purpose for discriminating.⁸ The court will measure the government’s purpose against the importance of the right denied, and use “reasoned judgment” to decide if the discrimination is justified.

It was easy for the court to rule in plaintiffs’ favor in *Baker* because the law deprived same-sex couples of hundreds of state-conferred rights, and the government’s justifications failed to match this significant deprivation. Whether a law granting all the rights, benefits, and responsibilities of marriage but not the word itself violates the Common Benefit Clause under the new sliding scale analysis is a closer question.

Massachusetts Supreme Judicial Court certainly thought the word mattered. In a 4-3 vote, that court, citing *Brown v. Bd. of Education*, said flatly that separate is never equal.⁹ The

⁸ *Id.* at 878-79.

⁹ *Opinion of the Justices*, 802 N.E.2d 565 (Mass. 2004).

court used language drawn from the civil rights movement of the 1960's: "The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to a second-class status. . . . The [civil union] bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits. . . . The history of our nation has demonstrated that separate is seldom, if ever, equal."¹⁰

¹⁰ *Id.* at 569-70.

The Connecticut trial court, addressing the same question, had a different take. It said, “This court has been unable to find any case in which the mere difference in nomenclature applied to two groups merits” equal protection analysis. . . . Put another way,” the court went on, “the fact that two similar groups—men and women, say—are referred to by two different names does not provide the basis for an equal protection or due process challenge.”¹¹ The court distinguished *United States v. Virginia* (the VMI case) and other Supreme Court precedent on separate but equal by saying, “Though [plaintiffs] argue that separate is never equal, they have been subjected to no tangible separation at all, and the court rejects the argument that the *rhetorical* separation of marriage vs. civil union is enough to invoke an equal protection or due process analysis.”¹²

2. What states, if any, officially recognize a Vermont civil union? Is the recognition statutory or judicial? Is the recognition full or partial, or circumstance-driven? Same questions about the federal government. Are there any differences compared to recognition of a same-sex marriage from Massachusetts, or Canada?

By my count, eight states currently recognize Vermont civil union in some manner. New Hampshire and California offer full recognition of Vermont civil union by statute. New Hampshire’s civil union law states that a civil union or a same-sex marriage legally contracted outside of New Hampshire shall be recognized as a civil union in this state.” California’s domestic partnership law states that “A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, and that is substantially equivalent to a

¹¹ *Kerrigan v. State*, 909 A.2d 89, 98-99 (Conn. Super. 2006).

¹² *Id.* at 100.

domestic partnership . . . shall be recognized as a valid domestic partnership in this state regardless of whether it bears the name domestic partnership.”

After Connecticut passed its civil union law, that state’s Attorney General issued a formal opinion concluding that out of state civil unions would be fully recognized in Connecticut. The Attorneys General of New Jersey and New York have reached the same conclusion about recognition of out-of-state civil unions.

Vermont civil unions have been recognized judicially in what you call “circumstance-driven” situations in several states. In particular, courts seem inclined to dissolve civil unions upon the parties’ request. This has happened in Massachusetts, West Virginia, and Iowa. In all these cases, the courts had to recognize the civil union first in order to dissolve it, prompting on gay law expert to call the phenomenon “divorce before marriage.” A trial court in New York did recognize a civil union in a wrongful death action, but that decision was overturned on appeal. Courts in Georgia and one in Connecticut in a pre-civil union law case have also refused to recognize Vermont civil unions.

The one interstate recognition case you might be aware of is the *Miller-Jenkins* case. In that case, a female couple with ties to both Virginia and Vermont joined in civil union in Vermont, had a child, and a two years later filed an action in Vermont to have their civil union dissolved and to establish custody and visitation rights. After this action was filed, Lisa Miller-Jenkins, the biological mother of the child, filed another suit in Virginia, claiming that Janet had no rights to visitation because their civil union was void in Virginia. This case appeared to be heading for a constitutional showdown after the Vermont court ruled it had jurisdiction and gave Janet visitation rights, and the Virginia court said that Janet had no rights because Virginia didn’t

recognize the civil union. On appeal, the Vermont Supreme Court affirmed Janet's visitation rights, concluding that the case was governed by federal statutes which sought to prevent forum shopping in child custody cases. In Virginia, the court of appeals agreed these federal statutes governed the case since the child had significant connections to Vermont and that's where state court custody determination was made. Couples joined in civil union shouldn't be too hopeful about this result since the federal statutes were determinative. In other recognition contexts, I would hazard that the chance of other states recognizing civil unions is slim.

As for Massachusetts marriages, they are recognized by statute in New Hampshire (as civil unions) and by Attorney General opinion in New Jersey (where they are considered as civil unions), Rhode Island, and New York (both those Attorney General Opinions treat the Massachusetts same-sex marriages as marriages, not civil unions). Vermont would also arguably recognize Massachusetts same-sex marriages as civil unions, according to Attorney General Sorrell. Trial courts in New York are split on the recognition issue. One court refused to recognize a Massachusetts marriage, relying on the New York Court of Appeals decision in *Hernandez v. Robles*, in which the court rejected plaintiffs' claim that they were entitled to same-sex marriage under the New York Constitution. Another trial court in New York has rejected the argument that *Hernandez* means Massachusetts marriages should not be recognized., since that's a Full Faith and Credit question, not a state constitutional law question. That court upheld a county executive order requiring county agencies to recognize out-of-state same-sex marriages. Both of these cases are on appeal in New York.

One New York trial court has recognized a Canadian marriage. Two courts, one in New Jersey and one in Washington state, have addressed the question and have refused to recognize Canadian same-sex marriages.

The intriguing question often asked is whether a civil union might stand a better chance of being recognized in another state than a same-sex marriage. This is what the Connecticut Attorney General concluded. He simply looked to the legislature's express ban on same-sex marriage, and said that this meant out-of-state same-sex marriages could not be recognized in Connecticut. Yet since the legislature had passed a civil union law, out-of-state civil unions would be recognized. The language of the California domestic partnership law would suggest the same result there. The countervailing argument is that civil unions are unlikely to be recognized for marital benefits in other states because a civil union is not a marriage. The very first line of the civil union law states that marriage is the union of one man and one woman. Worse, the law states that "a system of civil unions does not bestow the status of civil marriage." This is the line the Georgia court used to deny recognition, and it will likely loom large in any out-of-state recognition context. Still, it may well be the case that a court could use its equitable powers to recognize a civil union for limited purposes where it would not be able to recognize a same-sex marriage.

Still, the bottom line is that whatever the same-sex relationship is called, the chances of it being recognized in other states is slim. If I can offer a quick lesson on full faith and credit, the general rule is that marriages valid where celebrated are valid everywhere, unless a state has a "strong public policy" against the marriage. This public policy exception was often used in the South to refuse recognition of inter-racial couples in the days of Jim Crow, but since about the

1950's it is exceedingly rare for courts anywhere to refuse to recognize an opposite-sex marriage if it was valid where celebrated. This will not be the case for same-sex marriages. As I'm sure you know, following court successes in Hawaii, Vermont, and especially Massachusetts, many states passed their own versions of the DOMA. Today, 26 states have constitutional amendments limiting marriage to a man and a woman and 19 states have statutes to that effect. Seventeen states now have laws or constitutional amendments which go much further and prohibit recognition of any same-sex relationship. An example of this would be Nebraska's Constitutional Amendment, which reads, "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." State courts asked to recognize civil unions from Vermont or same-sex marriages from Massachusetts will no doubt turn to the laws and amendments as evidence of the state's strong public policy against recognition. One well-known scholar has posited that the public policy exception might be unconstitutional, but no court has ever come close to saying this, and the Supreme Court has made clear that states are not bound by the laws of other states under the Full Faith and Credit Clause. *See Nevada v. Hall*, 440 U.S. 410, 423-24 (1979) ("Full Faith and Credit does not . . . enable one state to legislate for the other or to project its laws across state lines so as to preclude the other from prescribing for itself the legal consequences of acts within it."). Furthermore, Congress has used its powers under that clause to allow states not to recognize same-sex relationships. The first paragraph of the federal DOMA states, "No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State

. . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.”

Where does this leave us? In a rather sorry state, as far as couples in a same-sex relationship are concerned. Unlike opposite-sex marriage couples, same-sex couples united in marriage or civil union cannot be certain their relationship will be recognized when they travel. This problem is very real in our mobile society and may be especially acute in Vermont, a small state with residents who frequently leave the state for services or other reasons. Yet we needn't assume same-sex marriages or civil unions will never be recognized. I highly recommend Andrew Koppelman's book, "Same Sex, Different States," for a perceptive analysis of the complexities of this issue. He argues that a simple rule of "blanket nonrecognition" in DOMA states does not capture the finer points of full faith and credit clause precedent. He divides recognition cases into 4 likely scenarios. First is what he calls "evasive marriages." This is when a couple travel to say Mass to get married and return home, never intending to live in Massachusetts or leave their home state, which does not recognize same-sex marriage. Koppelman believes that in this circumstance the home state has a right to refuse to recognize the marriage, under the public policy doctrine. It is a closer call, according to Koppelman, for "migratory marriages." That is, where couples were residing in mass when they were married but then moved to another state after that. Koppelman suggests that in these cases the new home state of the couple should be entitled to decide which "incidents" of marriage to afford the couple, and that if it is a right or responsibility the couple could have contracted for, such as hospital visitation rights and inheritance, it should be granted to them. But rights that only flow

from the operation of law, such as the right to file income taxes jointly, may rightly be denied. He offers the same result for “visitor marriages,” where the couple is just passing through, and “extraterritorial marriages,” where the parties have never lived in the state but has some property or other asset there. What is most interesting about Koppelman’s book is his historical look at recognition of interracial marriages at the height of Jim Crow. At one time, 40 states had laws banning interracial marriage, many by constitutional amendment. Courts got quite exercised about this issue, and vented a lot of spleen, yet still there were cases that recognized interracial marriages in the latter three contexts. This hopefully is an encouraging signal to mobile same-sex couples that their marriage or civil union might be recognized elsewhere.

3. Challenges to DOMA.

There have only been a few reported cases, and they have all come out the same way. I am only aware of three cases, from Florida, California, and Washington State. The Florida case is illustrative of the trend. There, a lesbian couple went to Massachusetts and got married. As an aside, apart from DOMA concerns this marriage would appear to violate Massachusetts’ evasion statute, which was upheld by the Supreme Judicial Court of Massachusetts in a case brought by same-sex couples from Vermont and other states challenging the law. In any event, this Florida couple sued in federal court arguing that the Florida had to recognize their marriage because the Florida and the federal DOMA were unconstitutional. First, the court concluded there is no fundamental right to same-sex marriage. Next, on the equal protection claim, the court used the traditional three-tiered approach I mentioned earlier. The court concluded that claims of sexual orientation discrimination are to be reviewed under the lenient rational basis level of review. From here, it is an easy step to uphold the DOMA’s since under rational basis any conceivable

rationale for the law will suffice. The court accepted the government's assertion that DOMA "encourages the creation of stable relationships that facilitate the rearing of children by both of their biological parents."

In short, it is highly unlikely that DOMA will be struck down. Indeed, national gay civil rights groups would never consider bringing such a claim, and have gone so far as to file a brief in the renegade California case asking the court to dismiss it for lack of standing, since the couple there had already dissolved their domestic partnership.

The slightly closer question is that of whether the comprehensive state DOMA's that prohibit the recognition of not only marriage but all other forms for same-sex relationships are unconstitutional. The Nebraska constitutional amendment I quoted above was challenged in federal court on equal protection grounds after its passage. The trial court ruled in plaintiffs' favor, relying on *Romer v. Evans*. That was the famous 1996 Supreme Court case in which the Court struck down a Colorado constitutional amendment which would have banned any claims of discrimination based on sexual orientation at the state or local level. The Court held that such a broad-based, undifferentiated, constitutional disability directed at an unpopular group, for no other reason than pure animus, was a "denial of equal protection in the most literal sense." The amendment's sweep belied any legitimate purpose: "It is a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests." The Nebraska federal trial court used this language to strike down that state's DOMA. Here again, while the court held there could be a rational reason to limit marriage to a man and a woman, the broad sweep of the DOMA, extending to civil unions, domestic partnerships, and any other sort of legal arrangement ran up against the rule in *Romer*. This decision was reversed on appeal.

The Eighth Circuit applied the rational basis test to uphold the DOMA. It also felt *Romer* did not apply because the DOMA addressed only marriage, and not all claims of discrimination. Still, when you consider the hundreds and even thousands of rights that flow from marriage, the trial court's use of *Romer* to strike down the DOMA is plausible.

4. What is “the basis for Vermont’s separate legal structures for recognizing and protecting same-sex couples versus heterosexual couples?”

At the time of *Baker*, the Vermont Supreme Court stopped short of ordering the state to immediately open up marriage to same-sex couples because of a concern that a “sudden change in the marriage laws . . . may have disruptive and unforeseen consequences.” This was a legitimate concern back in 1999 because at that time no state recognized same-sex marriage, civil union, or any other marital equivalent for same-sex couples. With the civil union law compromise, Vermont could chalk up yet another “first in the nation” accomplishment. Yet times have changed dramatically in just seven short years. What was once radical is now blase. Civil union laws are now passed with relatively little debate, and nowhere near the rancor we saw here. This is true even in New Hampshire. Massachusetts now has same-sex marriage, as do Canada, Holland, Belgium, Spain, and South Africa. In all of these places, opening up marriage to same-sex couples has not had any detrimental effect on the institution of marriage or on society.

The Vermont Supreme Court and Legislature wisely saw that an incremental approach to same-sex marriage would be the most productive and sensitive way to approach this divisive

issue. With the compelling testimony at the hearings on the civil union bill, Vermonters saw their neighbors, friends, and community leaders share their stories of what it was like to be in a same-sex relationship, and all the hardships that followed from not having that relationship recognized. The Legislature recognized these stories and others in its findings:

Despite longstanding social and economic discrimination, many gay and lesbian Vermonters have formed lasting, committed, caring and faithful relationships with persons of their same sex. These couples live together, participate in their communities together, and some raise children and care for family members together, just as do couples who are married under Vermont law.

Over the ensuing years, Vermonters became accustomed to civil union. The concluding report of the Civil Union Review Commission confirmed that the new institution has had a negligible impact on existing government services, but has had marked, “very positive impact [the lives of couples joined in civil union] in numerous ways.” The destabilizing effect the court was concerned with earlier is no longer a serious issue. Vermont led the way with civil union, but is now already behind the curve. Opening up marriage to same-sex couples would be the next logical—and far less divisive—step for Vermont.

I will close by saying it is my hope that if the legislature does the right thing and opens up marriage to same-sex couples, it doesn’t do away with civil union, at least immediately. In my scholarship I have described the many merits of this new institution. Same-sex marriage advocates criticize it because it is new, and has nothing of the historical cache of marriage. Yet this is what I see as one of its advantages. It has none of the historical baggage of marriage either. I have defended it as an institution that the lesbian and gay community can call its own so that it is not subsumed in the dominant heterosexual paradigm. If marriage were opened up to

same-sex couples, then civil union would have to be opened up to opposite-sex couples, and so it would lose this unique, community-building feature. Still, I think we should keep it.

In this regard a comparison to Holland might be helpful. There, after same-sex marriage became legal in 2001, the government decided to leave the existing registered partnership act in place for five years, to determine if there was still a need for it. The registered partnership system in Holland is open to same and opposite sex couples. A study commissioned by the government at the end of the five year period showed that gay and straight couples continued to register for domestic partnerships even though they all had the option to marry. Among same-sex couples, after a surge in 2001 when same-sex marriage became legal, the numbers have tapered off, so that by 2005, 588 female couples and 570 male couples got married. The partnership numbers have remained constant for gay couples. In 2005, 329 female couples, and 279 male couples registered their partnerships, so roughly half the number as got married. For straight couples, the percentages are similar. In 2005, 10,699 couples got married, and 5744 became domestic partners. The study acknowledged these numbers could show a need for “a well-regulated formalised institution without the symbolism and tradition of marriage.”

This is my point about civil union in Vermont. The institution remains viable. The numbers have been fairly steady since the surge in the first year of 2000. Since 2002, the numbers have ranged between 167 and 124 in-state. The out-of state numbers have declined from 1876 to 427. I am sure most of these couples would rather be married, but it would be hasty and incorrect to assume all of them would. Some would prefer an “well-regulated institution without the symbolism and tradition of marriage.”

My progressive vision would go even further than this. I ascribe to model which would give couples a wide range of choices, from a limited set of rights and responsibilities, akin to the Hawaii Reciprocal Beneficiaries Act, to “marriage-lite,” like France’s Pac Civile, to perhaps even covenant marriages, like they have in Louisiana and Arkansas, where couples, once married, can only get divorced for cause, such as spousal abuse. The fullest flowering of freedom in relationship and familial choices would come when we break away from the limited, binary view of marriage or nothing. This of course is exactly the worst-case scenario opponents of same-sex marriage say will happen if we open up marriage to same-sex couples, but I am not afraid of it. I am not one of these people who say government should get out of the marriage business, but I do believe the centuries-long lesson of liberal society has been toward a greater freedom of choice when it comes to deciding on the appropriate level of commitment with a life partner.