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Strategies to Achieve Same-Sex Marriage and the Method of Incrementalist Change

Frances Hamilton
Northumbria University

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STRATEGIES TO ACHIEVE SAME-SEX MARRIAGE AND THE METHOD OF INCREMENTALIST CHANGE

FRANCES HAMILTON*

ABSTRACT

Following the decision of the Supreme Court in *Obergefell v. Hodges*,¹ all U.S. states are required to license marriages between same-sex couples. This decision, although having the effect of immediately introducing same-sex marriage across the U.S., was taken by an unelected court and in the absence of a democratic mandate. Many other countries worldwide have yet to enact same-sex marriage. This piece considers an appropriate strategy for enacting lasting change for those in favour of same-sex marriage. Comparative constitutionalism is used in order to learn from the experience of other nations in tackling similar social and legal issues. After an analysis of recent international examples this article recommends the use of slow incremental change. This is often characterised by an intermediate stage of civil partnership legislation and by use of the legislative rather than court-based approach. This method allows influence upon and engagement with public opinion, which is useful to ensure successful change. This article demonstrates by way of case studies that countries which do not follow this method are more likely to see a backlash in public opinion and a subsequent legislative reversal of a court judgement. Alternatively, lack of public support could lead to less than substantive equality for same-sex couples.

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I. INTRODUCTION

In recent years there has been an increase in the number of countries which recognise same-sex marriage.² Change has been

* Frances Hamilton is a Senior Lecturer at Northumbria University.

1. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

2. The following list shows the states that currently recognise same-sex marriage: Netherlands (2001), Belgium (2003), Spain (2004), Canada (2005), South Africa (2006),

particularly rapid in the U.S. The *Obergefell* case marks the current highpoint in recognition of same-sex marriage.³ Following the decision of the Supreme Court on June 26, 2015, it was determined that all U.S. states are required to license marriage between two people of the same sex and to recognise a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state.⁴ Justice Kennedy, in delivering the opinion of the majority of five out of nine judges, determined that denial of the right to marriage to same-sex couples violated “[r]ights implicit in liberty and rights secured by equal protection” guaranteed by the Fourteenth Amendment.⁵ *Obergefell* does follow a line of cases which have increased recognition of the rights of same-sex couples to wed, but represents a marked increase in the Supreme Court’s willingness to intervene in this matter.

In 2013, the Supreme Court in *U.S. v. Windsor*⁶ declared section 3 of Defence of Marriage Act (DOMA) of 1996⁷ unconstitutional for violating equal protection principles. After that case, the federal government had to recognise same-sex marriages conducted in different U.S. states. However, at that time no requirement was made for U.S. states to recognise same-sex marriages conducted in other U.S. states or foreign jurisdictions. Until the *Obergefell* case, the Supreme Court had a record of denying standing in same-sex marriage cases. This was highlighted by the Supreme Court case of October 6, 2014, where certiorari was denied in five appeals in relation to same-sex marriage.⁸ In so doing, the Supreme Court allowed individual states to determine whether or not to legalise

Norway (2009), Sweden (2009), Portugal (2010), Iceland (2010), Argentina (2010), Mexico (2010), Denmark (2011), Brazil (2013), France (2013), Uruguay (2013), New Zealand (2013), England and Wales (2014), Scotland (2014), Luxembourg (2015), Republic of Ireland (2015), USA nationwide (2015) and Finland (2017). In addition, many states in Mexico recognise same-sex marriage.

3. See generally *Obergefell*, 135 S. Ct. 2584.

4. *Id.*

5. *Id.* at 2603-05.

6. *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

7. Section 3 of DOMA provided that: “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 wife.”

8. The US Supreme Court denial of certiorari on October 6, 2014, immediately affected the five states concerned in the appeal (Virginia, Indiana, Wisconsin, Oklahoma and Utah) where state courts had previously struck down same-sex marriage bans. The cases were: *Bogan v. Baskin*, 766 F.3d 648 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014); *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014), *cert. denied*, 135 S. Ct. 316 (2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014); *McQuigg v. Bostic* (Virginia) 14-251, 4th Cir., *certiorari denied* October 6, 2014; *Rainey v. Bostic* (Virginia) 14-153, 4th Cir., *cert. denied*; *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 314 (2014); and *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 271 (2014).

same-sex marriage and many did so.⁹ The Supreme Court appeared reluctant to intervene at the federal level and left this decision to individual states. Kathy Graham explains that “[t]raditionally, in the United States the regulation of marriage and family is a matter that has been left to the states”¹⁰ The majority opinion in *Obergefell*, as penned by Justice Kennedy, dismissed concerns about “insufficient democratic discourse” on the basis that there had been “far more deliberation than this argument acknowledges.”¹¹ He went on to refer to referenda, legislative debates and scholarly writings, amongst other sources.¹² Yet at the time when *Obergefell* was decided the U.S. was divided on this issue, as same-sex marriage remained prohibited in twelve states.¹³

The four dissenting judges in *Obergefell* were scathing of the democratic power which the Supreme Court had usurped. Chief Justice Roberts stated that “[f]or those who believe in a government of laws, not of men, the majority’s approach is disheartening.”¹⁴ Justice Scalia in his dissent also commented upon the “. . . naked judicial claim to legislative – indeed super-legislative-power; a claim fundamentally at odds with our system of government.”¹⁵ This use of power by the Supreme Court is especially marked in Justice Scalia’s view because the “[f]ederal judiciary is hardly a cross-section of America.”¹⁶ He went on to comment upon the homogenous background of the nine judges, with only one representative from the mid-states, and no representatives from the southwest states or evangelical Christians.¹⁷ Justice Scalia concluded that the decision of the majority violated the principle of “no social transformation without representation.”¹⁸ The speed of the decision by the Supreme

9. Prior to *Obergefell*, 38 states in the US had legalised same-sex marriage to some degree.

10. Kathy T. Graham, *Same-Sex Unions and Conflicts of Law: When ‘I Do’ May be Interpreted as ‘No, You Didn’t’*, 3 WHITTIER J. CHILD & FAM. ADVOC. 231, 237 (2004). See also Erez Aloni, *Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POLY 105, 141 (2010); Robert E. Rains, *A Minimalist Approach to Same-Sex Divorce: Respecting States that Permit Same-Sex Marriages and States that Refuse to Recognise Them*, UTAH L. REV. 393 (2012); Steven K. Specht, *The Continuing Relevance of the Full Faith and Credit Clause: The Life of the Same-Sex Marriage After Windsor and Beshear*, 2 INDON. J. OF INT’L & COMP. L. 423, 435 (2015) (“[h]istorically, defining marriage has been left to the states and federal law has given these definitions a presumption of validity”).

11. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

12. *Id.*

13. Prior to *Obergefell*, the following states still banned same-sex marriage: Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, and Texas.

14. See *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

15. *Id.* at 2629 (Scalia, J., dissenting).

16. *Id.*

17. *Id.*

18. *Id.*

Court in the U.S. is also at odds with the position in Europe. Although many European states have been legislating individually in favour of same-sex marriage,¹⁹ at a European level the leading European courts have been greatly concerned about developing a consensus on the issue before acting.²⁰ On July 21, 2015, the European Court of Human Rights (“ECtHR”) determined that same-sex couples in contracting states had the right to some form of civil union or registered partnership, not same-sex marriage.²¹

One point on which there is international agreement is in relation to the constitutional importance of marriage. Nancy Cott states that “from the founding of the United States to the present day, assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy.”²² This is reflected by the protection of marriage in international conventions²³ and the importance construed upon marriage in influential judgments.²⁴ In leading cases such as *Goodridge*²⁵ and *Loving*, marriage has been referred to as a “vital social institution”²⁶ and “one of the ‘basic civil rights of man’ fundamental to our very existence and survival.”²⁷ Similarly, in *Obergefell* the majority judgment referred to the “transcendent importance of marriage.”²⁸ Exclusion or not from marriage for same-sex couples is therefore of constitutional importance²⁹ as the ability to participate in a legally recognised marriage has implications for an individual’s

19. 11 states in Europe have now legalised same-sex marriage and 24 have some form of civil partnership or registered union.

20. See, e.g., *Schalk v. Austria*, 2010-IV Eur. Ct. H.R. 409, 436.

21. *Oliari v. Italy*, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-156265>.

22. Aloni, *supra* note 10, at 141 (citing NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 1 (2000)).

23. See for example Article 12 of the European Convention on Human Rights which states that “[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.” Another example is Article 23(2) of the UN Covenant on Civil and Political Rights which states that “the right of men and women of marriageable age to marry and to found a family shall be recognized.”

24. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Loving v. Virginia*, 388 U.S. 1 (1967).

25. *Goodridge*, 798 N.E.2d at 941.

26. Jonah M.A. Crane, *Legislative and Constitutional Responses to Goodridge v. Department of Public Health*, 7 N.Y.U. J LEGIS. & PUB. POLY 465, 469 (2003-2004) (referring to *Goodridge*, 798 N.E.2d at 948).

27. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). See also YVONNE ZYLAN, STATES OF PASSION: LAW, IDENTITY AND SOCIAL CONSTRUCTION OF DESIRE 224 (2011) (referring to *Loving*, 388 U.S. at 12).

28. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

29. Other writers who discuss the constitutional importance of marriage include Nicholas Bamforth, *Sexuality and Citizenship in Contemporary Constitutional Argument* 10(2) INT’L J. CONST. L. 477-492, 477 (2012); BRENDA COSSMAN, SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING 27 (2007); Jeffrey Weeks, *The Sexual Citizen*, 15 THEORY, CULTURE AND SOCIETY 35-52, 39 (1998); and David Bradley, *Comparative Law, Family Law and Common Law*, 23(1) OXFORD J. LEGAL STUD. 127-146, 129 (2003).

constitutionally protected status as an equal citizen.³⁰ Same-sex couples who are excluded from marriage are not truly equal. This has led authors to conclude that excluding gays from marriage is denying them the full status of citizenship.³¹ Michael Dorf goes so far as to say that “withholding the word marriage impermissibly connotes a kind of second-class citizenship that is inconsistent with the government’s basic obligation of equal protection.”³² Excluding same-sex couples from marriage also denies them the full legal incidents of marriage, including rights of inheritance, maintenance and any tax concessions that may be available to married couples.³³

It is unsurprising that in relation to discussions of gay rights, marriage continues to be a hot topic. William Araiza refers to the “continued centrality of marriage to discussions of gay rights mak[ing] the recent writing on the topic all the more important.”³⁴ For many the fight for same-sex marriage is seen as part of a continuing struggle for equality. The battle for legal rights by the gay community has been described as, the “most recent and gripping

30. See, e.g., Bamforth, *supra* note 29, at 478 (referring to THOMAS H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* 18 (Thomas H. Marshall and T. Bottomore eds., 1992), where he states in discussing citizenship that “all who possess the status are equal with respect to the rights and duties with which the status is endowed.”); Conor O’Mahoney, *There is No Such Thing as a Right to Dignity*, 10 INT’L J. CONST. L. 551, 555 (2012), which also discusses the Irish Constitution and the emphasis laid upon equality in that document which states that “[a]ll citizens shall, as human persons be equal before the law.”; Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings*, 97 VA. L. REV. 1267 (2011).

31. See, e.g., Bamforth, *supra* note 29, at 484 (referring to Diane Richardson, *Sexuality and Citizenship*, 31 SOCIOLOGY 83, 88 (1998), who states that “it can be argued that lesbians and gay men are only partial citizens, in so far as they are excluded from certain of these rights.”). See also, Dimitri Kochenov, *On Options of Citizens and Moral choices of States: Gays and European Federalism*, 33 FORDHAM INT’L L. REV. 156, 163 (2009) (referring to Angela P. Harris, *Loving Before and After the Law*, 76 FORDHAM INT’L L. REV. 2821, 2823 (2008), who states that “[m]oreover, once a link between marriage and citizenship is explored, it becomes clear that denying the right to marry a partner of one’s choice can also be viewed as a ‘cultural message that certain groups are not suited for full citizenship.’”).

32. Dorf, *supra* note 30, at 1269.

33. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013) (concerning the survivor of a same-sex couple who was forced to pay inheritance tax as her Canadian same-sex marriage had not been recognised. Federal law would otherwise have exempted a surviving spouse from paying such tax.) For further discussion on the incidents of marriage see also, Robert Leckey, *Must Equal Mean Identical? Same-Sex Couples and Marriage*, 10 INT’L J. L. CONTEXT 5 (2014).

34. William D. Araiza, Book Review, 19 J. HIST. SEXUALITY 371, 371 (2010) (reviewing WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE; FOR BETTER OR FOR WORSE? WHAT WE’VE LEARNED FROM THE EVIDENCE* (2006); MARK D. JORDAN, *AUTHORIZING MARRIAGE: CANON, TRADITION IN THE BLESSING OF SAME-SEX UNIONS* (2006); MARK D. JORDAN, *BLESSING SAME-SEX UNIONS: THE PERILS OF QUEER ROMANCE AND THE CONFUSIONS OF CHRISTIAN MARRIAGE* (2006); RICHARD D. MOHR, *THE LONG ARC OF JUSTICE: LESBIAN AND GAY MARRIAGE, EQUALITY AND RIGHTS* (2005)).

of the great historical struggles for such rights, including those of religious and ethnic minorities and women,³⁵ and often involves intense political debate.³⁶

However, not everyone sees marriage as a goal. Yvonne Zylan writes that “[feminist] . . . critics found much to dislike in marriage.”³⁷ Marriage was understood as “at best problematic for, and at worst deeply oppressive to, women as a class.”³⁸ It was seen as unattractive for gays to seek to join such a traditional institution. This attitude has largely changed in the face of “bracing realism”³⁹ and an acknowledgement of the “unique . . . constitutive power”⁴⁰ of marriage and the associated rights this entails. Gay rights movements worldwide have adopted a more positive view towards marriage.⁴¹ This move accords with the changing nature of marriage itself. Marriage is not a “fixed and immutable institution”⁴² and recent years have seen many changes in the nature of marriage itself.⁴³ This article is written from the perspective of a same-sex marriage supporter. The purpose of the piece is to develop strategies for success for those who favour same-sex marriage equality, or at the very least progress towards achievement of that goal. Success is measured by means of a long-term substantive equality for same-sex couples and the achievement of same-sex marriage without any backlash in public opinion.

This article advocates the use of comparative constitutionalism. This is of particular interest to those countries which are

35. David A. J. Richards, Book Review, 2 INT’L J. CONST. L. 727, 727 (2004) (reviewing CARL F. STYCHIN, *GOVERNING SEXUALITY: THE CHANGING POLITICS OF CITIZENSHIP AND LAW REFORM* (2003)).

36. WILLIAM N. ESKRIDGE JR., *EQUALITY PRACTICES, CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* 112 (2002).

37. ZYLAN, *supra* note 27, at 204.

38. *Id.*

39. *Id.* at 205 (referring to MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999)).

40. *Id.* at 275.

41. *Id.* at 205 (referring to Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. OF L. & SOC. CHANGE 567, 611 (1994)). See also, Aloni, *supra* note 10, at 156 (referring to Beccy Shipman & Carol Smart, ‘It’s Made a Huge Difference’: Recognition, Rights and the Personal Significance of Civil Partnerships, 12 SOC. RES. ONLINE, ¶ 2.5 (2007), <http://www.socresonline.org.uk/12/1/contents.html>).

42. Gretchen Van Ness, *The Inevitability of Gay Marriage*, 38 NEW ENG. L. REV. 563, 564 (2004) (commenting on the arguments made by other unreferenced authors). See also, Cindy Tobisman, *Marriage vs Domestic Partnership: Will We Ever Protect Lesbians’ Families?*, 12 BERKELEY WOMEN’S L. J. 112, 112 (1997) (explaining that the “institution of marriage is not monolithic and unchanging.”).

43. For example, changes allowing inter-racial couples to marry and allowing married women an independent legal status. For discussion see Tobisman, *supra* note 42, at 112. See also Ian Loveland, *A Right to Engage in Same-Sex Marriage in the United States*, 1 EUR. HUM. RTS. L. REV., 10 (2014); Leckey, *supra* note 33, at 11.

“demographically and culturally similar.”⁴⁴ Not every commentator sees the usefulness of such comparisons in family law. David Bradley argues that such comparisons are “particularly problematic,”⁴⁵ as “the European experience is inherently different from that of the United States.”⁴⁶ Differences have to be acknowledged, but comparisons enable a choice of strategies to be developed. A review of how other well developed nations have grappled with similar social claims concerning discrimination and equal protection before the law⁴⁷ enables an evaluation of the methods and concepts used to date.⁴⁸ Brenda Cossman also favours comparative constitutionalism. She writes that “[t]he migration of same-sex marriages and its cultural representations are changing the cultural landscape within which constitutional challenges will occur and constitutional doctrine will develop.”⁴⁹ Comparisons are perhaps of particular interest in the U.S. Traditionally, the U.S. has “lagged significantly behind those of other jurisdictions”⁵⁰ Although this position has been reversed by the *Obergefell* decision in favour of same-sex marriage across the U.S.,⁵¹ questions remain as to whether a Supreme Court judgment was the appropriate way of achieving this goal. For those jurisdictions which have yet to achieve same-sex marriage, evaluating the experience from other countries allows proponents of same-sex marriage to plan appropriate strategies.

Case law also demonstrates the rising influence of comparative constitutionalism. Despite criticism that the U.S. fails to look with regularity outside its own borders,⁵² leading cases see the U.S. Supreme Court referring to judgments from the European Court of Human Rights.⁵³

44. ESKRIDGE, *supra* note 36, at 83.

45. Bradley, *supra* note 29, at 127. Other writers also comment on the difficulties of international comparisons as regards family law. See, e.g., KONRAD ZWEIGERT & HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 59-61 (1998); Alision Diduck & Frances Raday, *Introduction: Family – An International Affair*, 8 INT’L J. L. CONTEXT 187 (2012).

46. Aloni, *supra* note 10, at 117.

47. Claire L’Heureux-Dube, *Realising Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective*, 1 INT’L J. CONST. L. 35, 36 (2002).

48. ESKRIDGE, *supra* note 36, at 112.

49. Amanda Alquist, *The Migration of Same-Sex Marriage from Canada to the United States: An Incremental Approach*, 30 U. LA VERNE L. REV. 200, 208 (2008) (referring to BRENDA COSSMAN, *Migrating Marriages and Comparative Constitutionalism*, in THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudry ed., 2006)).

50. See Richards, *supra* note 35, at 727. See also Araiza, *supra* note 34, at 371.

51. See generally, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

52. L’Heureux-Dube, *supra* note 47, at 36.

53. William N. Eskridge Jr., *Development – United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism*, 2 INT. J. CONST. L. 555, 555 (2004) (explaining that “Justice Anthony Kennedy’s opinion looked at constitutional precedents from abroad, referring to decisions of the European Court of Human Rights.” (referring to *Lawrence v. Texas*, 539 U.S. 558 (2003))).

Chief Justice William Rehnquist advised that U.S. courts should “begin looking to the decisions of other constitutional courts to aid in their own deliberative process.”⁵⁴ Yet this dicta was far from uncontroversial with Justice Scalia dissenting on the basis that constitutional entitlements do not “spring into existence . . . because foreign nations decriminalize conduct.”⁵⁵ He considered discussion of foreign views to be “dangerous.”⁵⁶ Despite these differing views, there is no way of avoiding this issue as globalisation means that with same-sex couples relocating internationally, courts in different countries and U.S. states will be forced to consider the legality of same-sex marriages conducted in other jurisdictions. The influence of comparative constitutionalism can also be seen from the greater speed of recognition of same-sex marriage in Europe and the U.S. since 2010.⁵⁷ This demonstrates the impact that a change in one jurisdiction in recognising same-sex marriage has on another jurisdiction. International comparisons are not only useful, but necessary as they reflect what is already happening.

The theory of incremental development towards same-sex marriage is also supported. Incrementalism, also known as the theory of ‘small change’ was first advanced by Kees Waaldijk,⁵⁸ and subsequently developed by William N. Eskridge⁵⁹ and Yuval Merin.⁶⁰ Erez Aloni explains that, “these scholars suggest that every country or state will, on its path to the legalization of same-sex marriage, follow the same three-stage process.”⁶¹ Yuval Merin refers in his book to what he terms the “standard pattern or process, or ‘standard sequence’ each stage being a prerequisite for the next one.”⁶² The model of small change begins with the “repeal of sodomy laws.” He then explains that the next step is to “prohibit discrimination against gay men and lesbians on the basis of sexual orientation” before the third level of “recognition of same-sex

54. Eskridge, *supra* note 53, at 555 (referring to William H. Rehnquist, *Constitutional Courts – Comparative Remarks* (1989), reprinted in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE – A GERMAN-AMERICAN SYMPOSIUM* 411, 412 (Paul Kirchhof & Donald P. Kornmiers eds., 1993)).

55. *Lawrence*, 539 U.S. at 598.

56. *Id.* (referring to *Foster v. Florida*, 537 U.S. 470, 470 (2002) (Thomas J., concurring in denial of *cert.*). Alquist, *supra* note 49, at 209 (referring to this as an example of “a resistance to allowing international case law and social trends to influence this country’s court decision.”).

57. See *supra* note 2.

58. Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* 437 (Robert Wintemute & Mads Andenaes eds., 2001).

59. ESKRIDGE, *supra* note 36.

60. YUVAL MERIN, *EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES* (2002).

61. Aloni, *supra* note 10, at 107.

62. MERIN, *supra* note 60, at 326.

partnerships as equal to opposite-sex unions.”⁶³ There are also several other authors which review, discuss and support the incrementalist approach.⁶⁴ The incrementalist method has also been followed in practice by many countries, including England and Wales, Scotland, Denmark, France and Nordic countries. In practice the ECtHR has also adopted a gradually increasing level of protection for gays and same-sex couples. This began with the decriminalisation of sodomy laws,⁶⁵ before moving on to equality in employment⁶⁶ and tenancy conditions for gays,⁶⁷ with more recent cases emphasising the need for equality in adoption⁶⁸ and civil partnership rights where these had already been introduced for heterosexuals.⁶⁹ The latest ECtHR case determined that same-sex couples in contracting states had the right to some form of civil union or registered partnership.⁷⁰ Yet same-sex marriage has not been introduced so far due to concerns by the ECtHR over lack of consensus.⁷¹ This piece analyses the importance of the incrementalist theory in light of recent developments especially the decisions of the U.S. Supreme Court in *Windsor v. U.S.* and *Obergefell*.⁷² Unlike other theorists who use incrementalism to predict when change would next occur, this piece uses incrementalism in connection with comparative constitutionalism to establish a strategy for success for those who favour same-sex marriage. In the next section the incremental approach is considered in further depth, before going on to consider the concept of civil partnership and the advantages of taking a legislative rather than court-based approach. Examples from different jurisdictions are used to demonstrate that slow incremental change is to be welcomed. This allows public opinion to have influence. It also avoids a backlash in public opinion and ensures the substantive reality of equality protections.

63. *Id.*

64. Hillel Y. Levin, *Conflicts and the Shifting Landscape around Same-Sex Relationships*, 41 CAL. WESTERN INT'L L. J. 93 (2010); Graham, *supra* note 10; Rains, *supra* note 10; Aloni, *supra* note 10, at 107; Kathryn L. Marshall, *Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed*, 2 WM. & MARY POLY REV. 194, 194 (2010); Nanci Schanerman, *Comity: Another Nail in the Coffin of Institutional Homophobia*, 42 U. MIAMI INTER-AM. L. REV. 145 (2010); Alquist, *supra* note 49.

65. *Dudgeon v United Kingdom*, 45 Eur. Ct. H.R. (1981).

66. *Smith v. United Kingdom*, 1999-IV Eur. Ct. H.R. 45; *Lustig-Prean v. United Kingdom*, Eur. Ct. H.R., App. Nos. 31417/96 & 32377/96 (1999).

67. *Karner v. Austria*, 2003-IX Eur. Ct. H.R. 199.

68. *EB. v. France*, App. No. 43546/02, (2008).

69. *Vallianatos v. Greece*, 2013-VI Eur. Ct. H.R. 125.

70. *Oliari v. Italy*, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-156265>.

71. *Id.*

72. *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

II. THE INCREMENTAL APPROACH

Marriage is not a “fixed and immutable institution.”⁷³ It is pertinent to make the point that the institution of marriage has “a history of continuous evolution.”⁷⁴ The extent of the change already achieved can be seen from examples in the U.S. where “as recently as 1967, state governments denied inter-racial couples to marry.”⁷⁵ Similarly, over a lengthy period there has been radical change to those marriage laws that denied married women an independent legal status.⁷⁶ The ECtHR has also recognised the right of transsexuals to marry in their new sex.⁷⁷ As the institution of marriage changes, so the attraction of this institution increases for same-sex couples. Indeed, same-sex couples can be seen as one of the drivers of change. These legal changes accord with the reality as to what constitutes a modern day family. Dale Carpenter states that gay families are “not . . . top-down creations of government bureaucrats or radical visionaries. They are bottom-up facts of life.”⁷⁸ Michele Grigolo also identifies the “diversification of the ways people establish relationships and families . . .”⁷⁹ It is correct that “progress in promoting tolerance towards homosexuality has not been linear . . . ,”⁸⁰ but change has already been happening for some time. The debate should instead consider the speed of change. The pace of slow incremental change should be welcomed where this accords with change in public opinion.

Kathryn Marshall sets out the debate about speed of change when she argues that there “remains a significant divide between those who argue in favour of pushing for immediate and full equality and those who favour a more incremental approach.”⁸¹ Proponents

73. Van Ness, *supra* note 42, at 564 (commenting on the arguments made by other unreferenced authors). See also Tobisman, *supra* note 42, at 112 (explaining that the “institution of marriage is not monolithic and unchanging.”).

74. Rt. Hon. Maria Miller MP, Minister for Women and Equalities, *Ministerial Forward*, EQUAL MARRIAGE: THE GOVERNMENT’S RESPONSE 4 (2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1_.pdf.

75. Tobisman, *supra* note 42, at 112. See also Loveland, *supra* note 43; Leckey, *supra* note 33, at 11.

76. Tobisman, *supra* note 42, at 112.

77. See *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, 4 (stating that “The Court had found . . . that a test of congruent biological factors could no longer be decisive in denying legal recognition to the change of gender” of a post-operative transsexual).

78. Dale Carpenter, *A Traditionalist Case for Gay Marriage*, 50 SOUTH TEX. L. REV. 93, 102 (2008).

79. Michele Grigolo, *Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject*, 14 EUR. J. INT’L L. 1023, 1026 (2003).

80. Aloni, *supra* note 10, at 136 (referring to M.V. Lee Badgett, *Predicting Partnership Rights: Applying the European Experience in the United States*, 17 YALE L.J. & FEMINISM 71, 75 (2005)).

81. Marshall, *supra* note 64, at 194.

of immediate action argue that “proceeding too slowly or conceding too much will cause the movement to become stagnant or toothless.”⁸² Hand-in-hand with this approach is a concern about the lack of equity for those affected,⁸³ and that the “need for governmental incrementalism” is an inappropriate reason for delay.⁸⁴ Moving too quickly in the absence of support from public opinion could result in a backlash of public opinion or less than substantive equality. Hillel Levin, writing before the recent *Obergefell* judgment also advised that “nationwide recognition of same-sex marriage will, should and can only be achieved through public persuasion.”⁸⁵ In introducing same-sex marriage nationwide without a full democratic mandate, the Supreme Court in *Obergefell*⁸⁶ runs the risk that there will be a lack of substantive support nationwide. It is hoped that public approval across all states will be successfully achieved, but this may take time.

An alternative approach to immediate action is that of incrementalism.⁸⁷ As explained in the introduction this involves a series of small changes on the path towards legalisation of same-sex marriage. After the decriminalisation of sodomy, the next step is the achievement of equality on the basis of sexuality before moving on to equalisation of same-sex unions. There are many examples of countries that followed the rules of small change. These include the Nordic countries of Norway, Sweden and Iceland.⁸⁸ Spain is also given as an example of success for incrementalism in Southern Europe.⁸⁹ In the U.S., Vermont is cited as an example of a state which has taken the slow incremental approach. Following a

82. *Id.* at 196-97.

83. *Id.* at 198 (referring to arguments which include “the principled belief that it is unjust to delay struggles for equality while waiting for ‘the right moment.’”) Another interesting example can be seen from the civil rights movement where Dr. Martin Luther King, Jr., wrote that “This ‘Wait’ has almost always meant ‘Never’. It has been a tranquilizing thalidomide, relieving the emotional stress” MARTIN LUTHER KING, JR., *Letter from a Birmingham City Jail*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, Jr.* 289, 292 (James M. Washington ed., 1986).

84. Kathryn Chapman, (Case Comment) *Halpern v. Canada* (Att’y Gen.) (2002), 215 D.L.R. 4th 223 (Can. Ont. Div. Ct.), 19 CANADIAN J. FAM. L., 423, 426 (2002) (referring to Justice LaForme in *Vriend v. Alberta* [1998] 1 S.C.R. 493, 559-60 (Can.) (cited in *Halpern* at ¶ 306)).

85. Levin, *supra* note 64, at 103.

86. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

87. See Waaldijk, *supra* note 58, at 437; ESKRIDGE, *supra* note 36; MERIN, *supra* note 60.

88. For further explanation see Aloni, *supra* note 10, at 118; Macarena Saez, *Same Sex Marriage, Same-Sex Cohabitation, and Same-Sex Families Around the World; Why ‘Same’ is So Different*, 19 AM. U. J. GENDER SOC. POL’Y & L. 1, 9 (2011).

89. For further explanation see Aloni, *supra* note 10, at 123; Saez, *supra* note 88, at 5 (referring to Carlos Martinez de Aguirre Aldaz & Pedro de Pablo Contreras, *National Report: Spain*, 19 AM. U. J. GENDER SOC. POL’Y & L., 289 (2012)).

judgement from the Vermont Supreme Court in 1999,⁹⁰ same-sex civil unions were legalised the following year.⁹¹ Subsequently, a same-sex marriage law was enacted in 2009.⁹²

Many criticisms of the incrementalist strategy remain. These centre around the fact that this strategy is drawn from Nordic experience which may not be appropriate to the U.S. because of “important cultural or social differences.”⁹³ The U.S. is seen as different because of “its greater heterogeneity and its strain of religious fundamentalism . . .”⁹⁴ in contrast to the “small ethnically homogeneous populations” and separation of “religion and politics . . .”⁹⁵ common in Nordic countries. As the incrementalist strategy aims to predict future change in same-sex marriage, Professor Badgett recommends that other factors are also important including, “rates of heterosexual cohabitation, levels of religiosity and tolerance toward homosexuality.”⁹⁶ All of these factors are appropriate issues to consider in predicting change. What is of most relevance is not predicting change but instead what can be learnt from countries which have followed the steps of the incremental change process. All of the Nordic countries cited have followed this process and have managed to introduce same-sex marriage resulting in a substantive and lasting change and avoiding a backlash in public opinion. David Richards also gives Vermont as an example of a state where civil partnership (and now subsequently same-sex marriage) has been introduced, “without a reactionary constitutional amendment.”⁹⁷ With the increase in the number of countries passing same-sex marriage legislation in recent years, England and Wales, France, and Denmark, for example, join the number of countries to have followed the incrementalist strategy. The concerns about drawing comparisons from small countries with homogenous populations, although still relevant, are now less accurate.

One of the major criticisms of the incrementalist strategy is that it proceeds too slowly. Worldwide, the great majority of countries do not give any “formal recognition to same-sex couples . . . ,”⁹⁸ as “[l]esbian and gay relationships are not currently relevant to the

90. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

91. VT. STAT. ANN. tit. 15, §§ 1201–07 (2002); An Act Relating to Civil Unions, § 42, 2000 Vt. Acts & Resolves 72, 87–88.

92. Marriage Equality Act 2009 Vt. Acts & Resolves 1-11.

93. Aloni, *supra* note 10, at 108 (referring to Badgett, *supra* note 80, at 85).

94. Araiza, *supra* note 34, at 375.

95. ESKRIDGE, *supra* note 36, at 97.

96. Aloni, *supra* note 10, at 108 (referring to Badgett, *supra* note 80, at 85).

97. Richards, *supra* note 35, at 727.

98. Saez, *supra* note 88, at 31.

public law agenda of most developing countries”⁹⁹ Before the recent decision of the ECtHR in *Oliari and Others v. Italy*¹⁰⁰ many countries within Europe had no protections for same-sex couples. Italy, Greece and Cyprus showed slow progress and were the “least developed with regards to same-sex marriage.”¹⁰¹ None of these countries offered any legal protection for same-sex couples. Indeed, the Italian Constitution referred to the “right of the family as a natural society based on marriage.”¹⁰² There were several failed attempts to introduce registered partnerships in Italy.¹⁰³ Similarly, in Greece there was no protection for same-sex couples. In 2008, Greece enacted a ‘Free Unions Pact’ that only applied to heterosexual partners and the ECtHR subsequently found this to violate Article 14 (equality) in conjunction with Article 8 (the right to private life) of the European Convention on Human Rights.¹⁰⁴ Greece had to amend its law to have equality for same-sex couples in respect of access to civil partnership.¹⁰⁵ Following the decision of *Oliari and Others v. Italy* on July 21, 2015,¹⁰⁶ all contracting states to the European Convention on Human Rights will have to introduce a form of civil union or registered partnership.¹⁰⁷ There is still no requirement to introduce same-sex marriage due to concerns about a lack of consensus on this issue between European nations.¹⁰⁸

Some countries need longer to adjust, and change may not come to “some jurisdictions for a long time, and maybe not ever.”¹⁰⁹ In many ways it is better to wait for the appropriate conditions for change. Change that outstrips public opinion could lead to a backlash in public opinion,¹¹⁰ or a lack of substantive equality.¹¹¹ This does not mean that there should be no change. Smaller changes such as anti-discrimination laws and civil partnership, in due course, could be effective in providing necessary legal protections. Change can be effected at the appropriate slower pace. The influence of comparative constitutionalism means that even if a country does not give same-sex couples legal protection, the

99. ESKRIDGE, *supra* note 36, at 97.

100. *Oliari v. Italy*, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-156265>.

101. Aloni, *supra* note 10, at 124.

102. Art. 29 Costituzione [Cost.] (It.).

103. For further discussion see Saez, *supra* note 88, at 32.

104. *Vallianatos v. Greece*, 2013-VI Eur. Ct. H.R. 125.

105. *Schalk v. Austria*, 2010-IV Eur. Ct. H.R. 409.

106. *Oliari v. Italy*, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-156265>.

107. *Id.*

108. *Id.*

109. ESKRIDGE, *supra* note 36, at 119.

110. Such as examples seen from certain U.S. states, which is explored in the final section of this piece.

111. Such as the example seen from South Africa, which is explored in the penultimate section of this piece.

enactment of same-sex marriage laws in other countries has had an influence on the public consciousness of that jurisdiction. In addition, international bodies such as the European Union ("EU") and the Council of Europe (the governing body behind the European Convention on Human Rights) continue to exert an influence in discussing these topics when legal challenges are brought. Finally, with the influence of globalisation, there are going to be increasing instances of same-sex married couples asking for legal recognition of their same-sex marriage legitimately conducted in another jurisdiction.

Slow change can also be seen as advantageous. Slower change is more likely to lead to lasting, substantively effective and enduring change¹¹² as it allows time to "permit . . . gradual adjustment of antigay mind-sets, slowly empower . . . gay right advocates and . . . discredit antigay arguments."¹¹³ It is necessary to allow for a change in public opinion as in reality the law cannot change unless public opinion also changes. Public opinion and enforcement of laws are "interwoven . . . because the law has little meaning if it is not enforced."¹¹⁴ This corresponds with the theory that to conduct legislative change, "the inclination of the majority of the people . . . are in favour of a change."¹¹⁵ The effect is circular as "law cannot move unless public opinion moves, but public attitudes can be influenced by changes in the law."¹¹⁶

In an interesting and useful comparison Kathryn Marshall discusses how civil rights lawyers and activists adopted a pragmatic strategy with "victories . . . often frustratingly incomplete, but the principles they established were the ones that translated most

112. MERIN, *supra* note 60, at 308.

113. ESKRIDGE, *supra* note 36, at 119. *See also* Marshall, *supra* note 64, at 199-200 (explaining that such slow change although frustrating at the time allows "public opinion to adjust gradually to the changes sought by social movement."); Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 NW. J.L. & SOC. POL'Y 260, 260 (2010); Nancy D 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).

114. Kimberly Gonzalez, *Gay Marriage and Gay Union Law in the Americas*, 16 L. & BUS. REV. AM. 285, 285 (2010).

115. Amy L. Wax, *The Conservative's Dilemma: Social Change, Traditional Institutions and Same-Sex Marriage*, 42 SAN DIEGO L. REV., 1059, 1100 (2005) (referring to MICHAEL FREEDMAN, EDMUND BURKE AND THE CRITIQUE OF POLITICAL RADICALISM 160 (1980) (quoting Edmund Burke, *Speech on the Acts of Uniformity* (February 6, 1772), in 7 THE WORKS OF THE RIGHT HONORABLE EDMUND BURKE (2005))). *See also* Maimon Schwarzschild, *Marriage, Pluralism and Change: A Response to Professor Wax*, 42 SAN DIEGO L. REV. 1115, 1116 (2005) (stating that "[i]n other words, as a politician, you should 'acquiesce in change only if both the public and [you] concur that some modification is necessary.'").

116. ESKRIDGE, *supra* note 36, at 97.

effectively into lasting and tangible social progress.”¹¹⁷ In contrast, pushing too hard could result in a harmful backlash, disrupting dialogue on the issue, and causing “unnecessary polarization”¹¹⁸ as seen in certain U.S. states.¹¹⁹ After *Windsor*,¹²⁰ commentators argued that the Supreme Court was taking a cautious approach.¹²¹ In that case, whilst the Supreme Court decision meant that the federal government had to recognise same-sex marriages, the Supreme Court did not find any requirement for states to recognise same-sex marriage conducted in other jurisdictions.¹²² Michael Klarman argues that the “*Windsor* majority were not yet prepared to impose gay marriage on the states.”¹²³ The *Windsor* majority were concerned that too broad a ruling would result in a backlash¹²⁴ and Justice Ginsburg is known to consider that “the Court erred in *Roe v. Wade* by intervening too quickly and too aggressively on abortion issues.”¹²⁵ Similarly in the decision of October 6, 2014, the U.S. Supreme Court, by denying certiorari in relation to same-sex marriage appeals, allowed the five states in question to take their own decisions in relation to this matter.¹²⁶ There were concerns that if the Supreme Court got too far ahead on this issue that this could backfire.¹²⁷ This caution has now been thrown to the wind. Following the decision in *Obergefell*, the Supreme Court by a majority of five to four determined that same-sex marriage be legalised nationwide.¹²⁸ This may raise concerns about the possibility of a backlash in public opinion or a lack of substantive support in some of the U.S. states. In his dissenting judgment Chief Justice Roberts

117. Marshall, *supra* note 64, at 199-200 (referring to Judge Stephen Reinhardt, *Legal and Political Perspectives on the Battle over Same-Sex Marriage*, 16 STAN. L. & POL'Y REV. 11, 12 (2005)).

118. *Id.* at 199-200.

119. See section 5 of this piece on backlash.

120. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

121. Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality* 16 HARV. L. REV. 127, 146 (2014).

122. *Windsor*, 133 S. Ct. at 2675. For further discussion see Klarman, *supra* note 121, at 146.

123. Klarman, *supra* note 121, at 146-47.

124. *Id.* at 148.

125. *Id.* at 146-47 (referring to Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 376, 379-82, 385-86 (1985); Ruth Bader Ginsburg, Madison Lecture, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198-200, 1205-08 (1992); Ruth Bader Ginsburg, Gillian Metzger & Abbe Gluck, A *Conversation with Justice Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 6, 15-16 (2013); Meredith Heagney, *Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit*, U. CHI. L. SCH. (May 15, 2013), <http://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit>).

126. See *supra* note 8.

127. Richard Wolf, *First Take: Justices Decide Gay Marriage by Not Deciding*, USA TODAY (October 6, 2014), <http://www.usatoday.com/story/news/politics/2014/10/06/supreme-court-gay-lesbian-marriage-analysis/16803357/>.

128. See generally, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

discussed the “consequences to shutting down the political process.”¹²⁹ In his view, “[p]eople denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide.”¹³⁰ He goes on to refer to Justice Ginsburg who in reflecting on the decision of the Supreme Court in *Roe v. Wade* in the context of the abortion debate commented that “[h]eavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict.”¹³¹ It is hoped that over time public support in favour of same-sex marriage in every state across the U.S. may be achieved. Nonetheless, it remains a missed opportunity that the U.S. has lost the chance to have a full democratic debate on this issue.¹³²

Statistics demonstrate that favourable public opinion is essential in ensuring effective and long-lasting change for proponents of same-sex marriage. For example, prior to the enactment of same-sex marriage in England and Wales, 53% of those consulted supported same-sex marriage.¹³³ Similar statistics emerge for France and Denmark. They enacted same-sex marriage in 2013 and 2012 respectively.¹³⁴ Pew Research Centre conducts surveys annually in 17 nations on this subject, refer to the correlation between public support for and legal recognition of same-sex marriage.¹³⁵ It is not surprising that there is most likely to be a backlash in public opinion, where court judgments strongly contravene public opinion.¹³⁶ Countries that have legalised same-sex marriage, but are struggling to ensure substantive change, show a

129. *Id.* at 2625 (Roberts C.J., dissenting).

130. *Id.*

131. *Id.* (referring to Ginsburg, *supra* note 125, at 385-86).

132. *Id.*

133. EQUAL MARRIAGE: THE GOVERNMENT’S RESPONSE 11 (2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1_.pdf.

134. Public opinion polls in France show a consistent support for same-sex marriage from 2008 onwards prior to the French same-sex marriage legislation in 2013. The following examples show the figures in support of same-sex marriage: Ifop poll (June 2008) 62%, BVA poll (November 2009) 64%, Credoc poll (July 2010) 61%, TNS-Sofres poll (January 2011) 58%, Ifop poll (June 2011) 63%, BVA poll (December 2011) 63%, Ifop poll (October 2012) 61%, BVA poll (October 2012) 58%, CSA poll (December 2012) 54%, Ifop poll (December 2012) 60%. Public opinion polls in Denmark also show a consistent support for same-sex marriage prior to the Danish same-sex marriage legislation in 2012. A YouGov Poll (Dec 2012) found that 79% of Danes were in favour of same-sex marriage.

135. *A Global Snapshot of Same-Sex Marriage*, PEW RESEARCH CENTRE (June 4, 2013), <http://www.pewresearch.org/fact-tank/2013/06/04/global-snapshot-sex-marriage/>.

136. See Klarman, *supra* note 121, at 148-149 (referring to Baehr v. Lewin, 852 P.2d 44, 67-68 (Haw. 1993) (a judgment of the Hawaiian Supreme Court which introduced “gay marriage when Americans imposed that reform by a margin of at least three to one.”)).

lack of public support for the institution.¹³⁷ The next section looks at one of the biggest criticisms of the incrementalist strategy, being that it often involves an intermediate stage of civil partnership.

III. THE IMPACT OF CIVIL PARTNERSHIP

One of the central planks of the incrementalist strategy is the introduction of intermediate stage legal protections where discrimination against gays is prohibited on the basis of sexual orientation.¹³⁸ In many instances this takes the form of civil partnerships. It should be noted that “registered partnership take different forms in different countries”¹³⁹ ranging from near equality in the United Kingdom¹⁴⁰ to less than equal protection in other states. The French *pacte civil de solidarite* (“PACS”) is an example of the latter category as, although it “provides rights and obligations similar but not equal to marriage . . . ,”¹⁴¹ notably citizenship is not included.¹⁴²

Even if the legal protections are similar, for many, civil partnership is not considered as a desirable status. Interestingly, in this context, the ECtHR has noted the “intrinsic value” of civil partnerships, “irrespective of the legal effects, however narrow or extensive.”¹⁴³ Despite this endorsement by the leading human rights court in Europe, civil partnerships are often seen as being “separate but equal,” and consigning same-sex couples to “second-class status.”¹⁴⁴ In this way, civil partnerships have been compared to segregated schools and public services in the ‘Jim Crow South.’¹⁴⁵ This contrasts to marriage which is seen as the gold standard.¹⁴⁶ On a practical note, if a same-sex couple wish to relocate

137. *A Global Snapshot of Same-Sex Marriage*, *supra* note 135 (noting South Africa as an instance of this where only “32% say it should be accepted versus 61% saying it should not be.”).

138. MERIN, *supra* note 60, at 326.

139. Aloni, *supra* note 10, at 111.

140. Civil Partnership Act 2004. Aloni, *supra* note 10, at 122 described this as the “comprehensive model for registered partnerships.”

141. For further explanation see Saez, *supra* note 88, at 25 (referring to Hughes Fulchiron, *National Report: France*, 19 AM. U. J. GENDER SOC. POL’Y & L. 123 (2011)).

142. Eric Fassin, *Same-Sex, Different Politics: ‘Gay Marriage’ Debates in France and the United States*, 13 PUB. CULTURE 215, 217 (2001). See also Saez, *supra* note 88, at 26; Leckey, *supra* note 33, at 11 (describing it as a “lighter form of union for both third parties and the partners.”).

143. Oliari v. Italy, Eur. Ct. H.R. ¶ 81 (2015), <http://hudoc.echr.coe.int/eng?i=001-156265>.

144. Crane, *supra* note 26, at 471. See also Dorf, *supra* note 30.

145. Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L. Q. 537, 543 (2007). See also Richard M. Lombino II, *Gay Marriage: Equality Matters*, 14 S. CAL. REV. L. & WOMEN’S STUD. 3, 17 (2004).

146. Wilkinson v. Kitzinger [2006] EWHC (Fam) 2022, [5] (Eng.); See also Aloni, *supra* note 10, at 110 (referring to MERIN, *supra* note 60, at 55-56 (describing marriage as the

internationally, civil partnerships may also be “unequal in the literal sense, as they may not prove as ‘portable’ as same-sex marriage.”¹⁴⁷

Aside from these criticisms of civil partnership as a status in itself, others criticise the “incrementalist paradigm . . . [and the fact that] civil unions are viewed as a necessary step prior to the complete legalization of same-sex marriage.”¹⁴⁸ Erez Aloni considers that civil partnerships may stall progress,¹⁴⁹ and are seen as a “stumbling block that can significantly delay acceptance of same-sex marriages.”¹⁵⁰ In contrast, it is argued that civil partnerships are a useful building block on the road to the recognition of same-sex marriage. Intermediate stage legislation allows public opinion to adjust and develop. The ECtHR in *Oliari and Others v. Italy* appears to have taken the same view.¹⁵¹ Although the ECtHR in that decision determined only that same-sex couples should have the option of entering into a form of civil union or registered partnership,¹⁵² the ECtHR did note the “continuing international movement towards legal recognition”¹⁵³ which suggests that the ECtHR will at some point legalise same-sex marriage, when sufficient consensus is reached. It is useful at this stage to look at some case examples of countries which have enacted civil partnership regimes in order to see how this affected their progress towards recognition of same-sex marriage.

When the UK government enacted the Civil Partnership Act 2004 it created a regime which gave distinct but equivalent protection to marriage for same-sex couples.¹⁵⁴ This Act was, “shaped by consultation with the stakeholders and public at large” who were not prepared for same-sex marriage at that date.¹⁵⁵ Stonewall (one of the leading gay rights organisations in the UK) considered civil partnership to be “preferable to marriage.”¹⁵⁶ It is perhaps unsurprising that when Erez Aloni was writing in 2010 he

“privileged and preferred legal status in Europe and the United States.”); George W. Dent Jr., *The Defense of Traditional Marriage*, 15 J. L. & POL. 581, 617 (1999) (referring to marriage as bringing many “intangible benefits” including “honour, respect [and] the social stamp of approval.”).

147. Marshall, *supra* note 64, at 199-200.

148. Aloni, *supra* note 10, at 105.

149. *Id.* at 116 (referring to *Developments in the Law – II Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004 (2003)).

150. Aloni, *supra* note 10, at 109.

151. *Oliari v. Italy*, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng/?i=001-156265>.

152. *Id.* at ¶ 174.

153. *Id.* at ¶ 178.

154. For further discussion see Saez, *supra* note 88, at 15 (referring to Kenneth Norrie, *National Report: United Kingdom*, 19 AM. U. J. GENDER SOC. POLY & L. 329 (2011)).

155. *Wilkinson v. Kitzinger* [2006] EWHC (Fam) 2022, [51] (Eng.).

156. Aloni, *supra* note 10, at 156 (referring to Shipman, *supra* note 41, at ¶ 2.5).

did not consider that the UK would “allow same-sex marriage in the near future”¹⁵⁷ In his opinion the civil partnership legislation meant that, “[c]ourts and legislatures have less of an impetus to push for same-sex marriage as there is less of an identifiable harm or damage”¹⁵⁸ A few years later, both England and Wales and Scotland introduced same-sex marriage legislation.¹⁵⁹ Civil partnership did not deter those who wanted to pursue same-sex marriage.¹⁶⁰ Instead, civil partnership in fact offered a useful staging post, allowing for the development of public opinion. Before the 2013 Act was enacted, the UK government commissioned another public consultation. This demonstrated that 53% of those surveyed in England and Wales supported same-sex marriage.¹⁶¹ This slow incremental change, allowing for adjustment in public opinion, means that a backlash in public opinion has been avoided.

Other countries also demonstrate the usefulness of civil partnership as a staging post thereby allowing for a change in public opinion. When Erez Aloni was writing in 2010 both France and Denmark were given as examples of countries which were content with civil partnership.¹⁶² He stated that “LGB individuals feel less discriminated against and have less motivation to fight for same-sex marriage”¹⁶³ For some years this statement appeared to be correct. With respect to France other writers also commented that the PACS legislation had reduced pressure on the government.¹⁶⁴ Similarly, in Denmark, same-sex marriage was not considered an important topic,¹⁶⁵ with “GLBT resistance to marriage as a patriarchal institution”¹⁶⁶ In 2012, Denmark passed same-sex marriage legislation and France followed suit the following year. A

157. Aloni, *supra* note 10, at 126.

158. *Id.* at 151.

159. Marriage (Same Sex) Couples Act 2013 c. 30 (Eng.); Marriage and Civil Partnership (Scotland) Act 2014 (ASP 5).

160. *Wilkinson v. Kitzinger* [2006] EWHC (Fam) 2022, [5] (Eng.) (demonstrating the dissatisfaction with civil partnership as a status for those who favoured same-sex marriage).

161. EQUAL MARRIAGE: THE GOVERNMENT’S RESPONSE 11 (2012), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/133262/consultation-response_1_.pdf.

162. Aloni, *supra* note 10, at 152 (referring to Edward Cody, *Straight Couples in France are Choosing Civil Unions Meant for Gays*, WASH. POST (Feb. 14, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/13/AR2009021303365.html>). *See also* Aloni, *supra* note 10, at 118 (referring to Denmark as giving “striking proof of the problems associated with registered partnerships – change is slow.”).

163. *Id.* at 152.

164. *See* Daniel Borillo & Eric Fassin, *The PACS, Four Years Later: A Beginning or an End?*, in SAME-SEX COUPLES, SAME-SEX PARTNERSHIPS & HOMOSEXUAL MARRIAGES: A FOCUS ON CROSS NATIONAL DIFFERENTIALS 19-26 (Marie Digoix & Patrick Festy eds., 2004), https://www.ined.fr/fichier/s_rubrique/19410/124.fr.pdf.

165. Aloni, *supra* note 10, at 118.

166. Araiza, *supra* note 34, at 373.

number of different opinion polls showed that both the French¹⁶⁷ and Danish public supported same-sex marriage.¹⁶⁸ Comparative constitutionalism played a part given the rapid increase in the number of European countries and U.S. states which enacted same-sex marriage legislation since 2010.¹⁶⁹ Ultimately, although change in both countries was slow in this regard it did eventually over a period of time lead to the desired goal, with no incidence of backlash in public opinion. In determining a strategy to proceed proponents in favour of same-sex marriage need to select either the legislative or the court based approach.

IV. METHOD OF PROCEEDING – COURT OR LEGISLATION

A powerful influence on which path is chosen depends on the constitutional setting of each country. Countries with constitutional courts and far reaching Bills of Rights are far more likely to see court action used to bring about change.¹⁷⁰ This can be demonstrated by the U.S. The majority in *Obergefell* justified action by the Supreme Court on the basis that “[t]he dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right.”¹⁷¹ This decision followed a line of court cases in the U.S. looking at the right of same-sex couples to wed.¹⁷² The court-based approach is not without difficulties. The decision of the Supreme Court, meant that the Obama administration avoided having to legislate in favour of same-sex marriage. President Obama has publicly stated his support for same-sex marriage.¹⁷³ Commentators (who in this context were discussing the earlier *Windsor* case of 2013) doubted whether legislative action would have been successful as it “would certainly have failed in [Congress] and might well have failed in the Senate.”¹⁷⁴ Commentators on these judgements criticised the “naked

167. See *A Global Snapshot of Same-Sex Marriage*, *supra* note 135.

168. *Id.*

169. See *supra* note 2.

170. See Normann Witzleb, *Marriage as the ‘Last Frontier?’ Same-Sex Relationship Recognition in Australia*, 25 INT’L J. L. POLY & FAM. 135, 154 (2011), who considers this issue from an Australian point of view and states that the absence of a Bill of rights in Australia “means that there is no prospect of achieving marriage equality through a judicial challenge of the discriminatory status quo . . .”.

171. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

172. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675 (2013).

173. President Barack Obama stated at his inaugural address that, “Our journey is not complete until our gay brothers and sisters are treated like anyone else under the law – for if we are truly created equal, then surely the love we commit to one another must be equal as well.” Barack Obama, U.S. President, Inaugural Address, 2013 DAILY COMP. PRES. DOC. 32 (Jan. 21, 2013).

174. Loveland, *supra* note 43, at 17.

usurpation of the legislative function.”¹⁷⁵ The four dissenting judges in *Obergefell* have also made similar criticisms of the majority decision in that case.¹⁷⁶ Following the court-based approach, the federal government had to recognise same-sex marriage without any direct input from the democratic process. Public opinion in the U.S. now overall broadly favours same-sex marriage, but this masks great differences in attitude between U.S. states.¹⁷⁷ Case studies demonstrate that where courts attempt to move ahead of public opinion this may lead to a backlash in public opinion or a lack of substantive equality.¹⁷⁸

Those who favour the incremental approach also favour legislative action. The legislative approach allows countries to enact changes in favour of same-sex marriage as a result of action from their democratically elected representatives. David Richards, referring to the critique of Carl Stychin, argues that “recognition should happen democratically rather than judicially and argues for a democracy in which gays are mobilised as full citizens, demanding their rights”¹⁷⁹ He goes on to argue that if the judiciary do too much of the work in recognising the rights of gays this could mean that democracy is marginalised and public opinion polarised.¹⁸⁰ Incrementalists favour the legislative-based approach as this allows for public opinion to adapt and change.

Other states have attempted to use the court-based approach. Court action can draw helpful attention to the issue of same-sex marriage, which can “become part of the national debate”¹⁸¹ Another perceived advantage of proceeding by court litigation is that constitutional courts can move ahead of public opinion.¹⁸² Yvonne Zylan notes that lawyers, in determining their strategy are guided by “purposive instrumentalism.”¹⁸³ In many cases the reason why lawyers select the immediate court-based approach is because this is seen as the quickest way to attract the package of rights associated with married couples.¹⁸⁴ Court-based attempts to

175. *Id.* at 18-19 (comparing this to Lord Simonds in *Magor and St Mellons RDC v. Newport Corp.* [1952] A.C. 189 at 191).

176. *Obergefell*, 135 S. Ct. at 2611-12.

177. Klarman, *supra* note 121, at 150-151 (noting that “states in the Deep South, especially Mississippi remain strong in their anti same-sex marriage stance.”).

178. See section 5 of this piece on Backlash.

179. Richards, *supra* note 35, at 733.

180. *Id.* See also Dent, *supra* note 146, at 622.

181. Bruce M. Wilson, *Claiming Individual Rights through a Constitutional Court: The Example of Gays in Costa Rica*, 5 INT’L J. CONST. L. 242, 252 (2007).

182. *Id.*

183. ZYLAN, *supra* note 27, at 215.

184. *Id.* at 209 (referring to George Chauncey, WHY MARRIAGE?: THE HISTORY SHAPING TODAY’S DEBATE OVER GAY EQUALITY (2004) (quoting Mary Bonauto, one of the lead attorneys in *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999))).

introduce same-sex marriage legislation could result in a confused outcome and lack of successful resolution to a dispute. The U.S. situation is particularly complex. Before the recent decision in *Obergefell*¹⁸⁵ there were challenges to same-sex marriage bans arising in every state where these were in force. Where the court-based introduction of same-sex marriage is successful in introducing changes to the law, attempts to proceed public opinion may not result in lasting or substantive change. One possible method of court action leading to a successful introduction of same-sex marriage is for courts to adopt a compromise approach by suspending their judgment to give the legislature time to canvas public opinion on the topic and amend legislation.¹⁸⁶

It is useful to consider several leading examples where court judgments have attempted to jump ahead of public opinion. In a case from the civil rights battle, the U.S. Supreme Court in *Brown v. Board of Education*, declared segregated schooling illegal.¹⁸⁷ Commentators agree that, in practice, this decision was “almost completely ignored for over a decade by eleven states” with laws continuing to require segregated schooling.¹⁸⁸ Bruce Wilson points this out as an example where “a Supreme Court ruling does not guarantee enforcement or respect by lower courts or government agencies.”¹⁸⁹ Another well-known example is from the abortion debate. Michael Klarman comments that, “[m]any scholars and judges believe that the Court in *Roe v. Wade* fomented such a backlash by intervening so aggressively on the abortion issue in 1973.”¹⁹⁰ In the context of same-sex marriage it is useful to consider case examples from two contrasting countries; South Africa and Canada. Both countries introduced change by means of Constitutional Court decisions, but the effectiveness of these decisions is linked largely to the state of public opinion.

The end of apartheid in South Africa was marked by a radical new constitution being introduced in 1996.¹⁹¹ This contained a “famous anti-discrimination clause that explicitly forbids discrimination because of sexual orientation.”¹⁹² Nicola

185. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

186. *See, e.g., Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (where the court suspended its decision for a period of 180 days to allow the legislature to take action if this was seen as appropriate).

187. *Brown v. Bd. of Educ.*, 347 U.S.483, 495 (1954).

188. Wilson, *supra* note 181, at 247 (referring to *Brown*, 347 U.S. at 483).

189. *Id.* (quoting ALEXANDER HAMILTON ET AL., *THE FEDERALIST PAPERS* 465 (Clinton Rossiter ed., 1961) (noting that the judiciary has “no influence over either the sword or the purse.”)).

190. Klarman, *supra* note 121, at 148.

191. CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996.

192. Patrick Awondo et al., *Homophobic Africa? Toward a More Nuanced View*, 55 *AFRICAN STUDIES REV.* 145, 147 (2012).

Barker notes that South Africa was the “first country in the world to explicitly include legal protections for lesbians and gay men in its Constitution”¹⁹³ Subsequently, the South African Constitutional Court ruled in favour of same-sex marriage¹⁹⁴ and the Constitutional Court “gave the legislature a year to amend the Marriage Act to include same-sex marriage.”¹⁹⁵ Despite this much vaunted decision¹⁹⁶ it is debatable as to what real progress has been made both legally and substantively. Firstly, the legal changes made in South Africa have not resulted in legal equality for same-sex couples. Instead of amending the existing Marriage Act, four new statutes were passed in South Africa.¹⁹⁷ Marriage under the Marriage Act remained open only to heterosexual couples, but the new statutes covered both same and opposite-sex couples. A divide between the legal protection available to heterosexual and same-sex couples, therefore, remains and has been criticised as “simultaneously reforc[ing] the primacy of heterosexual civil marriage”¹⁹⁸ South Africa demonstrates that a court judgment will not “automatically result” in a legislative change which gives “gold standard” recognition of same-sex couples marital status.¹⁹⁹

It is also doubtful whether same-sex couples in South Africa have achieved substantive equality. Writers argue that “[i]n South Africa, countervailing tendencies remain very strong and vocal”²⁰⁰ Patrick Awondo, Peter Geschiere and Graeme Reid argue that “despite ground-breaking success in terms of law and policy . . . the South African experience also speaks as to the limits of the law. The Constitution remains an ideal, sometimes at far remove from lived reality”²⁰¹ There is continued violence towards gays including, the “targeting rape of lesbians [which] is an extreme symptom of a gap between the ideals of the Constitution and everyday life”

193. Nicola Barker, *Ambiguous Symbolisms; Recognising Customary Marriage and Same-Sex Marriage in South Africa*, 7 INT’L J. L. CONTEXT 447, 448 (2011).

194. In the famous case of *Minister of Home Affairs v. Fourie* 2005 (3) BCLR 355 (CC), the South African Constitutional Court found that the marriage laws then in existence (which defined marriage as between a man and a woman only) violated section 9 Equality, section 10 Dignity and section 14 Right to Privacy, of the Bill of Rights.

195. For further explanation see Saez, *supra* note 88, at 7.

196. For further explanation see Barker, *supra* note 193, at 448 (describing South Africa as a “world leader in equality” and the “first nation in the global south and one of the first in the world legally to recognise same-sex marriage”).

197. Instead of amending the Marriage Act the legislature introduced four new statutes that regulate unions. These include the Marriage Act, the Customary Marriages Act, the Civil Union Act, and the Recognition of Customary Marriage Act.

198. Barker, *supra* note 193, at 465. See also Pierre De Vos, *The Inevitability of Same-Sex Marriage in South Africa’s Post Apartheid State*, 23 S. AFRICAN J. ON HUM. RTS. 432 (2007); Elsje Bonthuys, *Race and Gender in the Civil Union Act*, 23 S. AFRICAN J. ON HUM. RTS. 526, 533 (2007).

199. Barker, *supra* note 193, at 465.

200. Awondo, *supra* note 192, at 157.

201. *Id.*

and that the “existence of high-profile attacks place the aspirations of the constitution in stark relief”²⁰² It should be stated that this opinion is not universal. Other authors refer to gays and lesbians finding a way of “living a creative, productive and satisfying life,” and that the “image of the lesbian as a rape victim is limiting and inaccurate.”²⁰³ Despite these different viewpoints, the lack of equality through legal protections, and the reporting of violent attacks against gays, demonstrates that a high profile Constitutional Court decision does not automatically lead to substantive change. It is suggested that the difficulty in South Africa is that the majority of the public do not support same-sex marriage.²⁰⁴ Slower incremental change in accordance with public opinion is more likely to lead to substantive protection for gays.

Canada is another interesting country to look at in terms of judicial activism. The Canadian courts used the extensive equality provisions in the Canadian Constitution²⁰⁵ to introduce same-sex marriage.²⁰⁶ The Ontario Divisional Court initially found a violation of the equality provisions in the Canadian Charter, but suspended a remedy for twenty-four months to allow for debate.²⁰⁷ When the case reached the Ontario Court of Appeal they introduced same-sex marriage without waiting for legislative approval.²⁰⁸ Wade Wright notes that this case was the “first to reformulate the opposite-sex definition, and to order that same-sex couples be permitted to marry with immediate effect”²⁰⁹ The federal government responded quickly stating they agreed with the changes²¹⁰ and this resulted in the Civil Marriage Act 2005 which gave marriage rights to same-sex couples.²¹¹ Canada now has achieved almost “complete equality between same-sex and opposite-sex marriages”²¹² including the same-sex adoption rights.

Canada is unusual in having a court-based introduction of same-sex marriage which introduced substantive change. The immediate

202. *Id.* at 159.

203. *Id.* (referring to Z. Matebeni, *Exploring Black Lesbian Sexualities and Identities in Johannesburg* (2011) (unpublished Ph.D. dissertation, University of the Witwatersrand)).

204. *A Global Snapshot of Same-Sex Marriage*, *supra* note 135 (stating that “in 2014 only 32% considered that homosexuality should be accepted, whereas 61% said it should not be.”).

205. L’Heureux-Dube, *supra* note 47, at 36 (referring to the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c. 11 (U.K.)).

206. Wade K. Wright, *The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales*, 20 INT’L J. L. POL. & FAM. 249, 250 (2006).

207. Chapman, *supra* note 84, at 424 (referring to *Halpern v. Canada (Att’y Gen.)* (2002), 215 D.L.R. 4th 223 (Can. Ont. Div. Ct.)).

208. *Halpern v. Canada (Att’y Gen.)* (2003) 65 O.R. 3d 161 (Can. Ont. C.A.).

209. For further explanation see Wright, *supra* note 206, at 253.

210. *Id.* at 256.

211. For further explanation see Gonzalez, *supra* note 114, at 300.

212. Saez, *supra* note 88, at 7.

introduction of change is “questionable”²¹³ as there was no pause to engage with the legislature and public opinion.²¹⁴ Ultimately, whilst this approach was risky it did not lead to a backlash in public opinion, due to the high level of public support and earlier state level recognition of same-sex marriage for same-sex marriage in Canada. Kathryn Chapman notes that although the same-sex marriage debate in Canada had been “contentious both within the gay, lesbian, bisexual and transgendered (glbt) communities . . . approximately two-thirds of Canadians support the right of same-sex couples to marry”²¹⁵ Arguably one of the reasons why there was such a level of public support for judicial action in Canada stems from the fact that several authors argue that Canada is an example in itself of a country which followed the method of incrementalist change.²¹⁶ Nanci Schanerman lists the earlier changes which had been made prior to the introduction of same-sex marriage. “Those changes include spousal support, guardianship, adoption, pension entitlement and medical decision-making.”²¹⁷ By the time the Federal Marriage Act was enacted, same-sex marriage was legal in the majority territories and provinces.²¹⁸ This approach was successful in Canada, due to the support of public opinion, but the reality for many countries is that same-sex marriage “has been achieved by a legislative, rather than a judicial strategy”²¹⁹ William Eskridge adds that although “judges can jump-start [the] politics of recognition . . . such politics will have limited effect unless or until the Parliament gives the judicial decision teeth”²²⁰ Case studies demonstrate that, where courts attempt to move ahead of public opinion this may lead to a backlash in public opinion, or a lack of substantive equality and ultimately a delay in legal protection for same-sex couples.

V. THE PROBLEM OF BACKLASH

Writers and judges argue that acting in advance of public opinion can “mobilize opponents, undercut moderates and retard

213. Robert Wintemute, *Sexual Orientation and the Charter: The Achievement of Formal Legal Equality and its Limits (1985-2005)*, 49 MCGILL L. J. 1143, 1165 (2004).

214. Wright, *supra* note 206, at 253.

215. See Chapman, *supra* note 84, at 424 (referring to Canadian National Legal Poll (June 22, 2001)). See also Donald G. Casswell, *Moving Toward Same-Sex Marriage*, 80 CAN. BAR REV. 810 (2001).

216. Schanerman, *supra* note 64; Alquist, *supra* note 49.

217. Schanerman, *supra* note 64, at 158.

218. Gonzalez, *supra* note 114, at 300.

219. Wilson, *supra* note 181, at 253.

220. ESKRIDGE, *supra* note 36, at 104.

the cause they purport to advance.”²²¹ In one judge’s opinion “doctrinal limbs too swiftly shaped, experience teaches, may prove unstable.”²²² Past experience from the U.S. is also a prime example of the backlash in public opinion which can be experienced if change is introduced too swiftly in the area of same-sex marriage.²²³ Seeking to outpace public opinion by means of a court-based judgment can, in effect, mean that achievement of same-sex marriage can take longer to achieve than if the incremental approach had been followed in the first place. Several U.S. state examples will be studied to demonstrate this perspective. Conclusions will be drawn as to what lessons can be learnt from this experience. This is particularly necessary in relation to the recent decision of the U.S. Supreme Court in *Obergefell*²²⁴ in bringing forward same-sex marriage nationwide across the U.S.

The Massachusetts Supreme Court became the first state to recognise same-sex marriage.²²⁵ Vermont had earlier recognised same-sex civil union,²²⁶ but the Massachusetts Supreme court was “ground-breaking”²²⁷ in holding a statute unconstitutional that denied “same-sex couples the opportunity to obtain a marriage license.”²²⁸ The Massachusetts Supreme Court deliberately favoured same-sex marriage as civil unions were seen as “continu[ing] to relegate same-sex couples to a different status”²²⁹ In making this decision the Massachusetts Supreme Court were not deterred, despite the lack of a “broad social consensus” supporting the

221. Marshall, *supra* note 64, at 199 (referring to Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 482 (2005)).

222. *Id.* (referring to *Speaking In a Judicial Voice*, *supra* note 125, at 1198).

223. See section 5 of this piece on Backlash.

224. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

225. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

226. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

227. Crane, *supra* note 26, at 465 (referring to Press Release, Lambda Legal Defense and Education Fund, Praising Massachusetts Court Ruling Allowing Same-Sex Couples to Marry, Lambda Legal Vows to Push Forward (Nov. 18, 2003) (on file with the New York University Journal of Legislation and Public Policy)). See also Press Release, National Gay and Lesbian Task Force, Massachusetts High Court Same-Sex Marriage Decision is an Exhilarating Victory in the Struggle for Equal Rights (Nov. 18, 2003) (on file with the New York University Journal of Legislation and Public Policy) (describing this as “a critical step in the right direction.”).

228. Crane, *supra* note 26, at 465 (referring to *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003)).

229. Aloni, *supra* note 10, at 129 (referring to *Ops. of the Justices to the Senate*, 802 N.E.2d 565, 569 (Mass. 2004)).

introduction of same-sex marriage.²³⁰ Iowa is another state that introduced same-sex marriage by means of court action despite a lack of public support for same-sex marriage.²³¹

Erez Aloni argues that Massachusetts and Iowa discredit the incrementalist theory as they both introduced same-sex marriage by state Supreme Court action, without any preparatory steps such as civil partnership.²³² In practice, although Iowa never had civil partnership, there had been other legislative amendments in favour of gays prior to the legalisation of same-sex marriage.²³³ It is also debatable as to whether these changes can be considered successful, as although same-sex marriage was achieved immediately in the states in question this led to a backlash across other US states.²³⁴ Within six months of the enactment of same-sex marriage in Massachusetts, “voters responded with a crushing blow, approving, in eleven states, constitutional amendments outlawing same-sex marriage.”²³⁵ Michael Klarman argues that this backlash was unsurprising as, “when the Massachusetts Supreme Court ruled squarely in favour of gay marriage in 2003, the country was opposed by roughly two to one.”²³⁶ Subsequently, federal legislation was enacted in the shape of DOMA,²³⁷ allowing states the right to “deny recognition to same-sex marriages should they be allowed in other states.”²³⁸ Richard M. Lombino II believed DOMA is an example of backlash in itself.²³⁹

Examples from other U.S. states also demonstrate a backlash in public opinion in the particular state which enacted the same-sex marriage legislation. In these examples reforms have typically been introduced by the state Supreme Courts, but have then been

230. See Amelia A. Miller, *Letting Go of a National Religion: Why the State Should Relinquish All Control Over Marriage*, 38 LOY. L.A. L. REV. 2185, 2194 (2005) (referring to *Goodridge*, 798 N.E.2d at 958).

231. See Aloni, *supra* note 10, at 130 (referring to *Varnum v. Brien*, 653 N.W.2d 862, 906 (Iowa 2009)). See also ZYLAN, *supra* note 27, at chapter 6.

232. Aloni, *supra* note 10, at 129.

233. The Iowa Anti-Discrimination Act 2007 prohibited discrimination on the ground of sexual orientation.

234. For discussion see Crane, *supra* note 26, at 465 and ZYLAN, *supra* note 27, at 214.

235. For discussion see Robert R. M. Verchick, *Same-Sex and the City*, 37 URB. LAW. 191, 191 (2005). See also ZYLAN, *supra* note 27, at 214 (stating that the “Massachusetts case plainly accelerated the process” of backlash and further opining that several states “affirmed their same-sex marriage bans in the immediate wake of *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (including Arizona, New York and Washington) . . .”).

236. Klarman, *supra* note 121, at 148-49 (referring to MICHAEL J. KLARMAN, *MAKING SENSE OF THE MARRIAGE DEBATE FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 45 (2012) (noting opinion polls conducted around 1990 showing support for gay marriage between 11% and 23%)).

237. The Defense of Marriage Act (‘DOMA’) 1996.

238. For further explanation see Lombino, *supra* note 145, at 4.

239. *Id.* (referring to *Baehr v. Lewin*, 852 P.2d 44, 74 (Haw. 1993)).

“overruled by state constitutional amendment.”²⁴⁰ One state example which can be used in this context is that of Hawaii. In the leading 1993 case of *Baehr v. Lewin*,²⁴¹ Erez Aloni reports that the Hawaii Supreme Court “recognized that the exclusion of same-sex marriage amounts to discrimination on the basis of sex”²⁴² Shortly afterwards in a state referendum by a majority of 69%, Hawaiian voters asked the legislature “to amend the marriage law to apply only to opposite-sex couples.”²⁴³ Erez Aloni cites Hawaii as an example of the “problems associated with the theory of small change and the incremental approach”²⁴⁴ He later states that in Hawaii’s case “[i]ncrementalism . . . has been too slow and too gradual.”²⁴⁵ The Hawaiian experience can instead be used to demonstrate the difficulties connected with courts too far outpacing public opinion. The Hawaiian Supreme Court decision²⁴⁶ from 1993 delayed the legal protection of same-sex couples for many years. It was only when the slow incremental approach was adopted that same-sex couples achieved legal protection in Hawaii. Hawaii legalised civil unions in 2011,²⁴⁷ and same-sex marriage legislation was enacted in November 2013.²⁴⁸

California is another example of public opinion backlash. After a series of initiatives in which at “least one bill extending greater rights to same-sex couples pass[ed] every year,”²⁴⁹ California briefly authorized same-sex marriages briefly in 2008 by means of a Supreme Court Judgment.²⁵⁰ This made California the second state after Massachusetts to recognise same-sex marriage. In a move seen as “surprising” by some commentators given the widely held view of California voters as ‘liberal’,²⁵¹ the California Constitution was amended to declare that “only marriage between a man and a woman is valid or recognised in California.”²⁵² It was many years later and after much litigation that same-sex marriage became legal

240. Richards, *supra* note 35, at 727 (giving Hawaii and Alaska as examples of this trend).

241. *Baehr*, 852 P.2d at 74.

242. Aloni, *supra* note 10, at 128 (referring to *Baehr*, 852 P.2d at 74).

243. *Id.* (referring to MERIN, *supra* note 60, at 221-22).

244. *Id.*

245. *Id.* at 129.

246. *Baehr*, 852 P.2d at 74.

247. Hawaii Civil Unions Act, HAW REV. STAT. § 572-B2 (2011).

248. Hawaii Marriage Equality Act, HAW REV. STAT. § 572-1 (2013).

249. For further explanation see Gonzalez, *supra* note 114, at 300 (referring to the County of San Francisco Equal Benefits Ordinance 1997, Berkeley and Los Angeles Equal Benefits Ordinances 1999, Californian Domestic Partnership Registry 1999, expansion of the rights of same-sex couples under domestic partnership law 2001 and further extension of rights under domestic partnership law in 2003).

250. *In re Marriage Cases*, 43 Cal.4th 757 (Cal. 2008).

251. For discussion see Gonzalez, *supra* note 114, at 285.

252. CAL. CONST. art. 1 § 7.5 (held to be unconstitutional by *Perry v. Schwarzenegger*, 702 F. Supp. 2d 921 (N.D. Cal. 2010)).

again in California on June 28, 2013.²⁵³ This demonstrates that a state Supreme Court decision taken in advance of a development of public opinion can lead to a backlash of public opinion or a lack of substantive equality. A backlash of public opinion ultimately leads to delay in legal protection for same-sex couples. Instead, if the slow incremental approach had been taken, positive change in favour of protection of same-sex couples could be achieved with none of the time and expense involved in the multiple litigation attempts made necessary in California by the overly optimistic decision of the Californian Supreme Court from 2008.²⁵⁴ The examples from Hawaii and California were typical of many U.S. states and a wide number of states passed constitutional amendments outlawing same-sex marriage.²⁵⁵ Many states subsequently challenged these constitutional amendments and went on to legalise same-sex marriage individually.

In 2010, Kathryn Marshall stated that although there had been some striking changes in public opinion in the U.S., there are “a clear majority of Americans today who oppose same-sex marriage.”²⁵⁶ U.S. public opinion in favour of same-sex marriage has gathered strength. Statistics from Pew Research noted that whilst in 2001, Americans opposed same-sex marriage by a 57% to 35% margin, “since then support for same-sex marriage has steadily grown.” Today a majority of Americans (54%) support same-sex marriage, compared with 39% who oppose it,²⁵⁷ with studies from statisticians continuing to show fast growing support for same-sex marriage in the U.S.²⁵⁸ This does however mask disparities between U.S. states, where in some cases opposition to same-sex marriage remains strong.²⁵⁹ This was still the case when *Obergefell* was decided.²⁶⁰ At that time, 12 U.S. states still prohibited same-sex marriage.²⁶¹ In deciding to legalise same-sex marriage across the

253. *Hollingsworth v. Perry*, 570 U.S. 133 S. Ct. 2652 (2013) (case was dismissed on standing grounds, meaning that same-sex marriage became legal in California again).

254. *In re Marriage Cases*, 43 Cal. 4th 757 (2008).

255. When writing in 2010, Kathryn L. Marshall discussed the then 29 US states who had constitutional amendments outlawing same-sex marriage. Marshall, *supra* note 64, at 200.

256. *Id.* at 205.

257. *A Global Snapshot of Same-Sex Marriage*, *supra* note 135. See also Klarman, *supra* note 121, at 148-49 (referring to Nate Silver, *How Opinions on Same-Sex Marriage is Changing and What it Means*, N.Y. TIMES (Mar. 26, 2013), <http://fivethirtyeight.blogs.nytimes.com/2013/03/26/how-opinion-on-same-sex-marriage-is-changing-and-what-it-means/>).

258. Klarman, *supra* note 121, at 156-157 (referring to Nate Silver, *How Opinions on Same-Sex Marriage is Changing and What it Means*, N.Y. TIMES (Mar. 26, 2013).

259. Klarman, *supra* note 121, at 150-51 (noting that “states in the Deep South, especially Mississippi, remain strong in their anti same-sex marriage stance.”). See also ZYLAN, *supra* note 27, at 214; Marshall, *supra* note 64, at 205.

260. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

261. See *supra* note 13.

U.S., the Supreme Court abandoned its earlier approach of showing caution and deference to individual states in this matter. The earlier cautious approach was exemplified by *Windsor v. United States*²⁶² where the majority of the Supreme Court had valid concerns about a backlash in public opinion.²⁶³ Some commentators supported the step-by-step approach arguing that there was much to question in the “strategic wisdom of pushing forward an issue” which still draws strong opposition.²⁶⁴ Michael Klarman when writing in the Harvard Law Review in 2014 commented that the Supreme Court would act when “public opinion shifts overwhelmingly in its favour.” He argued that people would find a way to support same-sex marriage “or else their views will come to appear bigoted.”²⁶⁵ In making a decision in favour of same-sex marriage nationwide across the U.S. in 2015 in *Obergefell*,²⁶⁶ the question remains as to whether the Supreme Court have waited sufficiently for the shift in public opinion. The agreement of all U.S. states was far from certain and there was doubt whether the matter would have passed through Congress. Adopting a legislative approach, even if this had taken longer, would have offered a clearer solution, allowing democracy to have its impact on such crucial measures. By not taking an incremental approach the Supreme Court runs the risk that there may be a lack of substantive support in every U.S. state. Public approval across all states may take time to achieve. In any event, the U.S. did not see a full democratic debate on this issue.

VI. CONCLUSION

International conventions²⁶⁷ and leading case law²⁶⁸ demonstrate that marriage is of fundamental constitutional importance. Exclusion of same-sex couples from marriage therefore has implications upon an individual’s constitutionally protected status as an equal citizen.²⁶⁹ This has led authors to conclude that

262. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

263. Klarman, *supra* note 121, at 146-47 (referring to Ginsburg, *supra* note 125, at 376, 379-82, 385-86; *Speaking in a Judicial Voice*, *supra* note 125, at 1198-200, 1205-08; Ruth Bader Ginsburg, Gillian Metzger and Abbe Gluck, *supra* note 125, at 15-16).

264. Marshall, *supra* note 64, at 203 (referring to Klarman, *supra* note 221, at 472).

265. Klarman, *supra* note 121, at 160.

266. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

267. *See, e.g.*, European Convention on Human Rights art. 12 (“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”) *See also* United Nations Covenant on Civil and Political Rights art. 23(2) (“[T]he right of men and women of marriageable age to marry and to found a family shall be recognized.”).

268. *See, e.g.*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Loving v. Virginia*, 388 U.S. 1 (1967).

269. *See, e.g.*, Bamforth, *supra* note 29, at 478 referring to MARSHALL, *supra* note 30, at 18 (stating, in discussing citizenship, that “all who possess the status are equal with respect

excluding gays from marriage is denying them the full status of citizenship.²⁷⁰ Different jurisdictions are all dealing with the same social phenomenon caused by same-sex marriage. Comparative constitutionalism is advantageous in evaluating the experience of other nations in tackling the same problem and planning a strategy to achieve same-sex marriage. Although not without dissenting voices,²⁷¹ comparative constitutionalism has been recommended by senior members of the judiciary²⁷² and in practice is happening anyway with senior courts referring to each others' judgements worldwide.²⁷³ The speed of the recognition of same-sex marriage worldwide from 2010 also shows that comparative constitutionalism is happening in practice.²⁷⁴

Marriage is not a fixed and immutable institution and has in fact been changing over the years as can be seen when considering the changing nature of women's legal position in marriage,²⁷⁵ the repeal of laws which prohibited inter-racial marriage,²⁷⁶ and the recognition of transsexuals' rights with regard to marriage by the ECtHR.²⁷⁷ The debate concerns not whether change should occur, but instead the speed of change. Incremental change in accordance with public opinion is to be recommended. There are many criticisms about the incremental strategy. Some of these stem from the fact that the incremental theory was largely drawn from Nordic countries that are too far removed from the actualities of other states to make any comparison meaningless.²⁷⁸ Since an increasing number of other states have recognised same-sex marriage by

to the rights and duties with which the status is endowed."); O'Mahoney, *supra* note 30, at 555 (also discussing the Irish Constitution and the emphasis laid upon equality in that document which states that "[a]ll citizens shall, as human persons be equal before the law.").

270. See, e.g., Bamforth, *supra* note 29, at 484 (referring to Richardson, *supra* note 31, at 88 (stating that "it can be argued that lesbians and gay men are only partial citizens, in so far as they are excluded from certain of these rights.")). See also Kochenov, *supra* note 31, at 163 (referring to Harris, *supra* note 31, at 2823 (stating that "[m]oreover, once a link between marriage and citizenship is explored, it becomes clear that denying the right to marry a partner of one's choice can also be viewed as a 'cultural message that certain groups are not suited for full citizenship.'")).

271. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2488 (2003) (Scalia, J., dissenting).

272. Eskridge, *supra* note 53, at 555 (referring to Rehnquist, *supra* note 54).

273. For example Eskridge, *supra* note 53, at 555 (referring to *Lawrence*, 123 S. Ct. at 2472, and explaining that "Justice Anthony Kennedy's opinion looked at constitutional precedents from abroad, referring to decisions of the European Court of Human Rights.").

274. See *supra* note 2.

275. Tobisman, *supra* note 42, at 112.

276. *Id.* See also Loveland, *supra* note 43; Leckey, *supra* note 33, at 11.

277. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, 4 ("The Court had found . . . that a test of congruent biological factors could no longer be decisive in denying legal recognition to the change of gender" of a post-operative transsexual).

278. See for example Aloni, *supra* note 10, at 108 (referring to Badgett, *supra* note 80, at 85).

means of the incrementalist progress²⁷⁹ these concerns, although relevant, become less accurate. The criticism that incrementalism proceeds too slowly²⁸⁰ could also be seen as an advantage. Slow change allows for public opinion to change and develop.²⁸¹ Moving too quickly in the absence of support from public opinion could result in a backlash of public opinion²⁸² or less than substantive equality.²⁸³ The countries which have followed the incremental approach do not show any incidence of a backlash in public opinion or lack substantive change.

The incrementalist approach often includes the staging post of civil partnership. This is an intermediate stage which prevents discrimination against same-sex partners whilst not according them full equality. Although the ECtHR recognises the intrinsic value of civil partnerships,²⁸⁴ this has been criticised as reducing same-sex couples to a second class status,²⁸⁵ whilst allowing only heterosexuals to access the gold standard²⁸⁶ of marriage. Another criticism involves the fact that civil partnership can stall or even prevent the achievement of same-sex marriage and full equality for same-sex couples as they will no longer have the impetus of campaigning for legal equality.²⁸⁷ This article advocates the usefulness of civil partnership. This intermediate stage allows for public opinion to adjust towards a more favourable attitude towards same-sex marriage. Erez Aloni when writing in 2010, gave England

279. States which have used the incremental approach in recent years include for example England and Wales, Scotland, France, and Denmark.

280. Marshall, *supra* note 64, at 198 (referring to arguments which include “the principled belief that it is unjust to delay struggles for equality while waiting for ‘the right moment.’”) Another interesting example can be seen from the civil rights movement, where Dr. Martin Luther King, Jr., wrote that “This ‘Wait’ has almost always meant ‘Never’. It has been a tranquilizing thalidomide, relieving the emotional stress . . .” KING, *supra* note 83, at 292.

281. ESKRIDGE, *supra* note 36, at 119. See also Marshall, *supra* note 64, at 199-200 (explaining that such slow change although frustrating at the time allows “public opinion to adjust gradually to the changes sought by social movement.”); Gallagher, *supra* note 113, at 260; Polikoff, *supra* note 113.

282. See section 5 of this piece on Backlash.

283. See section 4 of this piece comparing the legislative and court-based approaches where South Africa is discussed.

284. *Oliari v. Italy*, Eur. Ct. H.R. (2015), <http://hudoc.echr.coe.int/eng?i=001-156265>.

285. See, e.g., Crane, *supra* note 26, at 471; Dorf, *supra* note 30.

286. *Wilkinson v. Kitzinger* [2006] EWHC (Fam) 2022, [18] (Eng.). See also Aloni, *supra* note 10, at 110 (referring to MERIN, *supra* note 60, at 55-56 (describing marriage as the “privileged and preferred legal status in Europe and the United States.”)); Dent, *supra* note 146, at 617 (referring to marriage as bringing many “intangible benefits” including “honour, respect [and] the social stamp of approval.”).

287. Aloni, *supra* note 10, at 116 (referring to *Developments in the Law – II Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, *supra* note 149).

and Wales, France and Denmark as examples of the obstructionist nature of civil partnership.²⁸⁸ In recent years, all these states have enacted same-sex marriage, once public opinion had time to adjust.

This paper also recommends the use of the legislative rather than court-based approach. The legislative approach allows for an engagement with the democratic process.²⁸⁹ The court-based approach can often lead to confusion and delay whilst multiple appeals are pursued. The South African case study also demonstrated that change introduced by Constitutional Court may result in a legal court victory but it does not necessarily introduce substantive change if this too far outpaces public opinion.²⁹⁰ Whilst the Canadian Constitutional Court action was successful in introducing lasting change, this article would argue that this was due to earlier incremental increases in the rights of gays and the wide spread public support for same-sex marriage in Canada.²⁹¹ Statistics demonstrate that favourable public opinion is essential in ensuring effective and long-lasting change for proponents of same-sex marriage. There is a correlation between public support for and legal recognition of same-sex marriage.²⁹² Slow incremental change characterised by civil partnership, legislative action and an adjustment of public opinion is the preferred method for introducing same-sex marriage. By not taking an incremental approach in the *Obergefell* case,²⁹³ the U.S. Supreme Court runs the risk that there may be a lack of substantive support in every U.S. state. It is hoped that public approval is achieved but experience will teach how long this takes to arrive.

288. Aloni, *supra* note 10, at 126 and 152.

289. For discussion see Richards, *supra* note 35, at 733. See also Dent, *supra* note 146, at 622; Loveland, *supra* note 43, at 18-19 (comparing this to Lord Simonds in *Magor and St Mellons RDC v. Newport Corp.* [1952] A.C. 189 at 191).

290. For discussion see Barker, *supra* note 193, at 448.

291. See Chapman, *supra* note 84, at 424.

292. *A Global Snapshot of Same-Sex Marriage*, *supra* note 135.

293. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

