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

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*Following the decision of the Supreme Court in Obergefell et al v Hodges, Director, Ohio Department of Health et al (henceforth ‘Obergefell’)[[2]](#footnote-2) all US states are required to license marriages between same-sex couples. This decision although having the effect of immediately introducing same-sex marriage across the US, 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.*

1. **Introduction**

In recent years there has been an increase in the number of countries which recognise same-sex marriage.[[3]](#footnote-3) Change has been particularly rapid in the US. The *Obergefell* case marks the current highpoint in recognition of same-sex marriage.[[4]](#footnote-4) Following the decision of the Supreme Court on 26 June 2015, it was determined that all US states are required to license marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of State.[[5]](#footnote-5) 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 ‘rights implicit in liberty and rights secured by equal protection’ guaranteed by the Fourteenth Amendment.[[6]](#footnote-6) *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 *US v Windsor*[[7]](#footnote-7) declared section 3 of Defence of Marriage Act 1996 (‘DOMA’)[[8]](#footnote-8) unconstitutional for violating equal protection principles. After that case the federal government had to recognise same-sex marriages conducted in different US states. However at that time, no requirement was made for US states to recognise same-sex marriages conducted in other US states or foreign jurisdictions. Until the *Obergefell* case[[9]](#footnote-9) the Supreme Court had a record of denying standing in same-sex marriage cases. This was highlighted by the Supreme Court case of 6 October 2014, where certiorari was denied in five appeals in relation to same-sex marriage.[[10]](#footnote-10) In so doing, the Supreme Court allowed individual states to determine whether or not to legalise same-sex marriage and many did so.[[11]](#footnote-11) The Supreme Court appeared reluctant to intervene at 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…’[[12]](#footnote-12)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’.[[13]](#footnote-13) He went on to refer to referenda, legislative debates and scholarly writings amongst other sources.[[14]](#footnote-14) Yet at the time when *Obergefell* was decided the US was divided on this issue as same-sex marriage remained prohibited in twelve states.[[15]](#footnote-15)

The four dissenting judges in *Obergefell* were scathing of the democratic power which the Supreme Court had usurped. Roberts CJ stated that ‘[f]or those who believe in a government of laws, not of men, the majority’s approach is disheartening’.[[16]](#footnote-16) Scalia J 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’.[[17]](#footnote-17) This use of power by the Supreme Court is especially marked in Scalia J’s view because the ‘[f]ederal judiciary is hardly a cross-section of America’.[[18]](#footnote-18) 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 south-west states or evangelical Christians.[[19]](#footnote-19) Scalia J concluded that the decision of the majority violated the principle of ‘no social transformation without representation’.[[20]](#footnote-20) The speed of the decision by the Supreme Court in the US is also at odds with the position in Europe. Although many European states have been legislating individually in favour of same-sex marriage,[[21]](#footnote-21) at a European level the leading European courts have been greatly concerned about developing a consensus on the issue before acting.[[22]](#footnote-22) On 21 July 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.[[23]](#footnote-23)

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’.[[24]](#footnote-24) This is reflected by the protection of marriage in international conventions[[25]](#footnote-25) and the importance construed upon marriage in influential judgments.[[26]](#footnote-26) In leading cases such as *Goodridge v Department of Public Health*,[[27]](#footnote-27) marriage has been referred to as a ‘vital social institution’[[28]](#footnote-28) and one of the ‘basic civil rights of man’ fundamental to our very existence and survival.[[29]](#footnote-29) Similarly in *Obergefell* the majority judgment referred to the ‘transcendent importance of marriage’.[[30]](#footnote-30) Exclusion or not from marriage for same-sex couples is therefore of constitutional importance[[31]](#footnote-31) as the ability to participate in a legally recognised marriage has implications for an individual’s constitutionally protected status as an equal citizen.[[32]](#footnote-32) 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.[[33]](#footnote-33) 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’.[[34]](#footnote-34) 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.[[35]](#footnote-35)

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’.[[36]](#footnote-36) 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 of the great historical struggles for such rights, including those of religious and ethnic minorities and women’,[[37]](#footnote-37) and often involves intense political debate.[[38]](#footnote-38)

However, not everyone sees marriage as a goal. Yvonne Zylan writes that ‘[feminist] ...critics found much to dislike in marriage’.[[39]](#footnote-39) Marriage was understood as ‘at best problematic for, and at worst deeply oppressive to, women as a class’.[[40]](#footnote-40) 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’[[41]](#footnote-41) and an acknowledgement of the unique... constitutive power’[[42]](#footnote-42) of marriage and the associated rights this entails. Gay rights movements worldwide have adopted a more positive view towards marriage.[[43]](#footnote-43) This move accords with the changing nature of marriage itself. Marriage is not a ‘fixed and immutable institution’[[44]](#footnote-44) and recent years have seen many changes in the nature of marriage itself.[[45]](#footnote-45) 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 ‘demographically and culturally similar’.[[46]](#footnote-46) Not every commentator sees the usefulness of such comparisons in family law. David Bradley argues that such comparisons are ‘particularly problematic’,[[47]](#footnote-47) as ‘the European experience is ‘inherently different from that of the United States’.[[48]](#footnote-48) 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 law[[49]](#footnote-49) enables an evaluation of the methods and concepts used to date.[[50]](#footnote-50) 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’.[[51]](#footnote-51) Comparisons are perhaps of particular interest in the US. Traditionally, the US has ‘lagged significantly behind those of other jurisdictions...’[[52]](#footnote-52) Although this position has been reversed by the *Obergefell* decision in favour of same-sex marriage across the US,[[53]](#footnote-53) 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 US fails to look with regularity outside its own borders[[54]](#footnote-54) leading cases see the US Supreme Court referring to judgments from the European Court of Human Rights (‘ECtHR’).[[55]](#footnote-55) Chief Justice William Rehnquist advised that US courts should ‘begin looking to the decisions of other constitutional courts to aid in their own deliberative process’.[[56]](#footnote-56) Yet this dicta was far from uncontroversial with Scalia J dissenting on the basis that constitutional entitlements do not ‘spring into existence… because foreign nations decriminalize conduct’.[[57]](#footnote-57) He considered discussion of foreign views to be ‘dangerous’.[[58]](#footnote-58) 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 US 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 US since 2010.[[59]](#footnote-59) 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 Waaldijjk,[[60]](#footnote-60) and subsequently developed by William N. Eskridge[[61]](#footnote-61) and Yuval Merin.[[62]](#footnote-62) 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’.[[63]](#footnote-63) 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’.[[64]](#footnote-64) 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 partnerships as equal to opposite-sex unions’.[[65]](#footnote-65) There are also several other authors which review, discuss and support the incrementalist approach.[[66]](#footnote-66) 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,[[67]](#footnote-67) before moving on to equality in employment[[68]](#footnote-68) and tenancy conditions for gays,[[69]](#footnote-69) with more recent cases emphasising the need for equality in adoption[[70]](#footnote-70) and civil partnership rights where these had already been introduced for heterosexuals.[[71]](#footnote-71) The latest ECtHR case determined that same-sex couples in contracting states had the right to some form of civil union or registered partnership.[[72]](#footnote-72) Yet same-sex marriage has not been introduced so far due to concerns by the ECtHR over lack of consensus.[[73]](#footnote-73) This piece analyses the importance of the incrementalist theory in light of recent developments especially the decisions of the US Supreme Court in *Windsor v US* and *Obergefell*.[[74]](#footnote-74) 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.

1. **The Incremental Approach**

Marriage is not a ‘fixed and immutable institution’.[[75]](#footnote-75) It is pertinent to make the point that the institution of marriage has ‘a history of continuous evolution’.[[76]](#footnote-76) The extent of the change already achieved can be seen from examples in the US where ‘as recently as 1967, state governments denied inter-racial couples to marry’.[[77]](#footnote-77) Similarly over a lengthy period there has been radical change to those marriage laws that denied married women an independent legal status.[[78]](#footnote-78) The ECtHR has also recognised the right of transsexuals to marry in their new sex.[[79]](#footnote-79) 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’.[[80]](#footnote-80) Michele Grigoloalso identifies the ‘diversification of the ways people establish relationships and families...’[[81]](#footnote-81) It is correct that ‘progress in promoting tolerance towards homosexuality has not been linear....’,[[82]](#footnote-82) 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’.[[83]](#footnote-83)Proponents of immediate action argue that ‘proceeding too slowly or conceding too much will cause the movement to become stagnant or toothless.’[[84]](#footnote-84) Hand in hand with this approach is a concern about the lack of equity for those affected,[[85]](#footnote-85) and that the ‘need for governmental incrementalism’ is an inappropriate reason for delay.[[86]](#footnote-86) 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’.[[87]](#footnote-87) In introducing same-sex marriage nationwide without a full democratic mandate, the Supreme Court in *Obergefell[[88]](#footnote-88)* 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.[[89]](#footnote-89) 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.[[90]](#footnote-90) Spain is also given as an example of success for incrementalism in Southern Europe.[[91]](#footnote-91) In the US, Vermont is cited as an example of a state which has taken the slow incremental approach. Following a judgement from the Vermont Supreme Court in 1999,[[92]](#footnote-92) same-sex civil unions were legalised the following year.[[93]](#footnote-93) Subsequently a same-sex marriage law was enacted in 2009.[[94]](#footnote-94)

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 US because of ‘important cultural or social differences’.[[95]](#footnote-95) The US is seen as different because of ‘its greater heterogeneity and its strain of religious fundamentalism...’,[[96]](#footnote-96) in contrast to the ‘small ethnically homogeneous populations’ and separation of ‘religion and politics...’ [[97]](#footnote-97) 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’.[[98]](#footnote-98) 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’.[[99]](#footnote-99) 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...’,[[100]](#footnote-100) as ‘[l]esbian and gay relationships are not currently relevant to the public law agenda of most developing countries,...’[[101]](#footnote-101) Before the recent decision of the ECtHR in *Oliari and Others v Italy*[[102]](#footnote-102) 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’.[[103]](#footnote-103) 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’.[[104]](#footnote-104) There were several failed attempts to introduce registered partnerships in Italy.[[105]](#footnote-105) 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).[[106]](#footnote-106) Greece had to amend its law to have equality for same-sex couples in respect of access to civil partnership.[[107]](#footnote-107) Following the decision of *Oliari and Others v Italy* on 21 July 2015[[108]](#footnote-108) all contracting states to the European Convention on Human Rights will have to introduce a form of civil union or registered partnership.[[109]](#footnote-109) There is still no requirement to introduce same-sex marriage due to concerns about a lack of consensus on this issue between European nations.[[110]](#footnote-110)

Some countries need longer to adjust, and change may not come to ‘some jurisdictions for a long time, and maybe not ever’.[[111]](#footnote-111) 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,[[112]](#footnote-112) or a lack of substantive equality.[[113]](#footnote-113) 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 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 change[[114]](#footnote-114) as it allows time to ‘permit… gradual adjustment of antigay mind-sets, slowly empower... gay right advocates and ...discredit antigay arguments’.[[115]](#footnote-115) 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’.[[116]](#footnote-116)  This corresponds with the theory that to conduct legislative change, ‘the inclination of the majority of the people… are in favour of a change’.[[117]](#footnote-117) The effect is circular as ‘law cannot move unless public opinion moves, but public attitudes can be influenced by changes in the law’.[[118]](#footnote-118)

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 effectively into lasting and tangible social progress...’[[119]](#footnote-119) In contrast, pushing too hard could result in a harmful backlash, disrupting dialogue on the issue, and causing unnecessary polarization...’[[120]](#footnote-120) as seen in certain US states.[[121]](#footnote-121) After *US v Windsor*,[[122]](#footnote-122) commentators argued that the Supreme Court were taking a cautious approach.[[123]](#footnote-123) 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.[[124]](#footnote-124) Michael Klarman argues that the ‘*Windsor* majority were not prepared to impose gay marriage on states’.[[125]](#footnote-125)The *Windsor* majority were concerned that too broad a ruling would result in a backlash[[126]](#footnote-126) 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.’[[127]](#footnote-127) Similarly in the decision of 6 October 2014, the US 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.[[128]](#footnote-128) There were concerns that if the Supreme Court got too far ahead on this issue that this could backfire.[[129]](#footnote-129) 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.[[130]](#footnote-130) This may raise concerns about the possibility of a backlash in public opinion or a lack of substantive support in some of the US states. In his dissenting judgment Chief Justice Roberts discussed the ‘consequences of shutting down the political process’.[[131]](#footnote-131) 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’.[[132]](#footnote-132) He goes on to refer 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’.[[133]](#footnote-133) It is hoped that over time public support in favour of same-sex marriage in every state across the US may be achieved. Nonetheless it remains a missed opportunity that the US has lost the chance to have a full democratic debate on this issue.[[134]](#footnote-134)

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.[[135]](#footnote-135) Similar statistics emerge for France and Denmark. They enacted same-sex marriage in 2013 and 2012 respectively.[[136]](#footnote-136) 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.[[137]](#footnote-137) It is not surprising that there is most likely to be a backlash in public opinion, where court judgments strongly contravene public opinion.[[138]](#footnote-138) Countries that have legalised same-sex marriage, but are struggling to ensure substantive change, show a lack of public support for the institution.[[139]](#footnote-139) 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.

1. **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.[[140]](#footnote-140)In many instances this takes the form of civil partnerships. It should be noted that ‘registered partnership take different forms in different countries’[[141]](#footnote-141) ranging from near equality in the United Kingdom[[142]](#footnote-142) to less than equal protection in other states. The French pacte civil de solidarite (‘PACS’)is an example of the latter categoryas, although it ‘provides rights and obligations similar but not equal to marriage...’[[143]](#footnote-143) notably citizenship is not included.[[144]](#footnote-144)

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’.[[145]](#footnote-145) 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’.[[146]](#footnote-146) In this way civil partnerships have been compared to segregated schools and public services in the ‘Jim Crow South’.[[147]](#footnote-147) This contrasts to marriage which is seen as gold standard.[[148]](#footnote-148) On a practical note, if a same-sex couple wish to relocate internationally, civil partnerships may also be ‘unequal in the literal sense, as they may not prove as ‘portable’ as same-sex marriage’.[[149]](#footnote-149)

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’.[[150]](#footnote-150) Erez Aloni considers that civil partnerships may stall progress,[[151]](#footnote-151) and are seen as a ‘stumbling block that can significantly delay acceptance of same-sex marriage’.[[152]](#footnote-152) 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 *Oliary and Others v Italy* appears to have taken the same view.[[153]](#footnote-153) 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[[154]](#footnote-154) the ECtHR did note the ‘continuing international movement towards legal recognition’[[155]](#footnote-155) 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.[[156]](#footnote-156) This Act was, ‘shaped by consultation with the stakeholders and public at large’ who were not prepared for same-sex marriage at that date.[[157]](#footnote-157) Stonewall (one of the leading gay rights organisations in the UK) considered civil partnership to be ‘preferable to marriage’.[[158]](#footnote-158) It is perhaps unsurprising that when Erez Aloni was writing in 2010 he did not consider that the UK would ‘allow same-sex marriage in the near future…’[[159]](#footnote-159) 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...’[[160]](#footnote-160) A few years later both England and Wales and Scotland introduced same-sex marriage legislation.[[161]](#footnote-161) Civil partnership did not deter those who wanted to pursue same-sex marriage.[[162]](#footnote-162) 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.[[163]](#footnote-163) 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.[[164]](#footnote-164) He stated that ‘...LGB individuals feel less discriminated against and have less motivation to fight for same-sex marriage...’[[165]](#footnote-165) 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. [[166]](#footnote-166)Similarly, in Denmark,same-sex marriage was not considered an important topic,[[167]](#footnote-167) with ‘GLBT resistance to marriage as a patriarchal institution…’[[168]](#footnote-168) In 2012 Denmark passed same-sex marriage legislation and France followed suit the following year. A number of different opinion polls showed that both the French[[169]](#footnote-169) and Danish public supported same-sex marriage.[[170]](#footnote-170) Comparative constitutionalism played a part given the rapid increase in the number of European countries and US states which enacted same-sex marriage legislation since 2010.[[171]](#footnote-171) 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.

1. **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.[[172]](#footnote-172) This can be demonstrated by the US. 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’.[[173]](#footnote-173) This decision followed a line of court cases in the US looking at the right of same-sex couples to wed.[[174]](#footnote-174)The court based approach is not without difficulties. The decision of the Supreme Court, meant that the Obama administration avoided having to take legislate in favour of same-sex marriage. President Obama has publicly stated his support for same-sex marriage.[[175]](#footnote-175)  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’.[[176]](#footnote-176) Commentators on these judgements criticised the ‘naked usurpation of the legislative function’.[[177]](#footnote-177) The four dissenting judges in *Obergefell* have also made similar criticisms of the majority decision in that case.[[178]](#footnote-178) 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 US now overall broadly favours same-sex marriage, but this masks great differences in attitude between US states.[[179]](#footnote-179) 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.[[180]](#footnote-180)

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...’[[181]](#footnote-181) 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.[[182]](#footnote-182)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...’[[183]](#footnote-183) Another perceived advantage of proceeding by court litigation is that constitutional courts can move ahead of public opinion.[[184]](#footnote-184)Yvonne Zylan notes that lawyers, in determining their strategy are guided by ‘purposive instrumentalism’.[[185]](#footnote-185) 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.[[186]](#footnote-186) Court based attempts to introduce same-sex marriage legislation could result in a confused outcome and lack of successful resolution to a dispute. The US situation is particularly complex. Before the recent decision in *Obergefell[[187]](#footnote-187)* 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.[[188]](#footnote-188)

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 US Supreme Court in *Brown v Board of Education*, declared segregated schooling illegal.[[189]](#footnote-189) 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.[[190]](#footnote-190) 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’.[[191]](#footnote-191) 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’.[[192]](#footnote-192) 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.[[193]](#footnote-193) This contained a ‘famous anti-discrimination clause that explicitly forbids discrimination because of sexual orientation’.[[194]](#footnote-194) Nicola 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…’[[195]](#footnote-195) Subsequently the South African Constitutional Court ruled in favour of same-sex marriage[[196]](#footnote-196) and the Constitutional Court ‘gave the legislature a year to amend the Marriage Act to include same-sex marriage’.[[197]](#footnote-197) Despite this much vaunted decision[[198]](#footnote-198) 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.[[199]](#footnote-199) 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 reinforc[ing] the primacy of heterosexual civil marriage…’[[200]](#footnote-200) 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. [[201]](#footnote-201)

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...’[[202]](#footnote-202) 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...’[[203]](#footnote-203) 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... ’ and that the ‘existence of high-profile attacks place the aspirations of the constitution in stark relief...’ [[204]](#footnote-204) 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’.[[205]](#footnote-205) Despite these different viewpoints the lack of egality 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.[[206]](#footnote-206) 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 Constitution[[207]](#footnote-207) to introduce same-sex marriage.[[208]](#footnote-208) 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. [[209]](#footnote-209) When the case reached the Ontario Court of Appeal they introduced same-sex marriage without waiting for legislative approval.[[210]](#footnote-210) 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…’[[211]](#footnote-211) The federal government responded quickly stating they agreed with the changes[[212]](#footnote-212) and this resulted in the Civil Marriage Act 2005 which gave marriage rights to same-sex couples.’[[213]](#footnote-213) Canada now has achieved almost ‘complete equality between same-sex and opposite-sex marriages…’ [[214]](#footnote-214) 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 introduction of change is ‘questionable’[[215]](#footnote-215) as there was no pause to engage with the legislature and public opinion.[[216]](#footnote-216) 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... ‘[[217]](#footnote-217)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.[[218]](#footnote-218) 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’.[[219]](#footnote-219) By the time the Federal Marriage Act was enacted, same-sex marriage was legal in the majority territories and provinces.[[220]](#footnote-220) 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...’[[221]](#footnote-221) 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…’[[222]](#footnote-222)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.

1. **The Problem of Backlash**

Writers and judges argue that acting in advance of public opinion can ‘mobilize opponents, undercut moderates and retard the cause they purport to advance’.[[223]](#footnote-223) In one judge’s opinion ‘doctrinal limbs too swiftly shaped, experience teaches, may prove unstable’.[[224]](#footnote-224) Past experience from the US 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.[[225]](#footnote-225) 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 US 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 US Supreme Court in *Obergefell[[226]](#footnote-226)* in bringing forward same-sex marriage nationwide across the US.

The Massachusetts Supreme Court became the first state to recognise same-sex marriage.[[227]](#footnote-227) Vermont had earlier recognised same-sex civil union,[[228]](#footnote-228) but the Massachusetts Supreme court was ‘ground-breaking’[[229]](#footnote-229) in holding a statute unconstitutional that denied ‘same-sex couples the opportunity to obtain a marriage license’.[[230]](#footnote-230) 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…’[[231]](#footnote-231) In making this decision the Massachusetts Supreme Court were not deterred, despite the lack of a ‘broad social consensus’ supporting the introduction of same-sex marriage.[[232]](#footnote-232) Iowa is another state that introduced same-sex marriage by means of court action despite a lack of public support for same-sex marriage. [[233]](#footnote-233)

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.[[234]](#footnote-234) 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. [[235]](#footnote-235) 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.[[236]](#footnote-236) 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’.[[237]](#footnote-237) 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’.[[238]](#footnote-238) Subsequently, federal legislation was enacted in the shape of DOMA,[[239]](#footnote-239) allowing states the right to ‘deny recognition to same-sex marriages should they be allowed in other states’.[[240]](#footnote-240) Richard M. Lombino II believed DOMA is an example of backlash in itself.[[241]](#footnote-241)

Examples from other US 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 ‘overruled by state constitutional amendment’.[[242]](#footnote-242) One state example which can be used in this context is that of Hawaii. In the leading 1993 case of *Beahr v Lewin*,[[243]](#footnote-243) Erez Aloni reports that the Hawaii Supreme Court ‘...recognized that the exclusion of same-sex marriage amounts to discrimination on the basis of sex...’[[244]](#footnote-244) 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’.[[245]](#footnote-245) Erez Aloni cites Hawaii as an example of the ‘problems associated with the theory of small change and the incremental approach…’[[246]](#footnote-246) He later states that in Hawaii’s case ‘[i]ncrementalism … has been too slow and too gradual’.[[247]](#footnote-247) The Hawaiian experience can instead be used to demonstrate the difficulties connected with courts too far outpacing public opinion. The Hawaiian Supreme Court decision[[248]](#footnote-248) 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,[[249]](#footnote-249) and same-sex marriage legislation was enacted in November 2013.[[250]](#footnote-250)

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’,[[251]](#footnote-251) California briefly authorized same-sex marriages briefly in 2008 by means of a Supreme Court Judgment.[[252]](#footnote-252) 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’[[253]](#footnote-253) the Californian Constitution was amended to declare that ‘only marriage between a man and a woman is valid or recognised in California’.[[254]](#footnote-254) It was many years later and after much litigation that same-sex marriage became legal again in California on June 28, 2013’.[[255]](#footnote-255) 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.[[256]](#footnote-256) The examples from Hawaii and California were typical of many US states and a wide number of states passed constitutional amendments outlawing same-sex marriage.[[257]](#footnote-257) 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 US, there are ‘a clear majority of Americans today who oppose same-sex marriage’.[[258]](#footnote-258) US 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’[[259]](#footnote-259) with studies from statisticians continuing to show fast growing support for same-sex marriage in the US. [[260]](#footnote-260) This does however mask disparities between US states, where in some cases opposition to same-sex marriage remains strong.[[261]](#footnote-261) This was stillthe case when *Obergefell* was decided.[[262]](#footnote-262) At that time 12 US states still prohibited same-sex marriage.[[263]](#footnote-263) In deciding to legalise same-sex marriage across the US, 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 US*[[264]](#footnote-264) where the majority of the Supreme Court had valid concerns about a backlash in public opinion.[[265]](#footnote-265) 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.[[266]](#footnote-266) 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’.[[267]](#footnote-267) In making a decision in favour of same-sex marriage nationwide across the US in 2015 in *Obergefell*,[[268]](#footnote-268) the question remains as to whether the Supreme Court have waited sufficiently for the shift in public opinion. The agreement of all US 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 US state. Public approval across all states may take time to achieve. In any event the US did not see a full democratic debate on this issue.

1. **Conclusion**

International conventions[[269]](#footnote-269) and leading case law[[270]](#footnote-270) 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.[[271]](#footnote-271) This has led authors to conclude that excluding gays from marriage is denying them the full status of citizenship.[[272]](#footnote-272) 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,[[273]](#footnote-273) comparative constitutionalism has been recommended by senior members of the judiciary[[274]](#footnote-274) and in practice is happening anyway with senior courts referring to each others’ judgements worldwide.[[275]](#footnote-275) The speed of the recognition of same-sex marriage worldwide from 2010 also shows that comparative constitutionalism is happening in practice. [[276]](#footnote-276)

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,[[277]](#footnote-277) the repeal of laws which prohibited inter-racial marriage,[[278]](#footnote-278) and the recognition of transsexuals’ rights with regard to marriage by the ECtHR.[[279]](#footnote-279) 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.[[280]](#footnote-280) Since an increasing number of other states have recognised same-sex marriage by means of the incrementalist progress[[281]](#footnote-281) these concerns although relevant become less accurate. The criticism that incrementalism proceeds too slowly[[282]](#footnote-282) could also be seen as an advantage. Slow change allows for public opinion to change and develop.[[283]](#footnote-283) Moving too quickly in the absence of support from public opinion could result in a backlash of public opinion[[284]](#footnote-284) or less than substantive equality.[[285]](#footnote-285) 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,[[286]](#footnote-286) this has been criticised as reducing same-sex couples to a second class status,[[287]](#footnote-287) whilst allowing only heterosexuals to access the gold standard[[288]](#footnote-288) 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.[[289]](#footnote-289) 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 and Wales, France and Denmark as examples of the obstructionist nature of civil partnership.[[290]](#footnote-290) 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.[[291]](#footnote-291) 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.[[292]](#footnote-292) 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.[[293]](#footnote-293) 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.[[294]](#footnote-294) 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,[[295]](#footnote-295) the US Supreme Court runs the risk that there may be a lack of substantive support in every US state. It is hoped that public approval is achieved but experience will teach how long this takes to arrive.

1. Frances Hamilton is a Senior Lecturer at Northumbria University. [↑](#footnote-ref-1)
2. *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 US (2015). [↑](#footnote-ref-2)
3. The following list shows the states that currently recognise same-sex marriage. Netherlands (2001), Belgium (2003), Spain (2004), Canada (2005), South Africa (2006), 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. [↑](#footnote-ref-3)
4. *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 U.S. (2015). [↑](#footnote-ref-4)
5. *Id.* [↑](#footnote-ref-5)
6. I*d* at 19 [↑](#footnote-ref-6)
7. *US v Windsor*, 570 U.S. (2013). [↑](#footnote-ref-7)
8. S3 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.’ [↑](#footnote-ref-8)
9. *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 U.S. (2015). [↑](#footnote-ref-9)
10. The US Supreme Court denial of certiorari on 6 October 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* (Indiana) 14-277, 7th Cir, Certiorari Denied 6 October 2014; *Walker v Wolf* (Wisconsin) 14-178, 7th Cir, Certiorari Denied 6 October 2014; *Herbert v Kitchen* (Utah) 14-124, 10th Cir, Certiorari Denied 6 October 2014; *McQuigg v Bostic* (Virginia) 14-251, 4th Cir, Certiorari Denied 6 October 2014; *Rainey v Bostic* (Virginia) 14-153, 4th Cir, Certiorari Denied; *Schaefer v Bostic* (Virginia) 14-225, 4th Cir, Certiorari Denied 6 October 2014 and *Smith v Bishop* (Oklahoma) 14-136, 10th Cir, Certiorari Denied 6 October 2014. [↑](#footnote-ref-10)
11. Prior to *Obergefell* 38 states in the US had legalised same-sex marriage to some degree. [↑](#footnote-ref-11)
12. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J. GENDER L. & POL’Y 105 -162 (2010-2011) at 141 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 AND FAM. ADVOC. 231 (2004). For further discussion see also 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, THE INDONESIAN J. OF INTER. & COMP. L. The Indonesian Journal of International and Comparative Law 383 also explains at 395 that ‘[h]istorically, defining marriage has been left to the states and federal law has given these definitions a presumption of validity’. [↑](#footnote-ref-12)
13. *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 U.S. (2015) at 23. [↑](#footnote-ref-13)
14. *Id.* [↑](#footnote-ref-14)
15. 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. [↑](#footnote-ref-15)
16. *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 U.S.(2015) Roberts CJ Dissent at 2. [↑](#footnote-ref-16)
17. I*d.* Scalia J Dissent at 5. [↑](#footnote-ref-17)
18. *Id at* 5-6. [↑](#footnote-ref-18)
19. *Id* at 6. [↑](#footnote-ref-19)
20. *Id.* [↑](#footnote-ref-20)
21. 11 states in Europe have now legalised same-sex marriage and 24 have some form of civil partnership or registered union. [↑](#footnote-ref-21)
22. See for examplethe European Court of Human Rights in *Schalk and Kopf v Austria*, Application No 30141/04, 24 June 2010 at para 94 [↑](#footnote-ref-22)
23. *Oliari and Others v Italy*, Application Nos. 18766/11 and 36030/11, 21 July 2015 at para 174. [↑](#footnote-ref-23)
24. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J. GENDER L. & POL’Y 105 -162 (2010-2011) at 141 referring to Nancy Cott, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000) at 1. [↑](#footnote-ref-24)
25. See for example Article 12 of the European Convention on Human Rights which states that ‘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.’ 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.’ [↑](#footnote-ref-25)
26. See for example *Goodridge v Department of Public Health*, 798 N.E. 2d 941 Mass 2003*, Loving v Virginia*, 388 U.S. 1 (1967). [↑](#footnote-ref-26)
27. *Goodridge v Department of Public Health*, 798 N.E. 2d 941 Mass 2003. [↑](#footnote-ref-27)
28. Jonah M.A. Crane, Legislative and Constitutional Responses to Goodridge v Department of Public Health, 7 N.Y.U. J LEGIS. AND PUB. POLICY 465-485 (2003 -2004) at 469 referring to *Goodridge v Department of Public Health*, 798 N.E. 2d 941 Mass (2003) at paragraph 948.  [↑](#footnote-ref-28)
29. Yvonne Zylan, STATES OF PASSION: LAW, IDENTITY AND SOCIAL CONSTRUCTION OF DESIRE 224 (2011) referring to Loving v Virginia, 388 U.S. 1 (1967) at 12. [↑](#footnote-ref-29)
30. *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 U.S. (2015) at 3. [↑](#footnote-ref-30)
31. Other writers who discuss the constitutional importance of marriage include Nicholas Bamforth, Sexuality and Citizenship in Contemporary Constitutional Argument 10(2) INT. J. CONST. L. 477-492 (2012) at 477, 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 (1998) at 39 and David Bradley, Comparative Law, Family Law and Common Law 33(1) OXFORD J. LEGAL STUDIES 127-146 (2003) at 129. [↑](#footnote-ref-31)
32. ISee for example Nicholas Bamforth, Sexuality and Citizenship in Contemporary Constitutional Argument 10(2) INT. J. CONST. L. 477-492 (2012) at 478 referring toThomas HMarshall, Citizenship and Social Class in Thomas H Marshall and T Bottomore (eds) (1992)CITIZENSHIP AND SOCIAL CLASS18 (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’ (2012) 10(2) INT. J. CONST. L. 551-574 (2012) at 555 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. See also Michael C Dorf, Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings 97 VA. L. REV. 1267-1346 (2011). [↑](#footnote-ref-32)
33. See for example Nicholas Bamforth, Sexuality and Citizenship in Contemporary Constitutional Argument 10(2) INT. J. CONST. L. 477-492 (2012) at 484 referring to Diane Richardson, 32 *Sexuality and Citizenship* 83 at 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(1) FORDHAM INT. L. R. 156-205 (2009) at 163 referring to Angela P Harris, Loving Before and After the Law, 76 FORDHAM INT. L. R. 2821-2847 (2008) at 2823 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.’ [↑](#footnote-ref-33)
34. Michael C Dorf, Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings 97 VA. L. REV. 1267-1346 (2011) at 1269. [↑](#footnote-ref-34)
35. *US v Windsor*, 570 U.S. (2013) (Docket No. 12-307) itself concerned 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 Robert Lecky, Must Equal mean Identical? Same-Sex Couples and Marriage 10(1) INT. J.L.C. 5-25 (2014). [↑](#footnote-ref-35)
36. William D. Araiza, Book Review, Project Muse: ‘The Long Arc of Justice: Lesbian and Gay Marriage, Equality and Rights’, and ‘Gay Marriage; for Better or for Worse? What We’ve Learned from the Evidence’ and ‘Blessing Same-Sex Unions: The Perils of Queer Romance and the Confusions of Christian Marriage’ and ‘Authorizing Marriage: Canon, Tradition in the Blessing of Same-Sex Unions’ 19(2) J. OF THE HISTORY OF SEXUALITY 371-379 (2010) at 371. [↑](#footnote-ref-36)
37. David A. J. Richards, Carl F. Stychin, Book Review: Governing Sexuality: the Changing Politics of Citizenship and Law Reform: Hart Publishing: Oxford and Portland, Oregon, 2(3) INT. J.CONST. L. 727-733 (2004) at 727. [↑](#footnote-ref-37)
38. WILLIAM N. ESKRIDGE JR, EQUALITY PRACTICES, CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002) at 112. [↑](#footnote-ref-38)
39. YVONNE ZYLAN, STATES OF PASSION: LAW, IDENTITY AND SOCIAL CONSTRUCTION OF DESIRE (2011) at 204. [↑](#footnote-ref-39)
40. *Id.* [↑](#footnote-ref-40)
41. *Id.* at 205 referring to MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE (1999). [↑](#footnote-ref-41)
42. *Id* at 275. [↑](#footnote-ref-42)
43. *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. & SOCIAL CHANGE567-615 (1994) at 611. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J . GENDER L. & POL’Y 105 -162 (2010-2011) at 156 referring to Beccy Shipman and Carol Smart, ‘Its Made a Huge Difference’: Recognition, Rights and the Personal Significance of Civil Partnerships 12 SOC. RES. ONLINE (2007) at para 2.5. [↑](#footnote-ref-43)
44. Gretchen Van Ness, The Inevitability of Gay Marriage 38 NEW ENG. L. REV. 563-568 (2003-2004) at 5644 comments 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. 112-118 (1997) at 112 who explains that the ‘institution of marriage is not monolithic and unchanging.’ [↑](#footnote-ref-44)
45. For example, changes allowing inter-racial couples to marry and allowing married women an independent legal status. See for discussion Cindy Tobisman, Marriage vs Domestic Partnership: Will We Ever Protect Lesbians’ Families? 12 BERKELEY WOMEN’S L. J. 112-118 (1997) at 112. See also Ian Loveland, A Right to Engage in Same-Sex Marriage in the United States 1 E.H.R.L.R 10-20 (2014) and Robert Leckey, Must Equal Mean Identical? Same-Sex Couples and Marriage 10(1) INT. J.C. 5-25 (2014) at 11. [↑](#footnote-ref-45)
46. WILLIAM N. ESKRIDGE JR, EQUALITY PRACTICES, CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002) at 83. [↑](#footnote-ref-46)
47. David Bradley, Comparative Law, Family Law and Common Law 33(1) OXFORD J. LEGAL STUDIES 127-146 (2003) at 127. Other writers also comment on the difficulties of international comparisons as regards family law. See for example KONRAD ZWEIGERT and HEIN KOTZ, AN INTRODUCTION TO COMPARATIVE LAW 59-61 (1998) and Alision Diduck and Frances Raday, Editorial, Introduction: Family – An International Affair, 8(2) INT. J. OF L. IN CONTEXT 187-195 (2012). [↑](#footnote-ref-47)
48. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J. GENDER L. & POL’Y 105 -162 (2010-2011) at 117. [↑](#footnote-ref-48)
49. Claire L’Heureux-Dube, Realising equality in the twentieth century: the role of the Supreme Court of Canada in comparative perspective, 1(1) INT. J. OF CONST. L. 35-57 (2002) at 36. [↑](#footnote-ref-49)
50. WILLIAM N. ESKRIDGE JR, EQUALITY PRACTICES, CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002) at 112. [↑](#footnote-ref-50)
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53. *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 U.S. (2015) at 3. [↑](#footnote-ref-53)
54. Claire L’Heureux-Dube, Realising Equality in the Twentieth Century: The Role of the Supreme Court of Canada in Comparative Perspective, 1(1) INT. J. CONST. L. 35-57 (2002) at 36. [↑](#footnote-ref-54)
55. William N. Eskridge Jr., Development – United States: Lawrence v Texas and the Imperative of Comparative Constitutionalism, 2(3) INT. J. CONST. L. 555-560 (2004) at 555 referring to *Lawrence v Texas* 123 S Ct 2472 (2003) explains that ‘Justice Anthony Kennedy’s opinion looked at constitutional precedents from abroad, referring to decisions of the European Court of Human Rights.’ [↑](#footnote-ref-55)
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58. *Id.* referring to *Foster v Florida* 537 U.S. (2002) Thomas J. Amanda Alquist, The Migration of Same-Sex Marriage from Canada to the United States: An Incremental Approach 30 U. LA VERNE L. REV. 200-215 at 209 refers to this as an example of ‘a resistance to allowing international case law and social trends to influence this country’s court decision.’ [↑](#footnote-ref-58)
59. See footnote 3. [↑](#footnote-ref-59)
60. 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 INTERNATIOANL LAW (Robert Wintemute and Mads Andenaes eds) (2001) at 437. [↑](#footnote-ref-60)
61. WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICES, CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002). [↑](#footnote-ref-61)
62. YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002). [↑](#footnote-ref-62)
63. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J . GENDER L. & POL’Y 105 -162 (2010-2011) at 107. [↑](#footnote-ref-63)
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65. *Id.* [↑](#footnote-ref-65)
66. Hillel Y. Levin, Conflicts and the Shifting Landscape around Same-Sex Relationships, 41 CAL. W. INT. L. J. 93 (2010); 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 AND FAM. ADVOC. 231 (2004); 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); Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J . GENDER L. & POL’Y 105 -162 (2010-2011) at 107; Kathryn L. Marshall, Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed, 2 WM & MARY POL’Y REV. 194-235(2010) at 194; Nanci Schanerman, Comity; Another Nail in the Coffin of Institutional Homophobia, 42 U. MIAMI INTER-AM. L. REV. 145 (2010) and Amanda Alquist, The Migration of Same-Sex Marriage from Canada to the United States: An Incremental Approach 30 U. LA VERNE L. REV. 200-215 (2008). [↑](#footnote-ref-66)
67. *Dudgeon v United Kingdom*, Application No. 7525/76, Judgment of 22 October 1981. [↑](#footnote-ref-67)
68. *Smith and Grady v UK*, Application No.s 33985/96 and 33986/96, Judgment of 27 September 1999 and *Lustig-Prean and Beckett v UK*, Application Nos 31417/96 and 32377/96, Judgment of 27 September 1999. [↑](#footnote-ref-68)
69. *Karner v Austria*, Application No 40016/98, Judgment of 24 July 2003. [↑](#footnote-ref-69)
70. *EB v France*, Application No 43546/02, Judgment of 22 January 2008. [↑](#footnote-ref-70)
71. *Vallianatos v Greece*, Application Nos 29381/09 and 32684/09, Judgment of 7 November 2013. [↑](#footnote-ref-71)
72. *Oliari and Others v Italy*, Application Nos. 18766/11 and 36030/11, 21 July 2015. [↑](#footnote-ref-72)
73. *Id.* [↑](#footnote-ref-73)
74. *US v Windsor*, 570 U.S. (2013) and *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 U.S.(2015). [↑](#footnote-ref-74)
75. Gretchen Van Ness, The Inevitability of Gay Marriage 38 NEW ENG. L. REV. 563-568 (2003-2004) at 564 comments 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. 112-118 (1997) at 112 who explains that the ‘institution of marriage is not monolithic and unchanging.’ [↑](#footnote-ref-75)
76. Ministerial Forward by Rt. Hon. Maria Miller MP, Minister for Women and Equalities, EQUAL MARRIAGE: THE GOVERNMENT’S RESPONSE, December 2012at 4available at https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/133262/consultation-response\_1\_.pdf [↑](#footnote-ref-76)
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78. *Id.* [↑](#footnote-ref-78)
79. In *Goodwin v UK,* Application No [28957/95](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":["7525/76"]}), Judgment of 11 July 2002 at paragraph 100 it was stated that ‘The Court has found ... that test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual.’ [↑](#footnote-ref-79)
80. Dale Carpenter, A Traditionalist Case for Gay Marriage, 50 SOUTH TEXAS L. REV. 93-104 (2008-2009) at 102. [↑](#footnote-ref-80)
81. Michaele Grigolo, Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject, 14(5) EUR. J. INT. L. 1023-1044 at 1026. [↑](#footnote-ref-81)
82. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J. GENDER L. & POL’Y 105 -162 (2010-2011) at 136 referring to M. V. Lee Badgett, Predicting Partnership Rights: Applying the European Experience in the United States, 17 YALE L.J. & FEMINISM 71-88 (2005) at 75. [↑](#footnote-ref-82)
83. Kathryn L. Marshall, Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed, 2 WM & MARY POL’Y REV. 194-235(2010) at 194. [↑](#footnote-ref-83)
84. *Id*. at 196-197. [↑](#footnote-ref-84)
85. *Id.* at 198 refers 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., Letter from a Birmingham City Jail in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING JR 289, 292 (James Melvin Washington ed. 1986) wrote that ‘This ‘Wait’ has almost always meant ‘Never’. It has been a tranquilizing thalidomide, relieving the emotional stress...’ [↑](#footnote-ref-85)
86. Kathryn Chapman, Case Comment, Halpern v Canada (AG) [2002] O.J. 2714 (Ont. Div. Ct.) 19 CANADIAN J. FAM. L. 423-444 (2002) at 426 referring to Justice LaForme in *Vriend v Alberta* [1998] 1 SCR 493 550-560 (1998) at 559-60 which case is cited in cited in *Halpern v Canada* (AG) [2002] O.J. 2714 (Ont. Div. Ct.) at paragraph 306. [↑](#footnote-ref-86)
87. Hillel Y. Levin, Conflicts and the Shifting Landscape around Same-Sex Relationships, 41 CAL. W. INT. L. J. 102, 93 (2010) [↑](#footnote-ref-87)
88. *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 U.S. (2015). [↑](#footnote-ref-88)
89. See Kees Waaldijk, Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIOANL LAW (Robert Wintemute and Mads Andenaes eds) (2001) at 437. WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICES, CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002). YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002). [↑](#footnote-ref-89)
90. For further explanation see Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J . GENDER L. & POL’Y 105 -162 (2010-2011) at 118 and Macarena Saez, General Report ‘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. 1-56 (2011) at 9. [↑](#footnote-ref-90)
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94. Marriage Equality Act (Vermont) 2009. [↑](#footnote-ref-94)
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96. William D Araiza, Book Review, Project Muse: ‘The Long Arc of Justice: Lesbian and Gay Marriage, Equality and Rights, and Gay marriage; for Better or for Worse? What We’ve Learned from the Evidence’, and ‘Blessing Same-Sex Unions: The Perils of Queer Romance and the Confusions of Christian Marriage’, and ‘Authorizing Marriage: Canon, Tradition in the Blessing of Same-Sex Unions’ 19(2) J. OF THE HISTORY OF SEXUALITY 371-379 (2010) at 375 [↑](#footnote-ref-96)
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100. Macarena Saez, General Report ‘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. 1-56 (2011) at 31. [↑](#footnote-ref-100)
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107. *Schalk and Kopf v. Austria*, Application No. 30141/04, Judgment of 24 June 2010. [↑](#footnote-ref-107)
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109. *Id.* [↑](#footnote-ref-109)
110. *Id.* [↑](#footnote-ref-110)
111. WILLIAM N ESKRIDGE JR, EQUALITY PRACTICES, CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002) at 119. [↑](#footnote-ref-111)
112. Such as examples seen from certain USA states, which is explored in the final section of this piece. [↑](#footnote-ref-112)
113. Such as the example seen from South Africa, which is explored in the penultimate section of this piece. [↑](#footnote-ref-113)
114. YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002) at 308. [↑](#footnote-ref-114)
115. WILLIAM N. ESKRIDGE JR, EQUALITY PRACTICES, CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002) at 119. See alsoKathryn L. Marshall, Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed, 2 WM. & MARY POL’Y REV. 194-235(2010) at 199-200 who explains that such slow change although frustrating at the time allows ‘public opinion to adjust gradually to the changes sought by social movement.’ See also Maggie Gallagher, Why Accommodate? Reflections on the Gay Marriage Culture Wars, 5 NORTHWESTERN J.OF LAW & SOCIAL POL’Y 260-273 (2010) at 260 and 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. 1535-1550 (1993). [↑](#footnote-ref-115)
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118. WILLIAM N ESKRIDGE JR, EQUALITY PRACTICES, CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002) at 97. [↑](#footnote-ref-118)
119. Kathryn L. Marshall, Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed, 2 WM. & MARY POL. REV. 194-235(2010) 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. (2005) at 12. [↑](#footnote-ref-119)
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122. *USA v Windsor*, 570 U.S. (2013). [↑](#footnote-ref-122)
123. Michael J. Klarman, Windsor and Brown: Marriage Equality and Racial Equality 16 HARV. L. REV. 127-160 (2014) at 146. [↑](#footnote-ref-123)
124. *USA v Windsor*, 570 U.S. (2013) (Docket No. 12-307). See for discussion Michael J. Klarman, Windsor and Brown: Marriage Equality and Racial Equality 16 HARV. L. REV. 127-160 (2014) at 146. [↑](#footnote-ref-124)
125. Michael J. Klarman, Windsor and Brown: Marriage Equality and Racial Equality 16 HARV. L. REV. 127-160 (2014) at 146-147. [↑](#footnote-ref-125)
126. *Id.* at 148. [↑](#footnote-ref-126)
127. *Id.* at 146-147 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, 379-382, 385-386 (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 and Abbe Gluck 25 COLUM. J. GENDER & L. 6, 15-16 (2013). [↑](#footnote-ref-127)
128. See footnote 10. [↑](#footnote-ref-128)
129. USA Today, Tuesday 6 October, Article by Richard Wolf 2. [↑](#footnote-ref-129)
130. *Obergefell et al v Hodges*, *Director, Ohio Department of Health* 576 U.S. (2015). [↑](#footnote-ref-130)
131. *Id.* at C. J. Roberts Dissenting Opinion 27. [↑](#footnote-ref-131)
132. *Id.* [↑](#footnote-ref-132)
133. *Id*. referring to Ruth Bader Ginsburg, Essay, Some Thoughts on Autonomy and Equality in Relation to Roe v Wade 63 N.C.L.REV. 385-386 (1985) at 375. [↑](#footnote-ref-133)
134. *Id.* [↑](#footnote-ref-134)
135. EQUAL MARRIAGE: THE GOVERNMENT’S RESPONSE, December 2012at 11available at https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/133262/consultation-response\_1\_.pdf [↑](#footnote-ref-135)
136. 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) s62%, BVA poll (November 2009) 64%, Credoc poll (July 2010) 61%, TNS-Sofres poll (Jan 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. [↑](#footnote-ref-136)
137. Pew Research Centre, A Global Snapshot of Same-Sex Marriage, 4 June 2013 available at <http://www.pewresearch.org/fact-tank/2013/06/04/global-snapshot-sex-marriage/> [↑](#footnote-ref-137)
138. See Michael J. Klarman, Windsor and Brown: Marriage Equality and Racial Equality 16 HARV. L. REV. 127-160 (2014) 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.’ [↑](#footnote-ref-138)
139. Pew Research Centre, A Global Snapshot of Same-Sex Marriage, 4 June 2013 available at <http://www.pewresearch.org/fact-tank/2013/06/04/global-snapshot-sex-marriage/> notes South Africa as an instance of this where only ‘32% say it should be accepted versus 61% saying it should not be.’ [↑](#footnote-ref-139)
140. YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002) at 326. [↑](#footnote-ref-140)
141. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J . GENDER L. & POL’Y 105 -162 (2010-2011) at 111. [↑](#footnote-ref-141)
142. Civil Partnership Act 2004. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J. GENDER L. & POL’Y 105 -162 (2010-2011) at 122 described this as the ‘comprehensive model for registered partnerships.’

     [↑](#footnote-ref-142)
143. For further explanation see Macarena Saez, General Report ‘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. 25, 1-56 (2011) referring to Hughes Fulchiron, National Report: France, 19 AM. U. J. Gender Soc. Pol’y & L. (2011). [↑](#footnote-ref-143)
144. Eric Fassin: Same-Sex, Different Politics: ‘Gay Marriage’ Debates in France and the United Sates Public Culture 215-232 (2001) at 217 . See also Macarena Saez, General Report ‘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. 1-56 (2011) at 26 and Robert Leckey, Must Equal Mean Identical? Same-Sex Couples and Marriage 10(1) INT. J.OF L. IN CONTEXT 5-25 (2014) at 11 who describes it as a ‘lighter form of union for both third parties and the partners.’ [↑](#footnote-ref-144)
145. *Oliari and Others v Italy*, Application Nos. 18766/11 and 36030/11, 21 July 2015 at paragraph 81. [↑](#footnote-ref-145)
146. Jonah M.A. Crane, Legislative and Constitutional Responses to Goodridge v Department of Public Health, 7 N.Y.U.J. LEGIS. & PUB. POL’Y 465-485 (2003 -2004) at 471. See also Michael C Dorf, Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings 97 VA. L. REV. 1267-1346 (2011). [↑](#footnote-ref-146)
147. Elizabeth S. Scott, A World Without Marriage 41 FAM. L. Q. 537-566 (2007-2008) at 543. See also Richard M. Lombino II, Gay Marriage: Equality Matters, 14(1) S. CAL. R. of LAW & WOMEN’S STUD. 3-24 (2004 – 2005) at 17. [↑](#footnote-ref-147)
148. *Wilkinson v Kritzinger* EWHC 835 (2006); 2 FCR 537(2006) at paragraph 18. See alsoErez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J . GENDER L. & POL’Y 105 -162 (2010-2011) at 110 referring to YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002) at 55-56 who describes marriage as the ‘privileged and preferred legal status in Europe and the United States.’ See also George W. Dent Jr.,The Defense of Traditional Marriage, 15 J. OF L. AND POLITICS 581-644 (1999) at 617 who refers to marriage as bringing many ‘intangible benefits’ including ‘honour, respect [and] the social stamp of approval.’ [↑](#footnote-ref-148)
149. Kathryn L. Marshall, Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed, 2 WM. & MARY POL’Y REV. 194-235(2010) at 199-200. [↑](#footnote-ref-149)
150. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J. GENDER L. & POL’Y 105 -162 (2010-2011) at 105. [↑](#footnote-ref-150)
151. *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). [↑](#footnote-ref-151)
152. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J . GENDER L. & POL’Y 105 -162 (2010-2011) at 109. [↑](#footnote-ref-152)
153. *Oliari and Others v Italy*, Application Nos. 18766/11 and 36030/11, 21 July 2015. [↑](#footnote-ref-153)
154. *Id* at para 174. [↑](#footnote-ref-154)
155. *Id* at para 178. [↑](#footnote-ref-155)
156. For further discussion see Macarena Saez, General Report: 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. 1-56 (2011) at 15 referring to Kenneth Norrie, National Report: United Kingdom, 19 AM. U.J. GENDER SOC. POL’Y & L. 329 (2011). [↑](#footnote-ref-156)
157. *Wilkinson v Kritzinger* EWHC 835 (2006); 2 FCR 537(2006) at paragraph 51 referring toBaroness Scotland (Hansard, HL 22 April 2004, Col 388). [↑](#footnote-ref-157)
158. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J . GENDER L. & POL’Y 105 -162 (2010-2011) at 156 referring to Beccy Shipman and Carol Smart, ‘It’s Made a Huge Difference’: Recognition, Rights and the Personal Significance of Civil Partnership, 12 SOC. RES. ONLINE (2007) at paragraph 2.5. [↑](#footnote-ref-158)
159. *Id.* at 126. [↑](#footnote-ref-159)
160. *Id.* at 151. [↑](#footnote-ref-160)
161. The Marriage (Same Sex) Couples Act 2013 in England and Wales and the Marriage and Civil Partnership Act 2014 in Scotland. [↑](#footnote-ref-161)
162. The case of *Wilkinson v Kritzinger* EWHC 835 (2006), 2 FCR 537 (2006) at paragraph 18 demonstrates the dissatisfaction with civil partnership as a status for those who favoured same-sex marriage. [↑](#footnote-ref-162)
163. EQUAL MARRIAGE: THE GOVERNMENT’S RESPONSE, December 2012at 11available at https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/133262/consultation-response\_1\_.pdf [↑](#footnote-ref-163)
164. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J . GENDER L. & POL’Y 105 -162 (2010-2011) 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>; Erez Aloni in the same article at 118 also referred to Denmark as giving ‘striking proof of the problems associated with registered partnerships – change is slow.’ [↑](#footnote-ref-164)
165. *Id.* at 152. [↑](#footnote-ref-165)
166. See also Daniel Borillo and Eric Fassin, The PACS, Four Years Later: A Beginning or an End? CROSS NATIONAL DEFERENTIALS (2003) at 19-26 and Macarena Saez, General Report ‘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. 1-56 (2011) at 26. [↑](#footnote-ref-166)
167. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J. GENDER L. & POL’Y 105 -162 (2010-2011) at 118. [↑](#footnote-ref-167)
168. William D. Araiza, Book Review, Project Muse: ‘The Long Arc of Justice: Lesbian and Gay Marriage, Equality and Rights’, and ‘Gay marriage; for Better or for Worse? What We’ve Learned from the Evidence’, and: ‘Blessing Same-Sex Unions: The Perils of Queer Romance and the Confusions of Christian Marriage’, and: ‘Authorizing Marriage: Canon, Tradition in the Blessing of Same-Sex Unions’ 19(2) J. OF THE HISTORY OF SEXUALITY 371-379 (2010) at 373. [↑](#footnote-ref-168)
169. See footnote 136. [↑](#footnote-ref-169)
170. *Id.* [↑](#footnote-ref-170)
171. See footnote 3. [↑](#footnote-ref-171)
172. Normann Witzleb, Marriage as the ‘Last Frontier? Same-Sex Relationship Recognition in Australia, 25(2) INT. J .L. POL’Y & FAM. 135-164 (2011) at 154 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...’ [↑](#footnote-ref-172)
173. *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 U.S.(2015) at 24. [↑](#footnote-ref-173)
174. For example *USA v Windsor,* 570 U.S. (2013) (Docket No. 12-307). [↑](#footnote-ref-174)
175. President Obama, Inaugural Address 2013 DAILY COMP. PRES. DOC. 32 (21 Jan 2013) stated that ‘[o]ur 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.’ [↑](#footnote-ref-175)
176. Ian Loveland, A Right to Engage in Same-Sex Marriage in the United States? 1 E.H.R.L.R. 10-20(2014) at 17. [↑](#footnote-ref-176)
177. *Id.* at 18-19 comparing this to Lord Simonds in *Magor and St Mellons RDC v Newport Corpn* [1952] A.C. 189 at 191.

     [↑](#footnote-ref-177)
178. *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 U.S. (2015). [↑](#footnote-ref-178)
179. Michael J. Klarman, Windsor and Brown: Marriage Equality and Racial Equality 16 HARV. L. REV. 127-160 (2014) at 150-151 notes that ‘states in the Deep South, especially Mississippi remain strong in their anti same-sex marriage stance.’ [↑](#footnote-ref-179)
180. See section 5 of this piece on Backlash. [↑](#footnote-ref-180)
181. David A. J. Richards, Carl F. Stychin Book Review: Governing Sexuality: the Changing Politics of Citizenship and Law Reform: Hart Publishing: Oxford and Portland, Oregon, 2(3) INT. J. CONST. L. 727-733 (2004) at 733. [↑](#footnote-ref-181)
182. *Id.* See also George W. Dent Jr., The Defense of the Traditional Marriage, 15 J. OF LAW & POLITICS 581-644 (1999) at 622. [↑](#footnote-ref-182)
183. Bruce M. Wilson, Claiming Individual Rights through a Constitutional Court. The Example of Gays in Costa Rica 5(2) INT. J CONST. L. 252, 242-257 (2007) at 252. [↑](#footnote-ref-183)
184. *Id.* [↑](#footnote-ref-184)
185. YVONNE ZYLAN, STATES OF PASSION: LAW, IDENTITY AND SOCIAL CONSTRUCTION OF DESIRE (2011) at 215. [↑](#footnote-ref-185)
186. *Id.* (2011) 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 (1999). [↑](#footnote-ref-186)
187. *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 U.S. (2015). [↑](#footnote-ref-187)
188. Massachusetts is an example of this where the Supreme Court following their decision in *Goodridge v Department of Public Health*, 798 N.E. 2d 941 Mass 2003 suspended this for a period of 180 days to allow the legislature to take action if this was seen as appropriate. [↑](#footnote-ref-188)
189. *Brown v Board of Education* 347 U.S.483 (1954). [↑](#footnote-ref-189)
190. Bruce M. Wilson, Claiming Individual Rights through a Constitutional Court. The Example of Gays in Costa Rica 5(2) INT. J. CONST. L. 242-257 (2007) at 247 referring to *Brown v Board of Education* 347 U.S. 483 (1954). [↑](#footnote-ref-190)
191. *Id.* at 247 referring to Alexander Hamilton, THE FEDERALIST No, 78 at 465 (Clinton Rossiter ed., Mentor 1961) who notes that the judiciary has ‘no influence over either the sword or the purse.’ [↑](#footnote-ref-191)
192. Michael J. Klarman, Windsor and Brown: Marriage Equality and Racial Equality 16 HARV. L. REV. 127-160 (2014) at 148 [↑](#footnote-ref-192)
193. Constitution of the Republic of South Africa 1996. [↑](#footnote-ref-193)
194. Patrick Awondo, Peter Geschiere and Graeme Reid, Homophobic Africa? Toward a More Nuanced View, 55 AFRICAN STUDIES REV. 145-168 (2012) at 147. [↑](#footnote-ref-194)
195. Nicola Barker, Ambiguous Symbolisms; Recognising Customary Marriage and Same-Sex Marriage in South Africa, 7(4) INT. J. OF L. IN CONTEXT 447-466 (2011) at 448. [↑](#footnote-ref-195)
196. In the famous case of *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/40) [2005] ZACC 19, [2006] (3) BCLR 355 (CC), [2006] (1) SA 524 (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 Article 9 Equality, Article 10 Dignity and Article 14 Right to Privacy of the Bill of Rights. [↑](#footnote-ref-196)
197. See for further explanation Macarena Saez, General Report: Same Sex Marriage, Same-Sex Cohabitation, And Same-Sex Families around the world; Why ‘Same’ is so Different’ 16 AM. U. J. GENDER SOC. POL’Y & L. 1-56 (2011) at 7. [↑](#footnote-ref-197)
198. See for further explanation Nicola Barker, Ambiguous Symbolisms; Recognising Customary Marriage and Same-Sex Marriage in South Africa, 7(4) INT. J. OF L. IN CONTEXT 447-466 (2011) at 448 who described 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…’ [↑](#footnote-ref-198)
199. 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. [↑](#footnote-ref-199)
200. Nicola Barker, Ambiguous Symbolisms; Recognising Customary Marriage and Same-Sex Marriage in South Africa, 7(4) INT. J .OF L. IN CONTEXT 447-466 (2011) at 465. See also Pierre De Vos, The Inevitability’ of Same-Sex Marriage in South Africa’s Post Apartheid State 23 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 432-465 (2007) and Elsje Bonthuys, Race and Gender in the Civil Union Act 23 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 526-542 (2007) at 533. [↑](#footnote-ref-200)
201. *Id.at 4*65. [↑](#footnote-ref-201)
202. Patrick Awondo, Peter Geschiere and Graeme Reid, Homophobic Africa? Toward a More Nuanced View, 55 AFRICAN STUDIES REV. 145-168 (2012) at 157. [↑](#footnote-ref-202)
203. *Id.* at 157. [↑](#footnote-ref-203)
204. *Id.* at 159. [↑](#footnote-ref-204)
205. *Id.* at 159 referring to Z Matebeni, EXPLORING BLACK LESBIAN SEXUALITIES AND IDENTITIES IN JOHANNESBURG Ph.D. diss., University of the Witwatersrand (2011). [↑](#footnote-ref-205)
206. Pew Research Centre, A Global Snapshot of Same-Sex Marriage, 4 June 2013 available at <http://www.pewresearch.org/fact-tank/2013/06/04/global-snapshot-sex-marriage/> states that ‘in 2014 only 32% considered that homosexuality should be accepted, whereas 61% said it should not be.’ [↑](#footnote-ref-206)
207. Claire L’Heureux-Dube, Realising Equality in the Twentieth Century: the Role of the Supreme Court of Canada in Comparative Perspective 1(1) INT. J. CONST. LAW 35-57 (2003) referring to the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act 1982 enacted as Schedule B to the Canada Act 1982 (UK) 1982 c 11. [↑](#footnote-ref-207)
208. Wade K. Wright, The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales 20 INT. J. of L. POL. & FAM. 249 – 328 (2006) at 250. [↑](#footnote-ref-208)
209. Kathryn Chapman, Halpern v Canada (AG) [2002] O.J. No. 2714 (Ont. Div.Ct.)19 Can. J. Fam. L. 423-444 (2002 ) at 424 referring to *Halpern v Canada* (Attorney General) O.J. No. 2714 (Ont. Div. Ct.) (2002). [↑](#footnote-ref-209)
210. *Halpern v Canada (Attorney General)* (65 OR (3d) 161 (Ont CA) (2003). [↑](#footnote-ref-210)
211. See for further explanation see Wade K. Wright, The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales 20 INT. J. of L. POL. & FAM. 249 – 328 (2006) at 253. [↑](#footnote-ref-211)
212. *Id.* at 256. [↑](#footnote-ref-212)
213. See for further explanation Kimberly Gonzalez, Gay Marriage and Gay Union Law in the Americas, 16 L. & BUS. REV. AMERICA 285-310 (2010) at 300. [↑](#footnote-ref-213)
214. Macarena Saez, General Report: Same Sex Marriage, Same-Sex Cohabitation, And Same-Sex Families Around the World; Why ‘Same’ is so Different’ 16 AM. U. J. GENDER SOC. POL’Y & L. 1-56 (2011) at 7. [↑](#footnote-ref-214)
215. Robert Wintemute, Sexual Orientation and the Charter: The Achievement of Formal Legal Equality and its Limits (1985-2005), 49 MCGILL L. J. 1143-1182 (2004) at 1165. [↑](#footnote-ref-215)
216. Wade K. Wright ‘The Tide in Favour of Equality: Same-Sex Marriage in Canada and England and Wales’ 20 INTER. J. of L. POL’Y & FAM. 249 – 328 (2006) at 253. [↑](#footnote-ref-216)
217. Kathryn Chapman, Halpern v Canada (AG) [2002] O.J. No. 2714 (Ont. Div.Ct.) 19 CAN. J. FAM. L. 424, 423-444 (2002) referring to Canadian National Legal Poll June 22 2001. See also Donald G. Casswell, Moving Toward Same-Sex Marriage 80 CAN. BAR R. 810-856 (2001). [↑](#footnote-ref-217)
218. Nanci Schanerman, Comity; Another Nail in the Coffin of Institutional Homophobia, 42 U. MIAMI INTER-AM. L. REV. 145 (2010) and Amanda Alquist, The Migration of Same-Sex Marriage from Canada to the United States: An Incremental Approach 30 U. LA VERNE L. REV. 200-215 (2008). [↑](#footnote-ref-218)
219. *Id.at* 158. [↑](#footnote-ref-219)
220. Kimberly Gonzalez, Gay Marriage and Gay Union Law in the Americas, 16 L. & BUS. REV. AMERICA 285-310 (2010) at 300. [↑](#footnote-ref-220)
221. Bruce M. Wilson, Claiming Individual Rights through a Constitutional Court. The Example of Gays in Costa Rica 5(2) INT. J. CONST. L. 242-257 (2007) at 253. [↑](#footnote-ref-221)
222. WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICES, CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002) at 104. [↑](#footnote-ref-222)
223. Kathryn L. Marshall, Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed, 2 WM. & MARY POL. REV. 194-235(2010) at 199 referring to Michael J. Klarman, Brown and Lawrence (and Goodridge) 104 MICH. L. REV. 431, 482 (2005). [↑](#footnote-ref-223)
224. *Id.* at 199 referring to Ruth Bader Ginsburg, Speaking In a Judicial Voice, 67 N.Y.U.L. REV. 1185, 1198 (1992). [↑](#footnote-ref-224)
225. See section 5 of this piece on Backlash. [↑](#footnote-ref-225)
226. *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 U.S. (2015). [↑](#footnote-ref-226)
227. *Goodridge v Department of Public Health*, 798 N.E. 2d 941 Mass (2003). [↑](#footnote-ref-227)
228. *Baker v Vermont* 744 A.2d 864 (1999). [↑](#footnote-ref-228)
229. Jonah M.A. Crane, Legislative and Constitutional Responses to Goodridge v Department of Public Health 7 N.Y.U. J LEGIS. & PUB. POLICY 465-485 (2003 -2004) at 465 referring to Press Release from 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) and 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) which described this as ‘a critical step in the right direction.’ [↑](#footnote-ref-229)
230. Jonah M.A. Crane, Legislative and Constitutional Responses to Goodridge v Department of Public Health, 7 N.Y.U. J. LEGIS. & PUB. POLICY 465-485 (2003 -2004) at 465 referring to *Goodridge v Department of Public Health* 798 N.E. 2d 941 (Mass.) (2003). [↑](#footnote-ref-230)
231. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J . GENDER L. & POL’Y 105 -162 (2010-2011) at 129 referring to Opinions of the Justice to the Senate 802 N.E.2e 565, 569 (Mass. 2004). [↑](#footnote-ref-231)
232. 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. 2185-2218 (2004 – 2005) at 2194 referring to *Goodridge v Department of Public Health*, 798 N.E. 2d 941 Mass (2003) at 958. [↑](#footnote-ref-232)
233. See Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J . GENDER L. & POL’Y 105 -162 (2010-2011) at 130 referring to *Varnum v Brien* 653 N.W.2d 862, 906 Iowa (2009). See also YVONNE ZYLAN, STATES OF PASSION: LAW, IDENTITY AND SOCIAL CONSTRUCTION OF DESIRE Chapter 6 (2011) for discussion. [↑](#footnote-ref-233)
234. *Id.* at 129. [↑](#footnote-ref-234)
235. The Iowa Anti-Discrimination Act 2007 prohibited discrimination on the ground of sexual orientation. [↑](#footnote-ref-235)
236. For discussion see Jonah M.A. Crane, Legislative and Constitutional Responses to Goodridge v Department of Public Health, 7 N.Y.U. J LEGIS. & PUB. POL’Y 465-485 (2003 -2004) at 465 and YVONNE ZYLAN, STATES OF PASSION: LAW, IDENTITY AND SOCIAL CONSTRUCTION OF DESIRE (2011) at 214. [↑](#footnote-ref-236)
237. For discussion see Robert R. M. Verchick, Same-sex and the City, 37 URB. L 191-199 (2005) at 191 . See also YVONNE ZYLAN, STATES OF PASSION: LAW, IDENTITY AND SOCIAL CONSTRUCTION OF DESIRE (2011) at 214

     who considers that the ‘Massachusetts case plainly accelerated the process’ of backlash. She further opines that several states ‘affirmed their same-sex marriage bans in the immediate wake of *Goodridge v Department of Public Health*, 798 N.E. 2d 941 Mass (2003) (including Arizona, New York and Washington)…’ [↑](#footnote-ref-237)
238. Michael J. Klarman, Windsor and Brown: Marriage Equality and Racial Equality 16 HARV. L. REV. 127-160 (2014) at 148-149 referring to MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE (2012) at 45 noting opinion polls conducted around 1990 showing support for gay marriage between 11% and 23%. [↑](#footnote-ref-238)
239. The Defense of Marriage Act (‘DOMA’) 1996. [↑](#footnote-ref-239)
240. For further explanation see Richard M. Lombino II, Gay Marriage: Equality Matters, 14(1) SOUTHERN CAL. REV. OF L. & WOMEN’S STUD. 3-24 (2004 – 2005) at 4. [↑](#footnote-ref-240)
241. *Id.* at 4 referring to *Baehr v Lewin* 852 P. 2d 44, 74 (Haw, 1993). [↑](#footnote-ref-241)
242. David A. J .Richards, Carl F. Stychin Book Review: Governing Sexuality: the Changing Politics of Citizenship and Law Reform: Hart Publishing: Oxford and Portland, Oregon, 2(3) INT. J. CONST. L. 727-733 (2004) at 727 who gives Hawaii and Alaska as examples of this trend. [↑](#footnote-ref-242)
243. *Baehr v Lewin* 852 P. 2d 44, 74 (Haw, 1993). [↑](#footnote-ref-243)
244. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage 18 DUKE J. GENDER L. & POL’Y 105 -162 (2010-2011) at 128 referring to *Baehr v Lewin* 852 P. 2d 44, 74 (Haw, 1993) at 561-572. [↑](#footnote-ref-244)
245. *Id.* at 128 referringto YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002) at 221-222. [↑](#footnote-ref-245)
246. *Id*. at 128. [↑](#footnote-ref-246)
247. *Id.* at 129. [↑](#footnote-ref-247)
248. *Baehr v Lewin* 852 P. 2d 44, 74 (Haw, 1993). [↑](#footnote-ref-248)
249. Hawaii Civil Unions Act 2011. [↑](#footnote-ref-249)
250. Hawaii Marriage Equality Act 2013. [↑](#footnote-ref-250)
251. See for further explanation Kimberly Gonzalez, Gay Marriage and Gay Union Law in the Americas, 16 L. & BUS. REV. AMERICA 285-310 (2010) at 300 who refers to the County of San Francisco Equal Benefits Ordinance 1997, Berkeley and Los Angelos 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. [↑](#footnote-ref-251)
252. Re Marriage Cases, 43 Cal. 4th 757 (2008). [↑](#footnote-ref-252)
253. See for discussion Kimberly Gonzalez, Gay Marriage and Gay Union Law in the Americas, 16 L. & BUS. REV. AMERICA 285-310 (2010) at 285. [↑](#footnote-ref-253)
254. Cal. Const. Art 1 at para 7.5. The amendment was known as ‘Proposition 8.’ [↑](#footnote-ref-254)
255. A final decision was issued by the US Supreme Court in the case of *Hollingsworth v Perry* 570 US 133 S.Ct. 2652 (2013) on June 26, 2013. The case was dismissed on standing grounds, meaning that same-sex marriage became legal in California again. [↑](#footnote-ref-255)
256. Re Marriage Cases, 43 Cal. 4th 757 (2008). [↑](#footnote-ref-256)
257. When writing in 2010, Kathryn L. Marshall, Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed, 2 WM. & MARY POL’Y REV. 194-235(2010) at 200 discussed the then 29 US states who had constitutional amendments outlawing same-sex marriage. [↑](#footnote-ref-257)
258. *Id.* at 205 referring to opinion polls from CBS (April 2009), CNN (May 2009) and Pew Forum. She stated that ‘though statistics vary, every poll shows that a majority of Americans oppose gay marriage.’ [↑](#footnote-ref-258)
259. Pew Research Centre, A Global Snapshot of Same-Sex Marriage, 4 June 2013 available at <http://www.pewresearch.org/fact-tank/2013/06/04/global-snapshot-sex-marriage/> See also Michael J. Klarman, Windsor and Brown: Marriage Equality and Racial Equality 16 HARV. L. REV. 127-160 (2014) at 148-149 referring to Nate Silver, How Opinions on Same-Sex Marriage is Changing and What it Means, N.Y. Times (March 26 2013). [↑](#footnote-ref-259)
260. Michael J. Klarman, Windsor and Brown: Marriage Equality and Racial Equality 16 HARV. L. REV. 127-160 (2014) at 156-157 referring to Nate Silver, How Opinions on Same-Sex Marriage is Changing and What it Means, N.Y. Times (March 26 2013). [↑](#footnote-ref-260)
261. *Id.* at 150 -151 notes that ‘states in the Deep South, especially Mississippi remain strong in their anti same-sex marriage stance.’ For discussion see also YVONNE ZYLAN, STATES OF PASSION: LAW, IDENTITY AND SOCIAL CONSTRUCTION OF DESIRE (2011) at 214 and Kathryn L. Marshall, Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed, 2 WM. & MARY POL’Y REV. 194-235 (2010) at 205. [↑](#footnote-ref-261)
262. *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 U.S. (2015). [↑](#footnote-ref-262)
263. See footnote 15. [↑](#footnote-ref-263)
264. *USA v Windsor*, 570 U.S. (2013) (Docket No. 12-307). [↑](#footnote-ref-264)
265. Michael J. Klarman, Windsor and Brown: Marriage Equality and Racial Equality 16 HARV. L. REV. 127-160 (2014) at 146-147 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, 379-382, 385-386 (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 and Abbe Gluck 25 COLUM. J. GENDER & L. 6, 15-16 (2013). [↑](#footnote-ref-265)
266. Kathryn L. Marshall, Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed, 2 WM. & MARY POL’Y REV. 194-235(2010) at 203 referring to Michael J. Klarman, Brown and Lawrence (and Goodridge) 104 MICH. L. REV. 431-489 (2005) at 472. [↑](#footnote-ref-266)
267. Michael J. Klarman, Windsor and Brown: Marriage Equality and Racial Equality 16 HARV. L. REV. 127-160 (2014) at 160. [↑](#footnote-ref-267)
268. *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 U.S. (2015). [↑](#footnote-ref-268)
269. See for example Article 12 of the European Convention on Human Rights which states that ‘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.’ 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.’ [↑](#footnote-ref-269)
270. See for example *Goodridge v Department of Public Health*, 798 N.E. 2d 941 Mass 2003 and *Loving v Virginia*, 388 U.S. 1 (1967). [↑](#footnote-ref-270)
271. ISee for example Nicholas Bamforth, Sexuality and Citizenship in Contemporary Constitutional Argument 10(2) INT. J. CONST. L. 477-492 (2012) at 478 referring toThomas HMarshall, Citizenship and Social Class in Thomas H Marshall and T Bottomore (eds) (1992)CITIZENSHIP AND SOCIAL CLASS18 (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(2) INT. J. CONST. L. 551-574 (2012) at 555 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. [↑](#footnote-ref-271)
272. See for example Nicholas Bamforth, Sexuality and Citizenship in Contemporary Constitutional Argument 10(2) INT. J. CONST. L. 477-492 (2012) at 484 referring to Diane Richardson, 32 *Sexuality and Citizenship* 83 (1998) at 88 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(1) FORDHAM INT. L. R. 156-205 (2009) at 163 referring to Angela P Harris, ‘Loving Before and After the Law’ (2008) 76 FORDHAM INT. L. R. 2821-2847 (2008) at 2823 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.’ [↑](#footnote-ref-272)
273. See Scalia J’s Dissenting Judgment in *Lawrence v Texas* 539 U.S. (2003) 598. [↑](#footnote-ref-273)
274. William N Eskridge Jr, Development – United States: Lawrence v Texas and the Imperative of Comparative Constitutionalism, 2(3) INT. J. CONST. L., 555-560 (2004) at 555 referring to William H Rehnquist, Constitutional Courts – Comparative Remarks (1989) reprinted in GERMANY AND ITS BASIC LAW: PAST, PRESET AND FUTURE – A GERMAN – AMERICAN SYMPOSIUM 411, 412 (Paul Kirchhof and Donald P. Kornmers eds., Nomos, 1993). [↑](#footnote-ref-274)
275. For example *Id.* at 555 referring to *Lawrence v Texas* 123 S Ct 2472 (2003) explains that ‘Justice Anthony Kennedy’s opinion looked at constitutional precedents from abroad, referring to decisions of the European Court of Human Rights.’ [↑](#footnote-ref-275)
276. See footnote 3. [↑](#footnote-ref-276)
277. Cindy Tobisman, Marriage vs Domestic Partnership: Will We Ever Protect Lesbians’ Families? 12 BERKELEY WOMEN’S L. J. 112-118 (1997) at 112. [↑](#footnote-ref-277)
278. *Id.* at 112. See also Ian Loveland, A Right to Engage in Same-Sex Marriage in the United States 1 E.H.R.L.R 2, 10-20 (2014) and Robert Leckey, Must Equal Mean Identical? Same-Sex Couples and Marriage 10(1) INT. J.C. 5-25 (2014) at 11. [↑](#footnote-ref-278)
279. In *Goodwin v UK,* Application No [28957/95](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"appno":["7525/76"]}), Judgment of 11 July 2002 at paragraph 100 it was stated that ‘The Court has found ... that test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual.’ [↑](#footnote-ref-279)
280. See for example Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J . GENDER L. & POL’Y 105 -162 (2010-2011) at 108 referring to M.V. Lee Badgett, Predicting Partnership Rights: Applying the European Experience in the United States, 17 YALE J. L. & FEMINISM 71-88 (2005) at 85. [↑](#footnote-ref-280)
281. States which have used the incremental approach in recent years include for example England and Wales, Scotland France and Denmark. [↑](#footnote-ref-281)
282. Kathryn L. Marshall, Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed, 2 WM. & MARY POL’Y REV. 194-235(2010) at 198 refers 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., Letter from a Birmingham City Jail in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING JR 289, 292 (James Melvin Washington ed. 1986) wrote that ‘This ‘Wait’ has almost always meant ‘Never’. It has been a tranquilizing thalidomide, relieving the emotional stress...’ [↑](#footnote-ref-282)
283. WILLIAM N. ESKRIDGE JR, EQUALITY PRACTICES, CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002) at 119. See alsoKathryn L. Marshall, Strategic Pragmatism or Radical Idealism? The Same-Sex Marriage and Civil Rights Movements Juxtaposed, 2 WM. & MARY POL’Y REV. 194-235(2010) at 199-200 who explains that such slow change although frustrating at the time allows ‘public opinion to adjust gradually to the changes sought by social movement.’ See also Maggie Gallagher, Why Accommodate? Reflections on the Gay Marriage Culture Wars, 5 NORTHWESTERN J.OF L. & SOCIAL POL’Y 260-273 (2010) at 260 and 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. 1535-1550 (1993). [↑](#footnote-ref-283)
284. See section 5 of this piece on Backlash. [↑](#footnote-ref-284)
285. See section 4 of this piece comparing the legislative and court based approaches where South Africa is discussed. [↑](#footnote-ref-285)
286. *Oliari and Others v Italy*, Application Nos. 18766/11 and 36030/11, 21 July 2015. [↑](#footnote-ref-286)
287. See for example Jonah M.A. Crane, Legislative and Constitutional Responses to Goodridge v Department of Public Health, 7 N.Y.U.J. LEGIS. & PUB. POLICY 465-485 (2003 -2004) at 471 and Michael C Dorf, Same-Sex Marriage, Second-Class Citizenship, and Law’s Social Meanings 97 VA. L. REV. 1267-1346 (2011). [↑](#footnote-ref-287)
288. *Wilkinson v Kritzinger* EWHC 835 (2006); 2 FCR 537(2006) at paragraph 18. See alsoErez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J . GENDER L. & POL’Y 105 -162 (2010-2011) at 110 referring to YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002) at 55-56 who describes marriage as the ‘privileged and preferred legal status in Europe and the United States.’ See also George W. Dent Jr.,The Defense of Traditional Marriage, 15 J. OF L. & POLITICS 617, 581-644 (1999) at 617 who refers to marriage as bringing many ‘intangible benefits’ including ‘honour, respect [and] the social stamp of approval.’ [↑](#footnote-ref-288)
289. Erez Aloni, Incrementalism, Civil Unions and the Possibility of Predicting Legal Recognition of Same-Sex Marriage, 18 DUKE J. GENDER L. & POL’Y 105 -162 (2010-2011) 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). [↑](#footnote-ref-289)
290. *Id.* at 126 and 152. [↑](#footnote-ref-290)
291. For discussion see David A. J. Richards, Carl F. Stychin Book Review: Governing Sexuality: the Changing Politics of Citizenship and Law Reform: Hart Publishing: Oxford and Portland, Oregon, 2(3) INT. J. CONST. L. 727-733 (2004) at 733. See also George W. Dent Jr., The Defense of the Traditional Marriage, 15 J. OF LAW & POLITICS 581-644 (1999) at 622and Ian Loveland, A Right to Engage in Same-Sex Marriage in the United States? 1 E.H.R.L.R. 10-20(2014) at 18-19 comparing this to Lord Simonds *in Magor and St Mellons RDC v Newport Corpn* [1952] A.C. 189 at 191. [↑](#footnote-ref-291)
292. For discussion see Nicola Barker, Ambiguous Symbolisms; Recognising Customary Marriage and Same-Sex Marriage in South Africa, 7(4) INTER. J. OF L. IN CONTEXT 447-466 (2011) at 448. [↑](#footnote-ref-292)
293. See Kathryn Chapman, Halpern v Canada (AG) [2002] O.J. No. 2714 (Ont. Div.Ct.) 19 CAN. J. FAM. L. 423-444 (2002) at 424. [↑](#footnote-ref-293)
294. Pew Research Centre, A Global Snapshot of Same-Sex Marriage, 4 June 2013 available at <http://www.pewresearch.org/fact-tank/2013/06/04/global-snapshot-sex-marriage/> [↑](#footnote-ref-294)
295. *Obergefell et al v Hodges, Director, Ohio Department of Health* 576 U.S.(2015). [↑](#footnote-ref-295)