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Going Dutch?: A Comparison of the Vermont Civil Union Law to the Same-Sex Marriage Law of the Netherlands

I. Introduction

“Kevin, do you take this man to be your lawfully wedded partner in civil union?” asked Justice of the Peace Robert Dixon of Kevin Gato, a warehouse worker.¹ “Boy, do I,” was the reply of Gato to the invitation to join with his partner, Declan Buckley, 44, in one of Vermont’s civil unions.² A civil union is a new social status created by Vermont’s legislature which confers on same-sex couples who enter it the benefits, protections and responsibilities of a heterosexual marriage.³ The civil union law was passed in response to the mandate of a 1999 Vermont Supreme Court case, *Baker v. Vermont*, which held that under the Common Benefits Clause of the state’s constitution, same-sex couples were entitled to receive the same legal rights as married heterosexual couples.⁴ Vermont created civil unions as a way of conferring these rights, while reaffirming that the institution of marriage is reserved for heterosexual couples. Gato and Buckley followed a score of others who obtained licenses to enter this new civil relationship, starting as soon as it became effective at midnight on July 1, 2000.⁵

Also in 2000, the legislature of the Netherlands passed a series of amendments to its marriage laws which allow same-sex couples

1. See *Gay Couples Rush to Tie Knot Under New Vermont Law*, DESERET News, July 2, 2000, at A02.

2. See *id.*

3. See David Goodman, *A More Civil Union—Vermont’s Legal Recognition of Same-Sex Couples Has Brought the Latest Struggle for Gay Rights Out of the Closet—and Onto the Stage of National Politics*, MOTHER JONES, July 1, 2000, at 48.

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

5. See *Vermont First to Legally Join Same-sex Couples: Follows Court Ruling: Civil Union Allows Partners to Receive Rights of Marriage*, NAT’L POST, July 3, 2000, at A10. The first couple to marry was that of Carolyn Conrad and Kathleen Peterson. “We’ve already been married spiritually and morally, and we wanted to be legal the minute we could,” said Conrad. *Id.*

to marry.⁶ During a September 12 vote in the Tweede Kamer, Holland's lower legislative house, 109 representatives voted for the measure, with only 33 opposing the changes.⁷ On December 19, the nation's upper legislative house, the Eerste Kamer, also approved the bill.⁸ The upper house was not permitted to amend lower house legislation and no opposition to the passage of the bill had been voiced.⁹ The Netherlands, which already had a quasi-marital status called a "registered partnership" for both straight and homosexual couples, was guided by notions of equality and wanted to extend the rights of same-sex couples to their logical legal limits.¹⁰

The Dutch legislature simultaneously passed a related piece of legislation: a bill to modify the Dutch adoption laws to offer the possibility of adoption to same-sex couples.¹¹ The law of the

6. See *Dutch to Allow Gays to Wed, Divorce*, DALLAS MORNING NEWS, Sept. 13, 2000, at 10A.

7. See Keith B. Richburg, *Dutch Legalize Same-Sex Marriages; Netherlands First to Grant Equal Status to Gay Pairs*, WASH. POST, Sept. 13, 2000, at A28. The vote was apparently greeted by a burst of cheers from a packed gallery. The Dutch attributed their "forward" looking vision to the fact that they have had the registered partnership law (see below) in place for several years and, hence, had had much of the political "discussion" of the issue previously.

8. See Kees Waaldijk Homepage, *Latest News About Same-sex Marriage in the Netherlands (and What it Implies for Foreigners)* at <http://ruljis.leidenuniv.nl/user/cwaaldij/www/NHR/news.htm> (last visited Jan. 3, 2001). This page has been modified and now contains the materials cited *infra* note 42. A copy of the January 3 page is on file with the author.

9. See Richburg, *supra* note 7.

10. See *Wijziging van Boek 1 van het Burgerlijk Wetboek in Verband Met de Openstelling van het Huwelijk Voor Personen van Hetzelfde Geslacht* [Amendment of Book 1 of the Civil Code, Marriage by Persons of the Same Sex] See *Staatsblad van het Koninkrijk der Nederlanden 2001, nr. 9 (11 January)* [Statutory Amendments] and *Kamerstukken II 1999-2000, 26672* [Parliamentary Paper], nr. 3 [Explanatory Memorandum], translated in Kees Waaldijk, *Text of Dutch Law on the Opening Up of Marriage for Same-Sex Partners (Plus Explanatory Memorandum)*, at <http://ruljis.leidenuniv.nl/user/cwaaldij/www/NHR/transl-marr.html> (last visited May 24, 2001) [hereinafter *Dutch Marriage Law*]. This law has not yet been officially translated. The translation indicated above was done by Kees Waaldijk, a professor of law at the University of Leiden in the Netherlands. Professor Waaldijk is prominent in the Dutch homosexual rights movement and his translations have been cited elsewhere. See Nancy G. Maxwell, *Legal Protection for All the Children: Dutch-United States Comparison of Lesbian and Gay Parent Adoptions*, 17 ARIZ. J. INT'L. & COMP. L. 309, 348 n.11 (2000).

11. See *Wijziging van Boek 1 van het Burgerlijk Wetboek (Adoptie Door Personen van Hetzelfde Geslacht* [Amendment of Book 1 of the Civil Code, Adoption by Persons of the Same Sex]. See *Staatsblad van het Koninkrijk der Nederlanden 2001, nr. 10 (11 January)* [Statutory Amendments] and *Kamerstukken II 1999-2000, 26673* [Parliamentary Paper], nr. 3 [Explanatory Memorandum], translated in Kees Waaldijk, *Text of Dutch Law on Adoption by Persons of the Same-Sex (Plus Explanatory Memorandum)* at <http://ruljis.leidenuniv.nl/user/cwaaldij/www/NHR/transl-marr.html> (last visited May 24,

Netherlands previously prevented such action by homosexual couples.¹² The legislature felt that the interests of children being raised by same-sex couples deserved legal protection.¹³ This bill, entered law along side the changes to the marriage laws.¹⁴ Both were signed into law on December 21, 2000.¹⁵ They took effect on April 1, 2001 as a result of a Royal Decree of March 20, 2001.¹⁶

This comment will examine the specific provisions of the laws of both Vermont and the Netherlands as they were passed by their respective legislatures in order to give international law readers with little knowledge of the same-sex marriage debate some insight into what is happening on the frontlines in Vermont and the Netherlands. First, the comment will examine the case and statutory law of Vermont as it existed prior to the passage of the civil union law. That section will also examine the registered partnership and adoption-related law of the Netherlands. Next, the civil union and Dutch marriage law provisions will be described, as well as the legislative history of the Dutch marriage and adoption statutes. Finally, an attempt will be made to sort out some of the ramifications of these laws for same-sex couples. The related issue of adoption will be dealt with in this section as well, as it will throughout the comment, because of its close relationship to the marriage issue. In addition, special consideration will be given to the fact that these laws are being enacted by legislatures at different levels: one an American state legislature; the other, a national legislative body.

II. The Law of Vermont and the Netherlands Prior to the Enactment of the New Legislation

A. *The Law of Vermont*

Vermont's enactment of its civil union legislation was precipitated by the Vermont Supreme Court's decision in *Baker v. Vermont*.¹⁷ The case was part of the "second wave" of challenges by

2001) [hereinafter *Dutch Adoption Law*]. This is also a translation by Professor Waaldijk.

12. See Maxwell, *supra* note 10.

13. See *Dutch Adoption Law*, *supra* note 11.

14. See *Dutch Marriage Law*, *supra* note 10; and *Dutch Adoption Law*, *supra* note 11.

15. See *id.*

16. See *id.* and *Dutch Adoption Law*, *supra* note 11; the Royal Decree may be found at *Staatsblad van het Koninkrijk der Nederlanden* 2001, nr. 145 (20 March).

17. See Baker, 744 A.2d 864.

homosexuals to laws limiting their ability to marry; the first, and largely unsuccessful “wave” having come in the early 1970’s.¹⁸ The latest set of cases has met with only limited success, with only two other courts deciding in favor of the interests of homosexual couples.¹⁹ A brief discussion of the *Baker* case will help illuminate the origins of the civil union law.

1. *Baker v. Vermont*.—In *Baker*, three same-sex couples who lived together for periods ranging up to 25 years sued the state and their respective towns because they were denied marriage licenses.²⁰ The Vermont Supreme Court held that excluding same-sex couples from the benefits and responsibilities of marriage violates the Common Benefits Clause of the Vermont Constitution.²¹ The Clause states that “government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community.”²² The Court deliberately pinned its analysis to this constitutional provision and rejected the idea that the statutory marriage scheme of Vermont mandated the granting of licenses to same-sex couples.²³ After disposing of state arguments that allowing same-sex couples to marry would undermine the state’s

18. See Robin Miller, Annotation, *Marriage Between Persons of Same Sex*, 81 A.L.R. 5th 1, 7 (2000).

19. See *Same-Sex Marriage—Vermont Supreme Court Holds State Must Extend Same-Sex Couples the Same Benefits as Married Opposite sex Couples. Baker v. State*, 113 HARV. L. REV. 1882 (2000). In Hawaii, the case of *Baehr v. Lewin*, 74 Haw. 645, 852 P.2d 44 (1993), held that a state statute prohibiting marriage for same-sex couples was subject to strict scrutiny and required the state to show a compelling state interest. The case was remanded. A second appeal in the case, *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999) was mooted following amendments to Hawaii’s constitution. In Alaska, the case of *Brause v. Alaska Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. 1998) also held that state constitutional rights were implicated by a bar to same-sex marriages. This case, too, was abrogated by a constitutional amendment.

20. See *Baker*, 744 A.2d at 867-68. The couples were Stan Baker and Peter Harrigan; Stacy Jolles and Nina Beck; and Holly Puterbaugh and Lois Farnham. See Cheryl Wetzstein, *Vermont House OK’s Gay Civil Unions; Governor Said He’ll Sign Legislation*, WASH. TIMES, Apr. 26, 2000, at A3. Two of the couples had raised children together. See *Baker*, 744 A.2d at 867-68. The first child of one of the couples, Noah, died of a heart defect shortly after the suit was announced. See Goodman, *supra* note 3, at 48. Nina Beck, Noah’s natural mother (by artificial insemination), said that one of the reasons she originally joined the suit was to “give [Noah] the same protection as a heterosexual couple’s child had.” Beck and her partner, Stacy Jolles, have since had another child born to them, Seth.

21. See *Baker*, 744 A.2d at 867.

22. See VT. CONST., ch. I, art. 7.

23. See *Baker*, 744 A.2d at 869.

duty to protect children and traditional perceptions of parenthood, the court identified the underlying question as being whether the Common Benefits Clause was violated by excluding same-sex couples from marriage.²⁴ The Court concluded that it was.²⁵ Thus, the state of Vermont was required to extend the same benefits and protections to same-sex couples which married, heterosexual couples enjoyed.²⁶

The court stated explicitly that this did not necessarily mean that the legislature had to include same-sex couples within the marriage laws themselves. The state could, if it chose, craft a “parallel” civil status which would satisfy the aforementioned constitutional requirement as long as the benefits themselves were the same as those available to married, heterosexual couples.²⁷ The Vermont legislature responded by creating the institution of civil unions. The law was passed on April 25, 2000, after what was described as a “marathon” of legislative action.²⁸

2. *Adoptions by Same-sex Couples.*—Prior to *Baker*, the Vermont Supreme Court had decided another case which also prompted legislative action. The case of the *Adoptions of B.L.V.B. and E.L.B.B.* dealt with the related issue of adoption by same-sex couples.²⁹ The case involved a lesbian who sought to adopt her unmarried partner’s natural child.³⁰ The woman had been prevented from adopting the child, despite positive feedback from social service and psychological experts, because a lower court had decided that the woman did not fit within the statutory requirements of the then-existing Vermont adoption laws.³¹ The court held that when a family unit consists, as this one did, of a natural parent and her partner, and if the adoption is in the best interests of the child, the adoption should be permitted and the rights of the natural parent need not be terminated.³² Subsequently, in 1995, the Vermont legislature revamped the adoption laws to

24. See *id.* at 882.

25. See *id.* at 886.

26. See *id.* at 886.

27. See *id.* at 886-88.

28. See Goodman, *supra* note 3, at 48. The Vermont House approved the law by a vote of 79 to 68. The vote came after four months of hearings. This included testimony by thousands of individuals expressing a wide range of secular, religious and personal views on the subject. Editorial, *Vermont’s Civil Debate*, THE PROVIDENCE JOURNAL, Apr. 26, 2000, at B06.

29. See *In re Adoptions, B.L.V.B. and E.L.V.B.*, 160 Vt. 368, 628 A.2d 1271 (1993).

30. See *id.* at 369-70.

31. See *id.* at 370.

32. See *id.* at 369.

conform with this holding.³³ In addition, single persons may adopt in Vermont and this would presumably afford gay men and women the ability to adopt children with whom they have no natural connection.³⁴ These cases and statutes set the stage for the later enactment of the civil union law, and its conferral of marriage rights on same-sex couples in Vermont.

B. The Law of the Netherlands

1. *Dutch Registered Partnership Law.*—The Netherlands has been a leader in furthering the rights of homosexuals in numerous areas.³⁵ One of these areas is the legal recognition of same-sex relationships. The law of the Netherlands, like the law of five other Scandinavian nations, allows same-sex couples to enter into a quasi-marital relationship.³⁶ In the Netherlands, this relationship is called a registered partnership.³⁷ The law empowering registered partnerships has been in effect since January 1, 1998.³⁸ A registered partnership is *not* the same as a full-fledged marriage though it encompasses most of the rights and duties of marriage.³⁹ One major difference that existed prior to the statutory amendments was that same-sex couples were not permitted to adopt children.⁴⁰

Straight as well as homosexual couples can enter a registered partnership.⁴¹ Prior to April, 2001, registered partnership were only open to Dutch citizens and those with “valid residence entitle-

33. See VT. STAT. ANN. tit. 15A, § 1-102(b) (2000).

34. See VT. STAT. ANN. tit. 15A, § 1-102(a) (2000).

35. See The International Lesbian and Gay Association World Legal Survey, *Netherlands*, at http://www.ilga.org/Information/legal_survey/europe/netherlands.htm (last visited Sept. 30, 2000). This site has been reviewed for accuracy by Kees Waaldijk. In 1985, the Netherlands was the only nation to advocate lesbian rights at the Third UN World Conference on Women. The Netherlands showed similar support for gay and lesbian rights at the UN World Conference on Human Rights in 1993. The Netherlands has also spoken in support of homosexual rights at various regional conferences as well. At home, the Dutch Constitution, though not explicitly prohibiting discrimination against homosexuals, has been interpreted as doing so; the Dutch have also decriminalized homosexual behavior.

36. See William Eskridge, *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 647 (2000).

37. See The International Lesbian and Gay Association World Legal Survey, *supra* note 35. The ILGA is quick to point out that same-sex marriage is not created by entrance into a registered partnership. They do note, however, that some religious organizations permit partners to participate in marital ceremonies.

38. See *id.*

39. See *id.*

40. See *id.*

41. See *id.*

ment”—i.e. those who are both entitled to live in the Netherlands *and who actually do so*.⁴² So long as this requirement is met, a bi-national registered partnership enjoys complete protection.⁴³ Registered partners, among other legal consequences, have the duty to live together and maintain each other.⁴⁴ Alimony may also be acquired after the dissolution of a partnership.⁴⁵ Unlike marriage, dissolution can be done by agreement, without judicial intervention.⁴⁶ Also, when one partner dies, the entire estate can pass to the other partner, unless the deceased partner has a child.⁴⁷ Operation of inheritance taxes, payable by the partner receiving the assets, is the same as with married couples.⁴⁸ Additionally, pension benefits must be equally divided on dissolution of the partnership.⁴⁹ Social security regulations apply equally to registered partners as well as married couples, as do the Dutch tax laws.⁵⁰

The Dutch government reports that 2922 registered partnerships were concluded in 2000 alone.⁵¹ 1322 of these partnerships were actually entered into by heterosexual couples.⁵² Male couples accounted for 815 of the homosexual couples; 785 female couples also entered partnerships.⁵³ The registered partnership status survived the enactment of the same-sex marriage bill and its continuing efficacy will be reevaluated in five years.⁵⁴

42. See The International Lesbian and Gay Association World Legal Survey, *supra* note 35. This limitation reflects the registered partnership law as it existed prior to changes that took effect on April 1, 2001. Registered partnerships are now open to any couple so long as at least one is a Dutch citizen or has his or her “domicile” or “habitual residence” in the Netherlands. This requirement is identical to the limitation on married couples. See *Staatsblad van het Koninkrijk der Nederlanden* 2001, nr. 11 (13 December 2000). See also Kees Waaldijk Homepage, *Latest News About Same-sex Marriage in the Netherlands (and What it Implies for Foreigners)*, at <http://ruljis.leidenuniv.nl/user/cwaaldijk/www/NHR/news.htm> (last visited May 24, 2001). The terms “domicile” and “habitual residence” have yet to be defined.

43. See The International Lesbian and Gay Association World Legal Survey, *supra* note 35.

44. See *id.*

45. See *id.*

46. See *id.*

47. See *id.*

48. See The International Lesbian and Gay Association World Legal Survey, *supra* note 35.

49. See *id.* Private pension plans have for some time allowed for payments to even unregistered or unmarried partners, regardless of their sex. *Id.*

50. See *id.*

51. See Kees Waaldijk Homepage, *supra* note 42.

52. See *id.*

53. See *id.* A total of 10804 partnerships have been registered overall since 1998. *Id.*

54. See Ministerie van Justitie Homepage, *Press Release: Bills for Same-sex*

2. *Dutch Adoption Law*.—Previously, Dutch law did not permit same-sex couples to adopt children as co-parents.⁵⁵ A single person could adopt, however.⁵⁶ Thus, one member of a same-sex couple could become the adoptive parent of a child. The result was that the other partner was excluded from enjoying this relationship. This was true, despite the fact that the “other” same-sex partner may have been just as involved in the upbringing of the child.⁵⁷

The partner excluded from formally adopting their partner’s child had to petition for “joint parental authority.”⁵⁸ This authority includes the duty to support the child and the ability to request a change in the child’s name.⁵⁹ A non-Dutch child can gain Dutch nationality through the non-adoptive parent.⁶⁰ Also, the non-adoptive “parent” can request visitation rights if she and her partner separate.⁶¹ Several rights are denied to the joint parental authority relationship. The child does not enjoy the right of inheritance from the non-adoptive parent or their relatives.⁶² Also, her joint parental rights terminate on the child reaching the age of 18.⁶³ Finally, persons entering a registered partnership do *not* automatically obtain joint parental authority over any children of the other partner.⁶⁴

III. Specific Provisions of the New Vermont and Dutch Laws Allowing Same-sex Unions and Marriages

A. *The Law of Vermont*

The first section of Vermont’s civil union law is a definitional section.⁶⁵ Specifically, it defines a civil union as a “relationship [of two eligible persons]” entitled to “receive the benefits and

Marriages and Adoptions by Same-sex Couples Laid Before Lower House, available at http://www.minjust.nl:8080/c_actual/persber/pb0458.htm (last visited Sept. 30, 2000).

55. See Maxwell, *supra* note 10, at 331.

56. See *id.*

57. See *id.* Maxwell points out that even unmarried heterosexual couples could adopt children under prior law. The only type of relationship excluded was a same-sex pair.

58. See *id.* at 332.

59. See *id.* at 332.

60. See Maxwell, *supra* note 10, at 332.

61. See *id.*

62. See *id.* at 332-33.

63. See *id.* at 333.

64. See *id.* at 334.

65. See VT. STAT. ANN. tit. 15, § 1201(2) (2000).

protections and be subject to the responsibilities of spouses.”⁶⁶ It reaffirms the definition of marriage as a “legally recognized union of one man and one woman.”⁶⁷ The legislative findings included in this section cite *Baker’s* state constitutional mandate as a driving force behind the legislation.⁶⁸ Also among the findings are that Vermont’s social history, its interest in encouraging close familial relationships and the state’s role in creating marital rights support the passage of the bill.⁶⁹ Perhaps most striking is finding number five, which cites Vermont’s past qualification of gays and lesbians as adoptive parents as an impetus for the civil union law’s enactment, thus re-enforcing the close connection between the two issues of homosexual marriage and adoption.⁷⁰

The second section of the statute defines the substantive prerequisites for the creation of a valid civil union.⁷¹ A party to a civil union may not be a partner in either another civil union or a marriage.⁷² Both persons entering a civil union must be of the same sex and, thus, excluded from entering a marriage in Vermont. The parties must also meet other formal requirements.⁷³

A civil union is void if it is entered into between persons within the prohibited degrees of consanguinity. Thus, parents, grandparents, children, grandchildren, siblings, nieces, nephews, aunts or uncles cannot contract a civil union.⁷⁴

The heart of the statute is its fourth section. This part of the statute essentially codifies the holding in *Baker* and grants to same-sex couples “all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as

66. *See id.*

67. *See* VT. STAT. ANN. tit. 15, § 1201(4)(2000).

68. *See* VT. STAT. ANN. tit. 15, § 1201(2000).

69. *See id.*

70. *See id.*

71. *See* VT. STAT. ANN. tit. 15, § 1202 (2000).

72. *See id.*

73. *See id.* Numerous formal requirements for entering civil unions, including rules about how long a civil union license is valid and who may certify one are listed in another section of Vermont’s statutes. *See* VT. STAT. ANN. tit. 18, §§ 5160-5168 (2000). The only substantive requirements in these sections are that parties seeking to unite in a civil union must be at least 18 years old, mentally competent and have the signature of a guardian, if applicable. *See* VT. STAT. ANN. tit. 18, § 5163 (2000).

74. *See* VT. STAT. ANN. tit. 15, § 1203 (2000). The requirements listed in this paragraph may seem to be obvious but it is important to include them both for the sake of completeness and to demonstrate that the civil union law is a responsible social step and to combat the misconception that homosexuals are rabidly hyper-sexual deviants.

are granted to spouses in marriage.”⁷⁵ This section includes “civil union” in any term identifying a spousal relationship anywhere in the law.⁷⁶ It also emphasizes the duty of support between civil union partners.⁷⁷ In addition, all marriage dissolution laws are made applicable to civil unions.⁷⁸ Finally, and seemingly by way of emphasis, a lengthy, “nonexclusive” laundry list of twenty-four classes of state rights that civil unions confer is included.⁷⁹ Listed fourth, behind property, tort, contract and probate rights is the entitlement of civil union members to inclusion within the adoption laws.⁸⁰ Other rights mentioned include those relating to insurance, tax, emergency and non-emergency medical care and workers compensation.⁸¹ The last sub-section makes special note of the rights of civil union partners with regards to children born within the term of the civil union.⁸²

Other sections of the statute deal with the formalities of a civil union. Laws concerning antenuptial agreements and other modifications or “understandings” of the partners of a marriage apply to civil unions.⁸³ The family court is given jurisdiction over civil union dissolution and provides that the same procedure and substantive rules applicable to divorce are binding on civil unions.⁸⁴

75. See VT. STAT. ANN. tit. 15, § 1204 (2000).

76. See VT. STAT. ANN. tit. 15, § 1204(b) (2000).

77. See VT. STAT. ANN. tit. 15, § 1204(c) (2000).

78. See VT. STAT. ANN. tit. 15, § 1204(d)(2000).

79. See VT. STAT. ANN. tit. 15, § 1204(e)(2000). Among the laws applicable to parties to a civil union listed in the section are the following: laws relating to property acquisition and distribution, including eligibility for tenancy by the entireties; standing to sue for causes of action dependant on marital status, such as loss of consortium; probate law and procedure; adoption law and procedure; state employee group insurance; spouse abuse programs; prohibitions against discrimination; victims compensation rights; workers compensation benefits; laws relating to medical care; terminal care documents; family leave protections; public assistance benefits; laws relating to state and municipal taxes; immunity from compelled testimony; homestead rights under 32 V.S.A. § 6062; laws relating to loans to veterans; the definition of the family farmer; anatomical gift law; state pay for military service; applications for absentee ballots; family and landowner fishing and hunting rights; legal requirements for assignment of wages; and affirmation of relationship.

80. See VT. STAT. ANN. tit. 15, § 1204(e)(4)(2000).

81. See VT. STAT. ANN. tit. 15, § 1204(e)(2000).

82. See VT. STAT. ANN. tit. 15, § 1204(f) (2000). Vermont law creates a presumption that children born within a civil union are the children of the couple. This provision of Vermont law will be discussed more fully in section IV(B) of this comment.

83. See VT. STAT. ANN. tit. 15, § 1205 (2000).

84. See VT. STAT. ANN. tit. 15, § 1206 (2000).

The responsibility for civil union forms, licenses and registration is delegated to the Commissioner of health.⁸⁵

B. The Law of the Netherlands

As stated above, the Dutch legislature passed two main pieces of legislation.⁸⁶ The first concerns modifications of the marriage laws. The second speaks to Dutch adoption law. Each of these statutes will be dealt with in turn, after a discussion of the law's legislative history.

1. The Dutch Bill on the Opening Up of Marriage to Same-sex Couples.—

a. *Legislative History.*—The legislative history of the recently enacted statutes warrants some discussion. In April of 1996, the Tweede Kamer, or lower legislative house, passed a resolution demanding the preparation of a set of bills that would open up both marriage and adoption to people of the same-sex, by a vote of 81 to 60.⁸⁷ The resolution was non-binding, however.⁸⁸ The Tweede Kamer wanted to see action on the resolution occur by August of 1997, but it was thought that such speed was not possible.⁸⁹ Apparently, and most interestingly, the legislature was motivated by the principle of equal treatment which has characterized Dutch law in general and the government's own policy toward homosexuals specifically.⁹⁰

The only action that the resolution prompted was the creation of a commission, known as the Kortmann commission for its head,

85. See VT. STAT. ANN. tit. 15, § 1207 (2000).

86. The Dutch also enacted a third law, the Adjustment Law. See *Staatsblad van het Koninkrijk der Nederlanden 2001, nr. 128 (8 March)*. This law provides for several changes that the modifications to the marriage and adoption law necessitate. These changes include the neutralization of gender-specific language in certain laws; the specification that same-sex couples cannot adopt foreign children; and the setting of the price for conversions between marriages and registered partnerships. See Kees Waaldijk Homepage, *supra* note 42.

87. See N.V.I.H. COC Homepage, *A Moral Victory But Battles Still Ahead*, available at http://www.coc.nl/index.html?file=marriage_09 (last visited Jan. 3, 2001).

88. See N.V.I.H. COC Homepage, *Dutch Parliament Demands Legislation to Open Up Marriage and Adoption for Same-sex Couples*, available at http://www.coc.nl/index.html?file=marriage_08 (last visited Jan. 3, 2001).

89. See *id.* This Dutch source describes the Dutch legislative process as being "notoriously slow." This is an interesting observation in light of the Netherlands' world-wide reputation for forward-looking social policies.

90. See *Dutch Marriage Law*, *supra* note 10.

Professor Sebastiaan Kortmann.⁹¹ The commission was created by the Dutch government's executive cabinet, which is not bound by resolutions of the legislature.⁹² However, as of May, 1996, the ministry of justice reported that the cabinet would formulate its own position on the issue following the report of the commission.⁹³ The commission itself was formed on June 25, 1996.⁹⁴

The commission's report was presented on October 27, 1997.⁹⁵ Five out of the Commission's eight members supported giving marital and adoptive rights to same-sex couples, citing the ideal of equal treatment as their primary motivator.⁹⁶ The commission's report prompted passage of another legislative resolution, again calling for action in the form of legislation.⁹⁷ The resolution once again seemed to be driven by a desire to see equal treatment come to this area of the law.⁹⁸

On August 3, 1998, a new government was sworn in in the Netherlands.⁹⁹ Again reaffirming a desire for equal treatment, the

91. See N.V.I.H. COC Homepage, *Dutch in Favour of Gay Marriage, Adoption*, available at http://www.coc.nl/index.html?file=marriage_06 (last visited Jan. 3, 2001).

92. See N.V.I.H. COC Homepage, *Committee Looks into Legalizing Same-sex Marriage*, available at http://www.coc.nl/index.html?file=marriage_07 (last visited Jan. 3, 2001).

93. See *id.*

94. See *Wijziging van Boek 1 van het Burgerlijk Wetboek in verband met de openstelling van het huwelijk voor personen van hetzelfde geslacht* [Amendment of Book 1 of the Civil Code, Marriage by Persons of the Same Sex] See *Kamerstukken II 1999-2000*, 26672 [Parliamentary Paper], nr. 3 [Explanatory Memorandum] [hereinafter *Dutch Bill*] (This bill is on file with the author). This is the untranslated version of the Dutch marriage bill as it existed prior to final passage.

95. See N.V.I.H. COC Homepage, *supra* note 90.

96. See *Dutch Bill*, *supra* note 93. As evidence of the committee's commitment to equality, it is worth noting that they recommended doing away with the registered partnership scheme as soon as marital rights were available to same-sex couples. Ultimately, the government decided on a more conservative path, as described in the text.

97. See N.V.I.H. COC Homepage, *Dutch Parliament Repeats Call for Same sex [sic] Marriage and Adoption—But Still No Legislation*, available at http://www.coc.nl/index.html?file=marriage_03 (last visited Jan. 3, 2001).

98. See *Dutch Bill*, *supra* note 93. The commitment of the Dutch government to the ideal of equality is evident from their legislative materials. While discussing the issue of same-sex marriage, the authors of the Dutch explanatory memo (the Dutch equivalent of legislative history) rejected the uniquely American idea of "separate but equal" provisions for different social groups. In fact, the Dutch apparently find the "separate but equal" idea so unique (and distasteful) that they did not even bother translating the concept into Dutch while writing their materials.

99. See N.V.I.H. COC Homepage, *New Dutch Government Committed to Opening Up Marriage and Adoption to Same-sex Couples*, available at http://www.coc.nl/index.html?file=marriage_03

new government included within its statement of pending programs a promise to follow the Eerste Kamer's (the lower legislative house) and the Kortmann commission's suggestions by enacting the called for legislation.¹⁰⁰ Acting on its promise, in November of 1998, the Dutch cabinet approved a bill to allow adoption by same-sex couples and followed up with a bill, in December, to allow same-sex marriage.¹⁰¹ On June 25, 1999, formal approval for the bills came and introduction occurred later that month.¹⁰² As noted, passage subsequently occurred in the Tweede Kamer in September and in the Eerste Kamer (or upper house) on December 19 of 2000.¹⁰³

b. The Law.—The Dutch civil code is divided into books, which are further subdivided into articles. The marriage law amendments modify existing articles of the code, and add a few new areas. The following section will describe these changes.

The first sections of the Dutch code to be modified by the marriage law amendments are in Book I of the code. These changes do not affect the substance of Dutch matrimonial law but should be noted.¹⁰⁴ The first set of changes relates to the administrative duties of the registrar.¹⁰⁵ These duties have been changed to alter the functions of that office to accommodate same-sex marriage.¹⁰⁶ Also transsexuals are now able to change their birth certificates even if they are married.¹⁰⁷

The first major substantive change is the addition of a sentence which allows for the contracting of a marriage between both same-sex and opposite-sex couples.¹⁰⁸ This simple change does not list the types of rights affected, as does its Vermont counterpart.¹⁰⁹

coc.nl/index.html?file=marriage_02 (last visited Jan. 3, 2001). The government of the Netherlands is run by elected officials, as in the United States, who are organized into parties who further form "coalitions." The current governing coalition is made up of labor, liberal and democratic parties.

100. *See id.*

101. *See* N.V.I.H. COC Homepage, *Dutch Law Reform in Progress*, available at http://www.coc.nl/index.html?file=marriage_01 (last visited Jan. 3, 2001).

102. *See* N.V.I.H. COC Homepage, *The Latest on Lifting the Ban on Marriage for Same-sex Couples in the Netherlands*, available at <http://www.coc.nl/index.html?file=marriage> (last visited Jan. 3, 2001).

103. *See* Kees Waaldijk Homepage, *supra* note 8.

104. *See Dutch Marriage Law*, *supra* note 10.

105. *See Dutch Marriage Law*, *supra* note 10, at Articles 16a, 20 and 20a.

106. *See id.* The summary translation of this bill does not go into detail on the exact nature of these changes.

107. *See id.*

108. *See Dutch Marriage Law*, *supra* note 10, at art. 30. The amendment simply states that "[a] marriage can be contracted by two persons of the opposite or of the same sex." *Id.*

109. Nonetheless, numerous consequences flow from the contracting of a

Articles relating to limitations on marriage have also been amended. Polygamy by any “person” who is already a party to a marriage is prohibited.¹¹⁰ Only heterosexual polygamy was prohibited by prior law. The law as it relates to consanguinity has also been changed. The statutory amendment outlaws marriage between individuals who are siblings.¹¹¹ However, the minister of justice, for “weighty” reasons, may grant an exemption from this requirement if the relationship is based on adoption.¹¹²

The code has also been amended to allow those in a marriage to convert their relationship to a registered partnership.¹¹³ As mentioned above, both hetero- and homosexual couples may currently enter such a partnership. In addition, couples are now able to convert a registered partnership into a marriage.¹¹⁴

The minimum age to marry or to enter a registered partnership is set at 18.¹¹⁵ If a woman is pregnant or has given birth, however, the minimum age to enter either type of relationship is sixteen years.¹¹⁶ Annulment of an underage marriage or partnership is also not permitted once a woman has become pregnant.¹¹⁷

There are also changes in the law as it relates to stepparents. The statutes provide, in essence, that a member of either a registered partnership or a marriage must support his partner’s or spouse’s minor child if that child lives within their nuclear family but only for the duration of the partnership or marital relationship.¹¹⁸ This duty of support extends to age twenty-one if the adult child is attending school.¹¹⁹

marriage, though most of these are identical for same and opposite-sex couples. For example, under Dutch law, spouses can assume one another’s surnames, except for use on official documents, when the individual’s given name must be used; also, the law of maintenance, marital property, pensions, legal transactions requiring spousal approval, divorce and any rights accruing to “in-laws” apply to all married couples. See Ministerie van Justitie Homepage, *Fact Sheet: Same-sex Marriages*, available at http://www.minjust.nl:8080/a_beleid/fact/same-sexmarriages.htm (last visited May 24, 2001).

110. See *Dutch Marriage Law*, *supra* note 10, at art. 33.

111. See *Dutch Marriage Law*, *supra* note 10, at art. 41.

112. See *Dutch Marriage Law*, *supra* note 10, at art. 41(2).

113. See *Dutch Marriage Law*, *supra* note 10, at art. 77a.

114. See *Dutch Marriage Law*, *supra* note 10, at art. 80f. One survey suggests that over 60% of registered partners would wish to convert their partnerships. See Kees Waaldijk Homepage, *supra* note 42.

115. See *Dutch Marriage Law*, *supra* note 10, at art. 80.

116. See *id.*

117. See *Dutch Marriage Law*, *supra* note 10, at art. 80a.

118. See *Dutch Marriage Law*, *supra* note 10, at art. 395.

119. See *Dutch Marriage Law*, *supra* note 10, at art. 395a.

The marriage law further provides that five years after it enters into force, the minister of justice is to send Parliament a report.¹²⁰ This report will evaluate the effects of the changes to the law.¹²¹ Especially important is whether the success or failure of the law has undermined the continuing efficacy of the registered partner law as it currently exists.¹²²

2. *The Dutch Bill Relating to Adoption by Persons of the Same Sex.*—Passed at the same time as the marriage law, the adoption statute also makes several modifications to Book I of the Dutch civil code.¹²³ First, the power to grant an adoption is vested in the courts, to whom two persons may, together, make an adoption request.¹²⁴ One person may also make a request on their own.¹²⁵ The ability of two individuals to make a request depends on whether they are precluded from marrying.¹²⁶ Under prior law, two persons could only make a joint request if they were of opposite sexes.¹²⁷

A joint request can only be made if the individuals have been living together for at least three continuous years prior to the submission of the request.¹²⁸ This requirement applies to spouses, registered partners or life partners to an individual who is the spouse of the adoptive child's natural parent.¹²⁹

Three other requirements must also be satisfied for the adoption request to be granted.¹³⁰ First, the adoption must be in evident interest of the child.¹³¹ Second, the child must have nothing more to expect from its parent or parents.¹³² Finally, several durational requirements must be fulfilled, as well.¹³³

The durational requirements specify that a single adopter must have been caring for the child and raising it for the three years prior

120. See *Dutch Marriage Law*, *supra* note 10.

121. See *Dutch Marriage Law*, *supra* note 10.

122. See *id.* Recall that the Kortmann Commission had recommended ending the registered partnership status instantly.

123. See *Dutch Adoption Law*, *supra* note 11.

124. See *Dutch Adoption Law*, *supra* note 11, at art. 227.

125. See *id.*

126. See *id.*

127. See *id.*

128. See *id.*

129. See *Dutch Adoption Law*, *supra* note 11, at art. 227. Recall that under prior law, heterosexual couples could adopt, even if unmarried, because they were of opposite sexes.

130. See *id.*

131. See *id.*

132. See *id.*

133. See *id.*

to the request being submitted to the court.¹³⁴ The Article also specifies that a couple making a joint adoption request must have been caring for the child for at least one year prior to making their request, except in the case of a lesbian couple composed of the natural mother and the adoptive parent; in which case, there is no durational requirement.¹³⁵

Another amendment grants the adoptive child the name of the adoptive father in an opposite-sex relationship.¹³⁶ In the case of same-sex couples, the child will maintain its original family name unless it is requested by the couple that the child be given one of the partner's names.¹³⁷

IV. Comparison and Analysis of the Dutch and Vermont Bills

This section will describe some of the ramifications of these laws for same-sex couples.

A. Recognition

One of the most significant problems that parties to either a Vermont civil union or a Dutch same-sex marriage will encounter is that of recognition. The reason these statutes are getting so much popular and scholarly attention is because of their uniqueness. Relatively few jurisdictions have similar laws and many others specifically outlaw them. The reader will note that the problems of recognition are slightly different for US and Dutch couples because the Vermont civil union law was promulgated by the state and the Dutch law was enacted at the national level. This discussion will be framed in light of this distinction.

1. *United States Recognition Issues.*—Parties seeking to enter a civil union are most likely to seek recognition in other states within the United States and from the federal government, as opposed to internationally. Two separate sets of obstacles stand in the way. At the federal level is the Defense of Marriage Act (“DOMA”).¹³⁸ This statute purports to grant states the power to refuse to recognize a “marriage” contracted between persons of the

134. See *Dutch Adoption Law*, *supra* note 11, at art. 228.

135. See *id.*

136. See *Dutch Adoption Law*, *supra* note 11 at art. 5.

137. See *id.*

138. See 28 U.S.C. § 1738(C) (1996) and 1 U.S.C. § 7 (1996). DOMA was passed as a single bill. See H.R. 3396, 104th Cong. (1996). It is codified in two places, however, because its parts relate to two different things. Section 1738 deals with the issue of Full Faith and Credit and is discussed here. Section 7 defines marriage for federal purposes and will be discussed in subsection D of this part.

same sex in another state.¹³⁹ The Act has been criticized and is arguably unconstitutional.¹⁴⁰ However, it does exist and any state wishing to deny recognition of a same-sex marriage can appeal to it for support. It is unclear how this affects civil unions. While DOMA does say that relationships “treated” as a marriage are affected by it, a civil union, though similar to marriage, is *not* a marriage by the civil union law’s terms.¹⁴¹

It may be *possible* for parties to a civil union to challenge a state which chooses to rely on DOMA for its failure to extend Full Faith and Credit simply by virtue of the relationship not being “treated” as or even called a marriage. It remains to be seen whether such a challenge would be successful. Even if, as a matter of statutory interpretation, such an argument were to prove successful, the fact still remains that Vermont is the only state with a civil union-type relationship. Thus, if DOMA were to be thwarted by virtue of the fact that a civil union is at issue and not a marriage, a state may still fail to extend any meaningful benefits to the parties because no civil union relationship exists in that state.

Another set of recognition problems that is created for those entering a civil union lies at the state level. At least thirty-five states have enacted so-called “mini-DOMA’s,” or laws aimed at defeating recognition within the state of same-sex marriages contracted elsewhere.¹⁴² Most of these statutes seem to deal with marriage by that name, just as the federal DOMA does.¹⁴³ While some mention “incidents” of marriage, such as divorce rights, as also being inapplicable to same-sex couples married elsewhere, the laws generally appear to deal with marriages and not civil unions.¹⁴⁴

139. See *id.*

140. See Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997) (arguing that DOMA’s constitutionality is questionable mainly because its purpose is invidious and is driven only by a desire to harm an unpopular social class). In January 2001, a bill was introduced into Congress to overturn the definitional portion of DOMA. Christopher Heredia, *Rep. Frank Goes for Round 2 in Fight for Allowing Gay Marriage*, SAN FRAN. CHRON., Jan. 26, 2001, available at 2001 WL 3393376.

141. See VT. STAT. ANN. tit. 15, § 1201(4)(2000).

142. See Pamela Ferdinand, *Same-Sex Marriages Revisited In Vermont*, WASH. POST, Mar. 17, 2001, available at 2001 WL 2665791. See also David Coolidge, *Definition or Discrimination: State Marriage Recognition Statutes in the “Same-Sex Marriage” Debate*, 32 CREIGHTON L. REV. 3 (1998).

143. See Coolidge, *supra* note 142, at 11-12.

144. See *id.* In May of 2001, the Texas Senate tentatively passed a law prohibiting civil unions there. See Terence Stutz, *States’ Gay Unions Opposed: Bill to Ignore Them OK’d*, DALLAS MORNING NEWS, May 15, 2001, available at 2001 WL 21170960. Nevada and Nebraska have passed similar constitutional amendments. See David Crary, *Gay Rights Activists to Fight to Legalize Same-sex*

Challenging these statutes may be possible in the same way in which the federal DOMA might be fought—by claiming that these relationships are not marriages. However, as with challenges to the federal law, the results of such efforts are debatable.¹⁴⁵

2. *Dutch Recognition Issues.*—Dutch marriages have, arguably, even less chance of being recognized. As stated earlier, several Scandinavian nations have established quasi-marital relationships but none currently permit a same-sex couple to enter a full-fledged marriage. The Netherlands stands alone in this regard. Thus, while Dutch same-sex couples enjoy unfettered right anywhere within the Netherlands, they may have problems with recognition when traveling to or settling in neighboring nations or elsewhere. The Kortmann Commission noted this in its 1997 report.¹⁴⁶ A relatively recent case out of the European Court of Justice in Luxembourg which declares that same-sex relationships are different from marriages between hetero-sexual couples supports this finding.¹⁴⁷ Also, it is thought that various treaties dealing with “private” international law will likely be interpreted so

Marriages Battle to Win OK for Gay Unions Expected to be a Long-Term Struggle, THE DETROIT NEWS, Jan. 25, 2001, available at 2001 WL 3745019. Similar measures failed in both New Hampshire and Louisiana. See Tara Kyle, *Vt. Civil Unions Still Marked by Controversy*, THE DARTMOUTH, May 14, 2001, available at 2001 WL 20501495; and *Bill to Ban Recognition of Gay Marriages Fails*, THE BATON ROUGE ADVOCATE, Apr. 27, 2001, available at 2001 WL 3858190. Maryland and Massachusetts have proposed such bills and Massachusetts' Governor has spoken out against gay marriages. See Pamela Ferdinand, *Same-sex Marriages Revisited in Vermont*, WASH. POST, available at 2001 WL 2665791; Rick Klein, *Rogers Bill Would Rule Out Gay Marriage*, THE BOSTON GLOBE, Feb. 2, 2001, available at 2001 WL 3917468; and Yvonne Abraham, *Gays Irked by Swift No on Marriage*, THE BOSTON GLOBE, Apr. 22, 2001, available at 2001 WL 3930095. Also, Rhode Island, Connecticut, Washington and California have considered civil union-type bills of their own. See E.J. Graff, *Civil Unions are Homemaking Here For a Reason*, THE BOSTON GLOBE, Feb. 11, 2001, available at 2001 WL 3919109; Florangel Davila, *Civil Union Law for Gays is Goal of Proposed Bills*, THE SEATTLE TIMES, Feb. 11, 2001, available at 2001 WL 3499646; and Miguel Bustillo, *California and the West: Bill Would Allow Civil Unions for Gays, Lesbians*, LOS ANGELES TIMES, Mar. 2, 2001, available at 2001 WL 2466000. The Georgia Court of Appeals has agreed to hear a case involving a claim that Georgia should recognize the Vermont civil union of two lesbians. See *Gay Union Law Gets Test in Georgia Court Will Review Whether Couple of Same Sex Should Be Recognized Under State Rules as Legally Married*, THE AUGUSTA CHRON., Apr. 27, 2001, available at 2001 WL 21247351.

145. The Attorney General of Illinois, James E. Ryan, has issued an opinion, relying heavily on the Federal DOMA as well as Illinois law, which concludes that Illinois need not recognize civil unions. See *State has No Duty to Accept Civil Unions as Legal*, Ryan Finds, CHICAGO DAILY L. BULL., Jan. 26, 2001.

146. See *Dutch Marriage Law*, *supra* note 10.

147. See *id.*

as to disfavor same-sex marriages.¹⁴⁸ In fact, a Royal Commission is to be appointed to study the issue.¹⁴⁹ With the enactment of these laws having occurred so recently, it is too early to say whether the two laws discussed here will gain greater, meaningful acceptance in other jurisdictions.

B. Adoption

Since 1995, gay and lesbian couples have been allowed to adopt in Vermont.¹⁵⁰ Vermont does not restrict such adoptions to Vermont or even American children. Also, the creation of these rights preceded the passage of the civil union statute. In addition, the civil union law extends to partners the same rights with regards to children born within the union as are possessed by married couples.¹⁵¹ Another section of the same title creates a rebuttable presumption that a child is the natural child of a person's spouse if the child is born during the marriage.¹⁵² When read together, these sections seem to say that a child born during a civil union is presumed to be the child of both partners without the need for an adoption proceeding.¹⁵³

The situation is quite different in the Netherlands. Until the passage of the Dutch adoption law described above, Dutch same-sex couples had been denied the right to adopt even Dutch children as a couple.¹⁵⁴ When the Netherlands considered changing the marriage and adoption laws, Article 199 of Book One posed certain problems—it establishes a presumption that a child born to a married woman is the child of her husband.¹⁵⁵ The Dutch think that extending this presumption to same-sex couples is stretching the law too far beyond reality to be considered viable.¹⁵⁶ To remedy the

148. See *id.* Private International Law has been defined as “the law governing the foreign transactions of individuals and corporations.” See MARK A. JANIS & JOHN E. NOYES, CASES & COMMENTARY ON INTERNATIONAL LAW 2 (West Group 1997).

149. See *Dutch Marriage Law*, *supra* note 10.

150. See VT. STAT. ANN. tit. 15A, § 1-102(b) (2000).

151. See VT. STAT. ANN. tit. 15, § 1204(f) (2000).

152. See VT. STAT. ANN. tit. 15, § 308(4) (2000).

153. Some attorneys still recommend that same-sex couples adopt any children born to them, just to be certain of preserving their parental rights. See E-mail from Susan M. Murray, Attorney, Langrock, Sperry and Wool, LLP, to Scott Seufert, Student, Dickinson School of Law of the Pennsylvania State University (Jan. 9, 2001, 19:33:51 EST) (on file with author). Attorney Murray was one of the attorneys who successfully took the *Baker* case to the Vermont Supreme Court.

154. See Maxwell, *supra* note 10.

155. See *Dutch Marriage Law*, *supra* note 10.

156. See *id.*

problem created by not extending the marital paternity presumption and to further the aforementioned goal of equality, the Netherlands decided to extend adoption rights to same-sex couples.¹⁵⁷ For these couples only, however, these rights are limited to the adoption of Dutch children.¹⁵⁸ In contrast, a heterosexual couple need not adopt any children born to them during their marriage in order to establish their rights.¹⁵⁹

These distinctions constitute perhaps the most striking differences between the laws of these two jurisdictions. Although adoption rights are separate from marital rights as a technical matter, both nations' statutes and materials concerning unions and marriages mention adoption and it is undeniable that rights with regards to children are very relevant to any discussion of marriage rights. Some Dutch commentators have said that forcing same-sex couples to adopt child born during a marriage in order to establish their rights is really just an example of the "separate but equal" idea being utilized to the detriment of same-sex couples and their children.¹⁶⁰ They point out that presumptions of paternity are mere legal fictions even when applied to heterosexual couples, who may also bear children through artificial insemination, and that there is no reason not to extend the same protections to same-sex couples.¹⁶¹

The problem of international adoptions is also vexing. The official rationale for not allowing international adoptions by married same-sex couples is apparently deference to the preferences of other nations. This rationale seems paternalistic, however, because it limits Dutch couples before other nations have been allowed to make official decisions of their own on the issue. At least with respect to rights regarding children, the law of Vermont seems to grant same-sex couples a slight advantage.¹⁶²

157. See *Dutch Bill*, *supra* note 93.

158. See *Dutch Adoption Law*, *supra* note 11.

159. See Elsbeth Boor, *Openstelling Homohuwelijk en Adoptie Door Personen van Hetzelfde Geslacht* [Opening Up of Gay Marriage and Adoption by Persons of the Same Sex], NEMESIS, 2000, at 21-23.

160. See *id.* at 21. These and other commentators have wondered what legal implications for sperm donors will flow from the new "nothing to expect" requirement, since this criterion must be satisfied during a court hearing. See *Id.* at 22. See also Arnoud Willems, *Adoptie door homo-ouders en de positie van de spermadonor* [Adoption by Gay Parents and the Status of the Sperm Donor], FJR, Oct., 2000, at 226 (questioning what legal implications for sperm donors will arise from the new adoption law). A proposal for automatic joint authority was introduced on March 15, 2000 for lesbian couples only. See *Dutch Marriage Law*, *supra* note 10.

161. See Boor, *supra* note 156.

162. It has also been decided that to succeed as monarch, a child must have

C. Unions by Non-residents

Although gaining out-of-state recognition of a civil union may be difficult, entering one is not. So long as neither party is married or a part of another civil union, both are of the same sex, both are at least 18 years of age and, neither is facing any type of impediment such as mental incompetence, a civil union is open to couples from any state. In fact, among the first couples to receive civil union licenses during the first hour that they were available were numerous couples from out of state.¹⁶³

The situation is more complicated for foreigners wishing to enter a Dutch marriage or registered partnership. There, at least one partner needs to have Dutch citizenship or have his or her “‘domicile’ and ‘habitual residence’ in the Netherlands.”¹⁶⁴ The terms “domicile” and “habitual residence” are not well defined as of yet. The requirement may prove to be a quite formal. In other words, it likely means that one must be registered as a resident in the Netherlands and must maintain one’s regular residence there.¹⁶⁵ It seems, then, that it is somewhat easier to contract a civil union than a Dutch marriage, giving the Vermont law a slight edge in this respect as well.

D. Tax

Vermont’s civil union law triggers more than 300 state-level benefits for those that enter such a relationship.¹⁶⁶ However, it is unclear whether any federal benefits will flow from this newly created civil status. At the moment, most commentators seem to agree that the 1300-plus federal benefits that accompany marriage have been defined away by the Defense of Marriage Act.¹⁶⁷ Prominent among the list of advantages that civilly united

been born in a Parliament approved heterosexual marriage. See Kees Waaldijk Homepage, *supra* note 42.

163. See NATIONAL POST, *supra* note 5. Since then, 1556 out-of-state couples have entered civil unions. See Ross Sneyd, *Anniversary of Vermont Civil Union Law*, AP ONLINE, April 26, 2001, available at 2001 WL 19779486.

164. See Kees Waaldijk Homepage, *supra* note 42.

165. See *id.*

166. See NATIONAL POST, *supra* note 5.

167. See David Goodman, *supra* note 3.; Editorial, *Correcting a Sexual Injustice U.S. Media Ignore Same-sex Marriage Issue*, SYRACUSE HERALD-JOURNAL, Feb. 5, 1999, at A6; NATIONAL POST, *supra* note 5. DOMA’s other half, which defines marriage for federal purposes, creates this problem. See 1 U.S.C. § 7 (West 1996) and *supra* note 135. This portion of DOMA limits marriage to relationships between “one man and one woman.”

Vermonters will be denied are those flowing from the federal tax laws. Currently, nationwide, it has been estimated that nearly half of all married couple receive some sort of "marriage subsidy" or tax advantage which flows from that fact that they are married and can take advantage of certain tax breaks.¹⁶⁸ The other one-half, or perhaps more, pay a "penalty;" in other words, these couples pay more tax by virtue of the fact that they are married than they would if they were single.¹⁶⁹ The fact that same-sex couples, even those in civil unions, are barred from the potential advantages of these laws angers some.¹⁷⁰ Others have looked at the situation and hypothesized that the federal government may be denying itself income by excluding same-sex couples from being considered married under the tax laws.¹⁷¹ These commentators have suggested that the characteristics of the "typical" same-sex couple may actually indicate that a majority would end up paying more tax if their unions were recognized at the federal level.¹⁷² As such, the government would derive greater revenue by recognizing the unions.¹⁷³ In any case, one factor that those contemplating a civil union in Vermont will need to consider is the fact that their new union is not likely to trigger any federal benefits, at least for now.

The situation is reversed in the Netherlands. The registered partnership law there apparently grants same-sex couples united in such a relationship the tax advantages of a married couple.¹⁷⁴ The new marriage legislation does not seem to negatively affect this. It is, perhaps, significant that a same-sex couple joined in a Dutch marriage will enjoy national benefits, rather than those limited to a particular state or region. Though the Netherlands is relatively small nation *geographically*,¹⁷⁵ the fact that a married same-sex

168. See James Alm, *Wedding Bell Blues: The Income Tax Consequences of Legalizing Same-sex Marriage*, 53 NAT'L. TAX J. available at 2000 WL 20242749.

169. See *id.*

170. See SYRACUSE HERALD-JOURNAL, *supra* note 162.

171. See Alm, *supra* note 163.

172. See *id.* This idea is based on studies of homosexual relationships, which seem to indicate that there would be two wage earners in the average partnership.

173. See *id.*

174. See *Dutch Parliament Approves Gay Marriages, Adoptions*, AGENCE FRANCE-PRESSE, September 13, 2000, available at 2000 WL24709626. Under Dutch tax law, the same tax advantages generally go to married and single people equally but any advantages that do exist will be available to same-sexers now as well. See E-mail from Kees Waaldijk, Professor of Law, Universiteit Leiden, Netherlands, to Scott Seufert, Student, Dickinson School of Law of the Pennsylvania State University (January 4, 2001, 4:44:44 EST) (on file with author).

175. The Netherlands has an area of just over 16,000 square miles. See Infoplease.com, *Netherlands*, available at <http://www.infoplease.com/ipa/A0107824.html> (last visited Jan. 12, 2001).

couple can enjoy the same benefits as any other married couple anywhere in Dutch *society* is a positive feature not currently possible in the United States.

V. Conclusion

The November elections in Vermont were supposed to be de facto referendums on civil unions. In fact, exit polls and election results show, in one observer's words, that "Vermonters are ready to move on to other issues and bring the State back together again."¹⁷⁶ The Pro-civil union Governor and Lieutenant Governor, as well as other pro-civil union candidates either won or maintained their positions.¹⁷⁷ Vermont's legislative houses are divided, however. A small majority of the state's senate is pro-civil union.¹⁷⁸ Control of the Vermont house shifted to candidates opposed to the civil union law, with many would-be incumbents losing their seats over the issue.¹⁷⁹ It is unclear at this time what changes to the civil union law may follow.¹⁸⁰

At the same time, the Dutch same-sex marriage and adoption bills received approval by that nation's upper house, the Eerste

176. See Vermonters for Civil Unions Inc., *Vermonters for Civil Unions Report*, available at <http://www.vtcivilunionpac.org/> (last visited Jan. 16, 2001).

177. See *id.* Governor Howard Dean maintained his seat; Lieutenant Governor Doug Racine also kept his seat, which will allow him to cast tie-breaking votes in the Senate, if necessary; Secretary of State Deb Markowitz, who advised town clerks of their duty to issue civil union licenses, also won re-election. Former State Senator Liz Ready, who voted for the civil union law, won a position as State Auditor.

178. See *id.* There is currently a 17-13 pro-civil union majority in the Senate. This is down, slightly from the 19-11 majority that existed before the elections.

179. See *id.*

180. In May of 2001, a measure was passed in the Republican-controlled Vermont house to replace civil unions with "reciprocal partnerships" and to open such relationships to non-homosexual couples who wish to create marriage-like rights (such as those caring for an elderly parent). As of May 24, 2001, the measure was not expected to pass the Democratically-dominated Senate. Governor Howard Dean said he would veto any attempts to repeal the civil union law, a move that even the partnership bill's sponsor said would likely be unconstitutional. See *Vt. Civil Unions Law Under Fire; Bill Seeks to Make More Duos Eligible*, THE ARIZONA REPUBLIC, May 24, 2001, available at 2001 WL 8544116. Also in May, amendments appeared that were aimed at repealing the civil union law without providing for a replacement and to have gay and lesbian relationships declared a "health hazard." See *In the States: Vermont: Dean "Ashamed" of Legis. Over Civil Unions Repeal*, THE HOTLINE, May 17, 2001. In March of 2001, the House passed a bill explicitly outlawing same-sex marriages, an unnecessary measure by the civil union law's WASHINGTON POST own terms. See Pamela Ferdinand, *Same-sex Marriages Revisited in Vermont*, OST, March 17, 2001, available at 2001 WL 2665791.

Kamer, on December 19th.¹⁸¹ On December 21st, the bills were signed into law.¹⁸² They took effect on April 1, 2001.¹⁸³ Though the Dutch marriage law instructs the government to re-evaluate the efficacy of the registered partnership law in five years, it is possible that couples will continue to appreciate the existence of both statuses, thus giving them a choice. This possibility underscores the flexibility of the marital relationship and its ability to adapt to different times and cultures.

In the meantime, an evaluation of the two statutes discussed here demonstrates that there is more to them than their names suggest. The civil union statute actually seems to grant slightly greater marital advantages to Vermont couples than the Dutch same-sex marriage law does to the citizens of that nation. Of course, the problems of out-of-jurisdiction recognition are equally thorny for both laws. However, the law of Vermont seems to grant greater rights with regards to children than does the Dutch law, even as amended by the new adoption statute. In addition, being able to enter a civil union more easily may prove telling in the future, if some of the recognition issues give way and couples seek out the more liberal Vermont policy in order to create a formal, legal relationship with substantial advantages. The one place where the Dutch law clearly prevails is with respect to national privileges. However, as stated, the recognition barrier, if overcome, would negate this advantage as well. All in all, even given the status quo, the two laws are admirable steps toward the creation of rights for same-sex couples.

In the end, which framework proves more advantageous may well depend on the attitudes and circumstances of those who take advantage of the laws' protections. The bigger question is where this leaves the issue of same-sex marriage as a whole. Fifteen years ago, there were no laws to compare. Now, at the beginning of a new millennium, two separate nations' legal systems have produced similar answers to the issue of granting rights to same-sex couples.

181. See Kees Waaldijk Homepage, *supra* note 8.

182. See *Dutch Marriage Law*, *supra* note 10.

183. See *id.* At midnight on the April 1, four couples were married by Job Cohen, Amsterdam's mayor, in City Hall. Cohen told the couples "[y]ou are writing history . . . (t)his is unique in the world." See Deb Price, *Holland Leads Way on Gay Marriage*, THE DETROIT NEWS, April 9, 2001, available at 2001 WL 3753344.

Hopefully, Vermont and the Netherlands will serve as examples of how a jurisdiction may earnestly debate what has been and will continue to be a volatile topic.

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